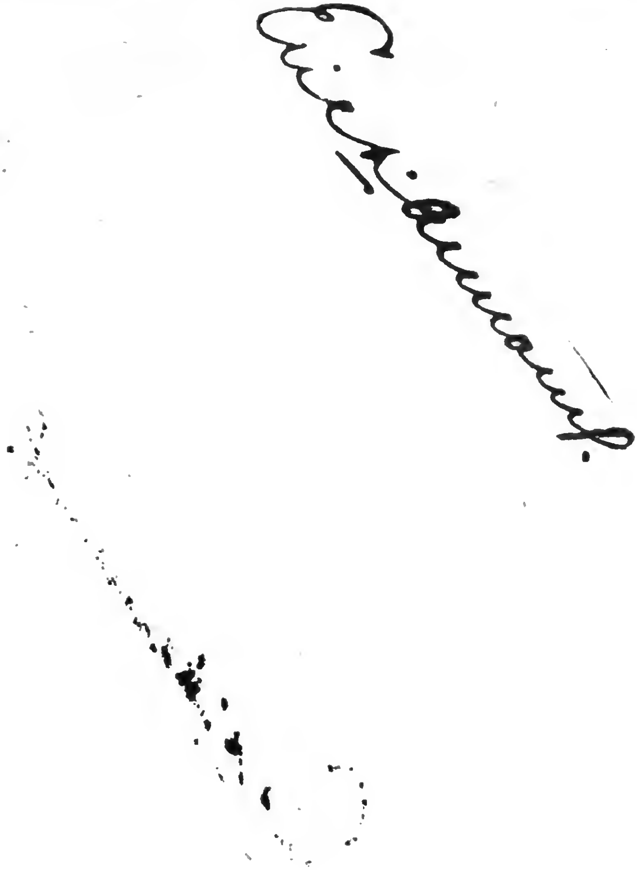

ARCHBOLD'S

PLEADING, EVIDENCE & PRACTICE

IN

Criminal Cases

BY

SIR JOHN JERVIS,

LATE LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS.

WITH THE

STATUTES, PRECEDENTS OF INDICTMENTS, &c.

THE TWENTY-SIXTH EDITION

BY

HENRY DELACOMBE ROOME,

OF THE MIDDLE TEMPLE AND SOUTH-EASTERN CIRCUIT

AND

ROBERT ERNEST ROSS,

OF THE MIDDLE TEMPLE; PRINCIPAL CLERK IN THE COURT OF CRIMINAL APPEAL,

BARRISTERS-AT-LAW.

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PREFACE

TO THE TWENTY-SIXTH EDITION.

Since the publication in 1918 of the twenty-fifth edition, comparatively few changes in criminal law have been effected by legislation. The book has been brought up to date by the inclusion of such new Acts as have been passed, of which the most important are those relating to official secrets, possession of firearms, and eligibility of women to serve on juries. Reference will also be found in the text to numerous recent decisions and rulings of the Court of Criminal Appeal and of the House of Lords in criminal cases.

The Editors desire to express their great indebtedness to Mr. G. B. McClure and Mr. W. Bentley Purchase, M.C., Barristers-at-Law, for most valuable assistance in the preparation of an entirely new Index and for seeing the book through the press.

H. D. R.

R. E. R.

Temple,
May 30th, 1922.

As the subject of Evidence in criminal cases, however, had not been treated of by any of these writers, and as some book upon the subject was extremely desirable, I thought I might select from the Work I originally compiled such part of it as related to evidence in criminal cases, and publish it, without subjecting myself to the imputation of wishing to enter into any competition with the learned writers of the Works already extant upon the Pleas of the Crown. I have made this compilation; I have added to it all the cases since decided, and the statutes since enacted, upon the subject; and I have compressed the whole into the smallest compass that appeared to me to be practical, consistent with perspicuity. I have also added precedents of indictments and other criminal pleadings—not from any idea that this part of the Work was required by the Profession, there being already one or two collections of great repute upon the subject—but merely because I found it impracticable to give the evidence in particular cases in the simplified form I was anxious to give it, without also giving, in each case, the particular indictment or pleading the evidence was intended to support. And as I was thus obliged to give the precedents, I thought it desirable, and indeed necessary, also to give such a summary of the law relative to pleading in criminal cases generally, as would enable the reader to frame an indictment in cases where he might not be able to find a precedent.

As to the arrangement of my materials, I have endeavoured to make it simple and perspicuous. The work consists of two books—the First Book, which treats of Pleading and Evidence in criminal cases generally, is divided into two parts; the first treating of Pleading generally, namely, of indictments, informations, special pleas, demurrers, etc.; the second treating of Evidence generally, namely, of evidence of records, of matters *quasi* of record, of private written instruments, and of parol evidence, the competency and credit of witnesses, etc., etc.

The Second Book, which treats of Pleading and

Evidence in particular cases, is divided into four parts: the first treats of offences against the property and persons of individuals; the second treats of offences of a public nature, namely, offences against the King and his government, offences against public justice, offences against the public peace, offences against public trade, and offences against public police and economy; the third treats of conspiracies; and the fourth of principals and accessories.

I have now apprised the reader of what he is to expect in the following Work. Trifling as it may appear, it has cost me much time and great labour. I have taken infinite pains to simplify my subject; to reject everything redundant or irrelevant; to compress the whole into the smallest possible compass consistent with perspicuity; and to clothe it in language plain, simple, and unadorned. In fact, my sole object has been to make this a practically useful book: I neither anticipate nor desire for it a higher commendation.

J. F. A.

Symonds Inn.

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It is the ordinary common law remedy for all treasons and felonies, for misprisions of treason and felony, and for misdemeanors of a public nature: 2 Hawk. c. 25, ss. 1, 4. In the case of treason and felony it is now the sole remedy except (1) impeachment, now very rarely resorted to: (2) a coroner's inquisition in cases of murder or manslaughter (*see post*, p. 140): (3) the summary remedy permitted in certain cases of felony and misdemeanor under the *Summary Jurisdiction Acts*, 1879 (42 & 43 Vict. c. 49), and 1899 (62 & 63 Vict. c. 22), and the *Children Act*, 1908 (8 Edw. 7, c. 67), s. 128 (2), as amended by the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), s. 15. In the case of misdemeanors, there is also an alternative remedy by way of criminal information, *post*, p. 127. As to the preparation of the indictment, *see post*, p. 27; as to preferring it to the grand jury, and the procedure of the grand jury, *see post*, p. 74 *et seq.*

Breaches of common law duty.]—An indictment lies at common law for a breach of duty, which is not a mere private injury, but an outrage on the moral duties of society. Perhaps the most important example is the neglect to provide sufficient food, medical aid or other necessaries, for a person unable to provide for himself, and for whom the defendant is obliged by duty or contract to provide, where such neglect injures the health of that person, whether the person injured be of extreme age (*R.* v. *Marriott*, 8 C. & P. 425; *R.* v. *Instan* [1893] 1 Q. B. 450; 62 L. J. (M. C.) 86), or of tender years (*R.* v. *Friend*, R. & R. 20; *R.* v. *Hogan*, 2 Den. 277; 20 L. J. (M. C.) 219; *R.* v. *Phillpot*, Dears. 179; 22 L. J. (M. C.) 113; *R.* v. *Chandler*, Dears. 453; 24 L. J. (M. C.) 109; *R.* v. *Ryland*, L. R. 1 C. C. R. 99; 37 L. J. (M. C.) 10; 10 Cox, 882; *R.* v. *Rugg*, 12 Cox, 16 (C. C. R.); *R.* v. *Jones*, 19 Cox, 678; 67 L. J. (Q. B.) 41; *R.* v. *Senior* (1899) 1 Q. B. 283, 289; 68 L. J. (Q. B.) 175), or is the defendant's servant (*R.* v. *Ridley*, 2 Camp. 650: *R.* v. *Smith*, L. & C. 607; 34 L. J. (M. C.) 153), or apprentice (*R.* v. *Self*, 1 Leach, 137; 1 East, P. C. 226; *R.* v. *Smith*, 8 C. & P. 153), or is a lunatic (*R.* v. *Pelham*, 8 Q. B. 959; 15 L. J. (M. C.) 105). The common law is strengthened by statutory provisions, *e.g.*, 24 & 25 Vict. c. 100, s. 26 (servants and apprentices); 53 & 54 Vict. c. 5, s. 322 (lunatics); 8 Edw. 7, c. 67, s. 12 (persons under 16). An indictment also lies for any act of wilful negligence, whereby human life or health is endangered, such as shipping dangerous combustibles without informing the ship-master: *Williams* v. *H. E. I. Co.*, 3 East, 192; or exposing for sale, or possessing with intent to sell, provisions unfit for human food: *R.* v. *Mackarty*, 6 East, 133, 141, cit.; 2 Ld. Raym. 1179; 3 Ld. Raym. 487: *R.* v. *Dixon*, 3 M. & Sel. 11; *R.* v. *Haynes*, 4 M. & Sel. 214: *R.* v. *Stevenson*, 3 F. & F. 106: *Shillito* v. *Thompson*, 1 Q. B. D. 12; 45 L. J. (M. C.) 18. It also lies for acts intended to interfere with or pervert the course of justice, *e.g.*, for disposing of a dead body so as to prevent the coroner from holding an inquest upon it where an inquest ought to be held: *R.* v. *Price*, 12 Q. B. D. 247; 53 L. J. (M. C.) 51: *R.* v. *Stephenson*, 13 Q. B. D. 331; 53 L. J. (M. C.) 176; but not for burning a dead body instead of burying it, unless it be so done as to cause a public nuisance: *R.* v. *Price*, *supra*; for manufacturing false evidence for the purpose of misleading a judicial tribunal, although the evidence is not

in fact used : *R.* v. *Vreones* [1891] 1 Q. B. 360; 60 L. J. (M. C.) 62; 17 Cox, 267; or for attempting to pervert the course of public justice by publishing articles in a newspaper affecting the conduct or character of persons awaiting trial : *R.* v. *Tibbits and Windust* [1902] 1 K. B. 77; 71 L. J. (K. B.) 4; 20 Cox, 70, and cases there cited : *R.* v. *Parke* [1903] 2 K. B. 432; 72 L. J. (K. B.) 839; *R.* v. *Davies* [1906] 1 K. B. 32; 78 L. J. (K. B.) 363.

It also lies for all nuisances of a public nature, though occasioned by an act in itself innocent, if the creation of the nuisance is the probable consequence of the act. *R.* v. *Moore*, 3 B. & Ad. 184; *and see* 1 Hawk. c. 75, ss. 6, 7. Under this head falls the remedy against a common innkeeper who refuses either to receive a traveller as guest in his house or to find him victuals or lodging on being tendered a reasonable price : *see R.* v. *Rymer*, 2 Q. B. D. 136; 46 L. J. (M. C.) 108; 13 Cox, 378; 2 Russ. Cr. (7th ed.) 1887.

Intention to commit offences.]—Mere intention to commit an offence is not indictable, except in the case of high treason, as to which it is said that under 25 Edw. 3, st. 5, c. 2, *voluntas reputatur pro facto*; but in all cases where the intent to commit a crime is manifested by any overt act, the party may be indicted for an attempt to commit the offence. 1 Deacon, Cr. L. 643 : *R.* v. *Scofield*, Cald. 397 : *R.* v. *Higgins*, 2 East, 5, 21; *R.* v. *Chapman*, 1 Den. 432; 18 L. J. (M. C.) 152; 3 Cox, 467; *R.* v. *Taylor*, 1 F. & F. 511 : *R.* v. *Duckworth*, [1892] 2 Q. B. 83; 17 Cox, 495; *and see* 1 Russ. Cr. (7th ed.) 140.

Attempts to commit crimes.]—Every attempt to commit a felony or misdemeanor is a misdemeanor at common law, whether the crime attempted is one by statute or at common law. *R.* v. *Hensler*, 11 Cox, 570 (C. C. R.) : *R.* v. *Roderick*, 7 C. & P. 795, Parke, B. : *R.* v. *Martin*, 2 Mood. 123; 9 C. & P. 213, 215 : *R.* v. *Ransford*, 13 Cox, 9 (C. C. R.) : *R.* v. *Cartwright*, R. & R. 107 n. : *R.* v. *Butler*, 6 C. & P. 368. This doctrine has been applied to an attempt to commit suicide. *R.* v. *Doody*, 6 Cox, 463; *R.* v. *Burgess*, L. & C. 258; 9 Cox, 302; 32 L. J. (M. C.) 185.

It is said that there cannot, *ex vi termini*, be an attempt to commit perjury : but an attempt to suborn perjury is indictable (1 & 2 Geo. 5, c. 6, s. 7); so are certain attempts to bribe (6 Edw. 7. c. 34, s. 1).

To constitute an attempt the act done must be immediately connected with the commission of the offence. *R.* v. *Eagleton*, Dears. 515; 24 L. J. (M. C.) 158, Parke, B. : *R.* v. *Cheeseman*, L. & C. 140; 31 L. J. (M. C.) 89; 9 Cox, 100 : *R.* v. *Roberts*, Dears. 539; 25 L. J. (M. C.) 17. (*a*). Thus, the *procuring* of indecent prints with intent to sell them is an indictable misdemeanor; but the merely *keeping and preserving* them with that intent is not. *Dugdale* v. *R.*,

(*a*) In *R.* v. *Baker*, 28 N. Z. L. R. 536, the Court had to consider the criminal responsibility of a man who had written to another a letter explaining how to open a safe by the use of explosives. No particular safe was in the contemplation of either man when the letter was written; but the recipient subsequently tried to open a safe in accordance with the directions in the letter. The Court held both men equally guilty, the writer of the letter apparently as having counselled or procured the particular attempt.

1 E. & B. 435; Dears. 64; 22 L. J. (M. C.) 50. Care must be taken to distinguish an attempt from an intention, *R.* v. *Landow*, 23 Cox, 457; 77 J. P. 364; 29 T. L. R. 375; and from mere acts of preparation. *R.* v. *Robinson* [1915] 2 K. B. 342; 84 L. J. (K. B.) 1149; 79 J. P. 303; 31 T. L. R. 313.

Attempts to commit certain crimes are punishable by statute; *e.g.*, attempts to murder (24 & 25 Vict. c. 100, ss. 11-15); to commit unnatural offences (24 & 25 Vict. c. 100, s. 62; 48 & 49 Vict. c. 69, s. 11); or offences against girls under thirteen, or between thirteen and sixteen (48 & 49 Vict. c. 69, ss. 4, 5); or incest (8 Edw. 7. c. 45, s. 1 (3)).

Under 14 & 15 Vict. c. 100, s. 9, any person indicted for felony or misdemeanor may be convicted of the attempt to commit the offence charged, if the jury is satisfied that the offence was not completed. *See R.* v. *McPherson* Dears. & B. 197; 26 L. J. (M. C.) 134; 7 Cox, 281: *R.* v. *Hapgood*, L. R. 1 C. C. R. 221. It is therefore unusual to prefer an indictment for the attempt to commit an offence (*e.g.*, to obtain money by false pretences) where the full offence is charged.

In *R.* v. *White* [1910] 2 K. B. 124; 79 L. J. (K. B.) 854; 26 T. L. R. 466; 4 Cr. App. R. 257, on an indictment for murder, Darling, J., directed the jury that they might convict of an attempt to murder, and on their finding a verdict of guilty of attempt to murder the prisoner was sentenced to penal servitude as for a statutory felony within 24 & 25 Vict. c. 100, ss. 11-15. This ruling was upheld on appeal on the ground that the offences described in ss. 11-15 fell within the definition of attempts to murder, and that on an indictment for murder it was admissible under 14 & 15 Vict. c. 100, s. 9, to convict of such attempt.

Incitement.]—To solicit or incite another to commit a felony or misdemeanor is an indictable misdemeanor at common law, even though the solicitation or incitement has no effect. *R.* v. *Higgins*, 2 East, 5; *R.* v. *Scofield*, Cald. 397: *R.* v. *Quail*, 4 F. & F. 1076: *R.* v. *Gregory*, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60; 10 Cox, 459; *and see* 3 Chit. Cr. L. 688; Steph. Dig. Cr. L. (6th ed.) 39. This includes an offer of a bribe to a person to commit an offence. *Wade* v. *Broughton*, 3 V. & B. 172: and an attempt to incite to the commission of felony or misdemeanor is also an indictable misdemeanor at common law. *R.* v. *Ransford*, 13 Cox, 9 (C. C. R.). It is immaterial whether the principal offence is one existing by the common law or is created by statute. *See also* 1 Russ. Cr. (7th ed.) 203; *R.* v. *Campbell* [1908] Victoria L. R. 136.

Incitements to commit certain crimes are punishable by statute, *e.g.*, inciting to mutiny (37 Geo. 3, c. 70); to murder (24 & 25 Vict. c. 100, s. 4); to offences against Post Office laws (8 Edw. 7, c. 48, s. 69); to offences against the Official Secrets Acts, 1911 (1 & 2 Geo. 5, c. 28, s. 4, and 1920 (70 & 71 Geo. 5, c. 75, s. 7.)

Disobedience to statutes.]—Where a statute declares any act or omission to be treason, felony, misprision of treason or misdemeanor, an indictment lies in respect of such act or omission. And even though a statute does not use express terms describing the nature of the offence, if it prohibits a matter of public grievance to the liberties and securities of the subject, or commands a

matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, punishable by indictment, unless such method of procedure manifestly appears to be excluded by the statute. 2 Hawk. c. 25, s. 4; *R.* v. *Davis*, Say. 163; *R.* v. *Sainsbury*, 4 T. R. 451; *R.* v. *Price*, 11 A. & E. 727 : *R.* v. *Stephenson*, 13 Q. B. D. 331; 53 L. J. (M. C.) 176 : *R.* v. *Hall* [1891] 1 Q. B. 747; 60 L. J. (M. C.) 124. In *R.* v. *Kenyon* [1901] 36 L. J. Newsp. 371, an indictment was framed for contravening s. 3 of the *Disused Burial Grounds Act*, 1884 (47 & 48 Vict. c. 72) by building on a disused Roman Catholic burial-ground. Phillimore, J., seems to have considered the indictment good, and the defendants pleaded guilty, and were sentenced to imprisonment. The remedy usually sought is injunction (*see Re Ponsford and Newport District School Board* [1894] 1 Ch. 454; 63 L. J. (Ch.) 278). If a statute specifies a mode of proceeding otherwise than by indictment, then, if the matter is already indictable at common law, and the statute merely introduces a different mode of prosecution and punishment, the remedy is alternative, and the prosecutor has the option of proceeding either by indictment at common law, or by the mode specified by the statute. *Castle's case*, Cro. Jac. 644 : *R.* v. *Robinson*, 2 Burr. 799, 805 : *R.* v. *Wigg*, 2 Ld. Raym. 1163; 2 Salk. 460 : *R.* v. *Balme*, 2 Cowp. 648 : *R.* v. *Richard Carlile*, 3 B. & Ald. 161 : *and see* 2 Hale, 191; 1 Saund. 135, and notes; Craies on Statute Law (4th ed.), pp. 283 *et seq.*; Maxwell on Statutes (5th ed.), p. 299. If a statute prohibits under a penalty an act which was formerly lawful, and a subsequent statute (*R.* v. *Boyall*, 2 Burr. 832), or the same statute (in a *subsequent* substantive clause), provides a mode of proceeding for the penalty otherwise than by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law, or he may at his option proceed in the manner provided by the statute. 2 Hale, 171 : *R.* v. *Wright*, 1 Burr. 543; *and see R.* v. *Jones*, 2 Str. 1146 : *R.* v. *Harris*, 4 T. R. 202; 2 R. R. 358 : *R.* v. *Buchanan*, 8 Q. B. 883; 15 L. J. (Q. B.) 227 : *R.* v. *Hall* [1891] 1 Q. B. 747, 770; 50 L. J. (M. C.) 124, Charles, J. : *Saunders* v. *Holborn District Board* [1895] 1 Q. B. 64, 69; 64 L. J. (Q. B.) 101. But if the manner of proceeding for the penalty is contained in the *same* clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other; for the express mention of any other mode of proceeding impliedly excludes that of indictment. *R.* v. *Robinson*, 2 Burr. 799, 805 : *R.* v. *Buck*, 2 Str. 679 : *R.* v. *Hall*, *supra* : *R.* v. *Lovibond*, 19 W. R. 753. Where a statute, in one clause, declares an act to be a *public nuisance*, it is indictable, though a subsequent clause subjects it to a pecuniary penalty recoverable by "information, bill, plaint, or action at law," or makes it abateable. *R.* v. *Crawshaw*, Bell, 303; 30 L. J. (M. C.) 58; 8 Cox, 375 : *R.* v. *Gregory*, 5 B. & Ad. 555; 3 L. J. (M. C.) 25. It is now an established rule of construction that "where an act or omission constitutes an offence under two or more Acts of Parliament, or both under an Act and at common law, whether any such Act was passed before or after" January 1, 1890, the offender shall, "unless the contrary intention appears, be liable to be punished under either or any of those Acts, or at common law, but shall not be liable to be punished twice for the same

offence." 52 & 53 Vict. c. 63 (*Interpretation Act*, 1889), ss. 33, 42. If, in the case of a common-law misdemeanor, a new mode of punishment or new mode of proceeding merely is directed, without altering the class or nature of the offence, the new punishment or new mode of proceeding is alternative, and the offender may be indicted as before for the common-law misdemeanor (*R.* v. *Richard Carlile*, 3 B. & Ald. 161); and the mere declaration that an offence shall be felony which was so at common law does not create a new offence. *Williams* v. *R.*, 7 Q. B. 250, 253, Patteson, J. But if a later statute expressly alters the quality of an offence, *e.g.*, by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence cannot be proceeded for under the earlier statute. *Michell* v. *Brown*, 1 E. & E. 267; 28 L. J. (M. C.) 53. This result equally follows if the words "feloniously" or "deemed to be a felony" are used in the later Act. *R.* v. *Johnson*, 3 M. & Sel. 539, 556; Bayley, J.: *R.* v. *Solomons*, 1 Mood. 292; overruling *R.* v. *Cale*, 1 Mood. 11. And if a later statute describes an offence created by a former statute, and affixes to it a different punishment, varying the procedure, and giving an appeal where there was no appeal before, the prosecutor must proceed for the offence under the later statute. *Michell* v. *Brown*, *supra*. And where a *statute* makes the doing of an act *felonious*, if a subsequent statute makes it *penal* only, the later statute is a virtual repeal of the former, so far as relates to the punishment of the offence. 1 Hawk. c. 40, s. 5: *R.* v. *Davis*, 1 Leach, 271. As to the effect of a statute treating as a felony an act or omission which before was a misdemeanour at common law, *see R.* v. *Cross*, 1 Ld. Raym. 711: *R.* v. *Payne* [1906] 1 K. B. 388; 75 L. J. (K. B.) 114: *R.* v. *Garland* [1910] 1 K. B. 154; 79 L. J. (K. B.) 239; 3 Cr. App. R. 199.

Disobedience to rules and orders made under statutory authority.]—Disobedience to an order relating to quarantine, made by the King in Council under statutory authority, has been held to be an indictable misdemeanor at common law. *R.* v. *Harris*, 4 T. R. 202, explained in *R.* v. *Hall* [1891] 1 Q. B. 747, 765; 60 L. J. (M. C.) 124. Where a statute, the matter of which concerns the public in general, delegates to commissioners the power to make orders under it, disobedience to an order made by them in pursuance of such power is an indictable misdemeanor at common law. *R.* v. *Walker*, L. R. 10 Q. B. 355; 44 L. J. (M. C.) 169. And where a statute gives power to make regulations, a regulation made under the power becomes for the purposes of obedience or disobedience a provision of the statute. *Willingale* v. *Norris* [1909] 1 K. B. 57, 64; 78 L. J. (K. B.) 69. Where a corporation was authorized by a public statute to make a towing-path on the side of a river, it was held to be an indictable misdemeanor at common law to obstruct the corporation in the execution of the powers given it by the statute. *R.* v. *Smith*, 2 Doug. 441. Disobedience to an order of a court of competent jurisdiction is a misdemeanor indictable at common law. *R.* v. *Robinson*, 2 Burr. 799, 804: *R.* v. *Mortlock*, 7 Q. B. 459: *R.* v. *Brisby*, 1 Den. 416; 18 L. J. (M. C.) 157: *R.* v. *Jeyes*, 3 A. & E. 416: *R.* v. *Johnson*, 4 M. & Sel. 515; 1 Russ. Cr. (7th ed.) 542. It was an indictable misdemeanor to obstruct a coroner in the execution of the duties imposed upon him by 4 Edw. 1, st. 2 (*stat. de officio coronatoris*). *R.* v. *Price*, 12 Q. B. D.

punishment may be imposed as if the repealing Act had not been passed." *See R.* v. *Webb* [1904] 140 C. C. Sess. Pap. 627, Walton, J.; 1 Russ. Cr. (7th ed.), p. 7. Particular clauses to the like effect were common in prior statutes: as to their effect, *see R.* v. *Smith*, L. & C. 131; 31 L. J. (M. C.) 105.

SECT. 2.

AGAINST WHOM AN INDICTMENT LIES.

AN indictment lies against all persons who actually commit, or who procure, or assist in, the commission of any crime, or who knowingly harbour a traitor or felon; for each, in contemplation of law, is guilty, and liable to punishment according to the part which he takes in the perpetration or concealment of the offence. In the case of felony offenders are classed as principals in the first or in the second degree or accessories before or after the fact. In the case of misdemeanors all persons who aid, abet, counsel or procure the offence are treated as principal offenders.

Number and gender.]—By s. 1 (2) of the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), when an enactment relates to an offence punishable on indictment or on summary conviction, unless the contrary intention appears, words importing the masculine gender include females, and words in the singular include the plural, and words in the plural include the singular. [This re-enacts part of 7 & 8 G. 4, c. 28, s. 14.]

Corporations.]—By s. 2 (1) of the *Interpretation Act*, 1889, "in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after" January 1, 1890, "the expression 'person' shall, unless a contrary intention appears, include a body corporate." *See R.* v. *Tyler* [1891] 2 Q. B. 588, 594; 61 L. J. (M. C.) 38, Bowen, L.J. A contrary intention would be inferred in the case of treason, felony, or misdemeanors involving personal violence: *Pharmaceutical Society* v. *London & Provincial Supply Association*, 5 App. Cas. 857, 869; 49 L. J. (Q. B.) 736: *R.* v. *Great West Laundry Co.*, 13 Manitoba, 66: and in cases where the only penalty for the offence is imprisonment or corporal punishment. *See Pearks, Gunston & Tee* v. *Ward* [1902] 2 K. B. 1, 11, Channell, J.; 71 L. J. (K. B.) 656. *Hawke* v. *Hulton, Ltd.* [1909] 2 K. B. 93; 78 L. J. (K. B.) 633. A corporation aggregate has been held incapable of perjury. *Wych* v. *Meal*, 3 P. Wms. 310; 24 E. R. 1078. But a corporation aggregate may be indicted, by its corporate name, for breaches of public duty, whether in the nature of nonfeasance, such as the non-repair of highways or bridges which it is their duty to repair: *R.* v. *Birmingham & Gloucester Rail Co.*, 2 Q. B. 47; 9 C. & P. 469; or of misfeasance, such as the obstruction of a highway by a railway company, in a manner not authorized by their Act of Parliament. *R.* v. *Great North of England Rail. Co.*, 9 Q. B. 315; 16 L. J. (M. C.) 16:

" child " now means a person of 7 and under 14 years (8 Edw. 7, c. 67, s. 128 (1).) A list of the offences to which this provision applies is given in Douglas, Summary Jurisdiction Procedure (9th ed.), 148. The section only applies when the justices on summary conviction can pass a sentence of more than three months' imprisonment, and does not apply where the proceeding may result in a detention for a longer period than three months (*e.g.*, the conviction of a person summarily of being an incorrigible rogue, and his commitment to Quarter Sessions for sentence). *R.* v. *Evans and Connor*, 30 T. L. R. 326; 10 Cr. App. R. 53. There are several other enactments, such as the *Explosives Act*, 1875 (38 & 39 Vict. c. 17), s. 92; the *Conspiracy and Protection of Property Act*, 1875 (38 & 39 Vict. c. 86), s. 9; the *Prevention of Cruelty to Animals Act*, 1876 (39 & 40 Vict. c. 77), s. 15; and the *Merchandise Marks Act*, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 6, which expressly enable a defendant, when accused of an offence punishable on summary conviction under those statutes, to insist upon a trial on indictment. It is the duty of the Court of Summary Jurisdiction before going into the case to inform the accused of his right so to elect : and failure to do so invalidates the subsequent summary proceedings. *R.* v. *Cockshott* [1898] 1 Q. B. 582; 67 L. J. (Q. B.) 467 : *R.* v. *Beesby* [1909] 1 K. B. 849; 78 L. J. (K. B.) 482, which overrules *R.* v. *Fowler*, 64 L. J. (M. C.) 9. When the election has been made the justices deal with the case as a charge of an indictable offence (*see R.* v. *Mitchell, ex parte Livesey* [1913] 1 K. B. 561; 82 L. J. (K. B.) 153; 23 Cox, 273; 77 J. P. 148); and they may commit not merely for the offence charged as to which the election was made, but for any indictable offence disclosed by the depositions. *R.* v. *Brown* [1895] 1 Q. B. 119, 127.

Effect of repeal on pending proceedings.]—Prior to 1889 by the unqualified repeal of the statute on which an indictment was framed, though it took place after the finding of the bill, (but before plea pleaded,) the proceedings fell to the ground and no judgment could be pronounced. *R.* v. *Denton*, 18 Q. B. 761; Dears. 3; 21 L. J. (M. C.) 207 : *see R.* v. *Mawgan in Meneage*, 8 A. & E. 496; 7 L. J. (M. C.) 98. Where a prisoner was indicted for privately stealing from a shop against 10 W. 3, c. 12 (10 & 11 W. 3, c. 23, Ruffhead), which was repealed after the offence was committed, but before the prisoner was tried, by 1 G. 4, c. 117, s. 1 (*rep.*), it was held that the prisoner could not be sentenced under the repealed Act. *R.* v. *M'Kenzie*, R. & R. 429. But it has been held that an indictment for conspiracy to violate a statute, being a common law offence, will lie after the repeal of the statute, or in respect of an offence committed before the repeal. *R.* v. *Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183. As to statutes passed since 1889, the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), s. 38 (2), provides that where an Act " repeals any other enactment, then unless the contrary intention appears, the repeal shall not . . . (*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or (*e*) affect any investigation, legal proceeding, or remedy in respect of any such . . . penalty, forfeiture or punishment as aforesaid;" and that " any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or

punishment may be imposed as if the repealing Act had not been passed." *See R.* v. *Webb* [1904] 140 C. C. Sess. Pap. 627, Walton, J.; 1 Russ. Cr. (7th ed.), p. 7. Particular clauses to the like effect were common in prior statutes: as to their effect, *see R.* v. *Smith*, L. & C. 131; 31 L. J. (M. C.) 105.

SECT. 2.

AGAINST WHOM AN INDICTMENT LIES.

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Att.-Gen. v. *London & North Western Rail. Co.* [1900] 1 Q. B. 78. It would seem, also, that a corporation may be indicted by its corporate name, and fined, for a libel published by its order. *See Pharmaceutical Society* v. *London & Provincial Supply Association*, *supra*, at p. 870, Lord Blackburn: *Eastern Counties Rail Co.* v. *Broom*, 6 Ex. 314: *Whitfield* v. *South-Eastern Rail Co.*, E. B. & E. 115; 27 L. J. (Q. B.) 229. Trial of an indictment against a corporation cannot take place before a court of oyer and terminer or gaol-delivery or quarter sessions. *See post*, p. 111.

Capacity.]—The capacity to commit crime presupposes an act of understanding and an exercise of will; and "the full definition of every crime contains expressly or by implication a proposition as to a state of mind. In all cases whatever, competent age, sanity, and some degree of freedom from coercion are assumed to be essential to criminality." *R.* v. *Tolson*, 23 Q. B. D. 168, 187; 58 L. J. (M. C.) 97, Stephen, J.

EXEMPTIONS AND EXCUSES.

Aliens.]—British law is not construed as applying to the acts of aliens on land outside the King's dominions or at sea except within British territorial waters, or on British ships, or in cases of piracy *jure gentium*.

A British subject cannot naturalize himself as a subject of a foreign state at war with this country so as to exempt himself from criminal liability for treason. *R.* v. *Lynch* [1903] 1 K. B. 444; 20 Cox, 468; 67 J. P. 41. And an alien resident within the King's dominions is guilty of treason if he joins an invading force of his own countrymen, when the King's forces have temporarily retired, for strategical or other reasons. *De Jager* v. *Att.-Gen. for Natal* [1907] A. C. 326.

An alien friend is subject to indictment for offences committed in England (*R.* v. *Esop*, 7 C. & P. 456: *R.* v. *Barronet*, 1 E. & B. 1; 22 L. J. (M. C.) 25), or upon British ships within the admiralty jurisdiction (*see post*, p. 31), and for piracy *jure gentium*. *Att.-Gen. of Hong Kong* v. *Kwok a Sing*, L. R. 5 P. C. 179, 199: 1 Hawk. c. 17, s. 5. This liability appears not to extend to aliens who have diplomatic immunity. *See Diplomatic Privileges Act*, 1708 (7 Anne, c. 12): Law Mag. and Review (Nov. 1894), p. 43. *Sed contrà*, *see* case of *Pantaleon da Sa*, 5 St. Tr. 461, *and cf.* 2 St. Tr. 881, n.; Fost. 187. The burden of proof that the accused is an alien appears to lie upon him. *See R.* v. *Lindsay*, 14 St. Tr. 987, 994: *R.* v. *Macdonald*, 18 St. Tr. 857; except perhaps where the offence is committed outside the realm: *but see R.* v. *Jameson* [1896] 2 Q. B. 525; 65 L. J. (M. C.) 218. The liability of an alien enemy is not clearly ascertained. *See R.* v. *Molieres*, Fost. 188, n.: *R.* v. *Johnson*, 6 East, 583, 593; Ellenborough, C.J.: 1 Hawk. c. 17, s. 6.

Infants under seven.]—Infants under the age of discretion are not punishable by any criminal prosecution whatever; 1 Hale, 27: 1 Hawk. c. 1, s. 1: *and see*

Mirror, c. 4, s. 16 (Selden Soc. Publ., vol. 7); 1 Russ. Cr. (7th ed.) 58 (*f*). A child under the age of seven years cannot be guilty of any criminal offence; for, under that age an infant is, by incontrovertible presumption of law, *doli incapax*, and cannot be endowed with any discretion. Reg. 309 b; 1 Hale, 27, 28; 4 Bl. Com. 23: Mirror, c. 4, s. 6; Fost. 349: *Reniger* v. *Fogossa*, 1 Plowd. 1: *R.* v. *Carter* [1774] 1 Cowp. 220. 223: *Marsh* v. *Loader*, 14 C. B. (N. S.) 535: 1 Russ. Cr. (7th ed.) 58.

Infants between seven and fourteen.]—Between the ages of seven and fourteen years a child is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion, expressed in the maxim *malitia supplet ætatem*; for the capacity to commit crime, do evil and contract guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. 4 Bl. Com. 23: 1 Hale, 25, 27. Thus, it has been said that an infant eight years of age might be indicted for murder, and hanged on conviction; Dalt. c. 147; and an infant between the age of eight and nine years was executed for arson, it appearing that he was actuated by malice and revenge, and had perpetrated the offence with craft and cunning. 1 Hale, 25 n. So a girl of thirteen was burnt for killing her mistress; 1 Hale, 26; and where an infant nine years of age killed an infant of the like age, and confessed the felony, it appearing upon examination that he had hid both the blood and the body, the justices were of opinion that he might lawfully be hanged, but respited the judgment that he might be pardoned. Fitz. Cor. 57. *See R.* v. *York*, Fost. 70; 4 Bl. Com. 24: *R.* v. *Wild*, 1 Mood. 452. Under the present law sentence of death may not be pronounced or recorded against a person under sixteen (8 Edw. 7, c. 67, s. 103). In criminal proceedings against a person under fourteen, the evidence of a mischievous discretion, to rebut the *primâ facie* presumption of law arising from nonage, should be clear and strong beyond all doubt and contradiction. 4 Bl. Com. 23: 1 Hale, 25, 27: *R.* v. *Vamplew*, 3 F. & F. 520. *R.* v. *Gorrie*, 83 J. P. 136. Where a child between the age of seven and fourteen years is indicted for felony, two questions are to be left to the jury: first, whether he committed the offence; and secondly, whether at the time he had a guilty knowledge that he was doing wrong. *R.* v. *Owen*, 4 C. & P. 236: *R.* v. *Smith*, 1 Cox, 260; and see *R.* v. *Gorrie*, *supra*. The fact that the child did the acts constituting the elements of the offence is not in itself any evidence whatever of the guilty state of mind which is essential for conviction. *R.* v. *Kershaw*, 18 T. L. R. 357; 37 L. J. Newsp. 120, Bucknill, J. An infant under fourteen is presumed by law to be unable to commit a rape, and therefore cannot be found guilty of it as a principal in the first degree; for though in other felonies *malitia supplet ætatem*, yet, as to this particular act, the law presumes him impotent, as well as wanting in discretion. This presumption was not affected by 9 G. 4, c. 31, ss. 16, 17 (*rep.*), which first made the offence complete upon proof of penetration, without evidence of emission; *R.* v. *Groombridge*, 7 C. & P. 582; nor by the present enactment, 24 & 25 Vict. c. 100, s. 63, by which 9 G. 4, c. 31, is superseded: *R.* v. *Waite* [1892] 2 Q. B. 600; 61 L. J. (M. C.) 189; 17

Cox, 554. Nor is any evidence admissible to show that the defendant had in fact arrived at the full state of puberty, and could commit the offence. *R.* v. *Philips*, 8 C. & P. 736 : *R.* v. *Jordan*, 9 C. & P. 118 : *R.* v. *Brimilow*, *Id.* 366; 2 Mood. 122. In *R.* v. *Brimilow* it was held that the boy had been properly convicted of an assault under 1 Vict. c. 85, s. 11 (*rep.*). Nor can a boy under fourteen be convicted of an assault with intent to commit a rape. *R.* v. *Eldershaw*, 3 C. & P. 396. This doctrine has been extended to other offences involving carnal knowledge. *R.* v. *Waite*, *supra*. But a boy under fourteen may be a principal in the second degree in a rape, or like offence, if he aids and assists in the commission of the offence, and it appears that he had a mischievous discretion; for the excuse of impotency will not apply in such a case. 1 Hale, 630 : *R.* v. *Eldershaw*, 3 C. & P. 396. *See R.* v. *Allen*, 1 Den. 364; 2 C. & K. 869; 18 L. J. (M. C.) 72; 3 Cox, 270 : *R.* v. *Williams* [1893] 1 Q. B. 320; 62 L. J. (M. C.) 69. Whether where there is evidence of guilty knowledge he may be held to be an accomplice appears to be doubtful. *See R.* v. *Cratchley*, 9 Cr. App. R. 232; and *R.* v. *Tatam*, 15 Cr. App. R. 132.

In *R.* v. *Sutton*, 3 A. & E. 597; 5 N. & M. 353, there are dicta to the effect that under certain circumstances an infant under fourteen might be liable to indictment in respect of public duties arising out of his occupation of property.

Infants of fourteen or over.]—The incapacity of infants to commit crime ceases upon their attaining the age of fourteen years, at which age they are presumed by the law to be *doli capaces*, and capable of distinguishing good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. 1 Hale, 25; Doct. and Stu. c. 26; Co. Litt. 79, 171, 247; Dalt. c. 147; 1 Hawk. c. 1, n. (1). But for the purposes of punishment a distinction is drawn between adults and young persons (of fourteen and under sixteen), and juvenile adults (of sixteen and under twenty-one). *See* 8 Edw. 7, c. 67, ss. 102, 103, and 8 Edw. 7, c. 59, ss. 1-4.

In some misdemeanours and offences which are not capital an infant is said to be privileged by reason of his nonage, if under twenty-one, because laches is not to be attributed to him. Co. Litt. 357; 4 Bl. Com. 22. But inasmuch as an infant is liable in tort, it is difficult to understand the grounds of this early distinction as to misdemeanours when an infant over seven could be liable for felony. And an infant who is indicted for any notorious breach of the peace, as riot, forcible entry, battery, or for perjury or cheating, or the like, is equally liable as a person of full age; because, upon his trial, the court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion to do the act with which he is charged. 1 Hale, 20, 21; 4 Bl. Com. 22; 3 Bac. Abr., Infancy (H.). An infant, though incapable of making a contract of bailment, has been held liable to indictment for larceny as a bailee. *R.* v. *M'Donald*, 15 Q. B. D. 323. But an infant cannot lawfully be adjudicated bankrupt, and consequently cannot be convicted as a bankrupt of an offence under s. 159 of the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59), which depends on the existence of bankruptcy and the existence of valid debts by the infant.

R. v. *Wilson*, 5 Q. B. D. 28; 49 L. J. (M. C.) 13; *Lovell* v. *Beauchamp* [1894] A. C. 607; 63 L. J. (Q. B.) 802.

Summary remedy.]—Under the *Summary Jurisdiction Act*, 1879 (42 & 43 Vict. c. 49), as amended by the *Children Act*, 1908 (8 Edw. 7, c. 67), s. 128 (1), power is given to try summarily, for any indictable offence committed in England except homicide, a child under fourteen if the child's parent or guardian consents to this course (s. 10), and for certain indictable offences a young person over fourteen but under sixteen, if the young person consents (s. 11). Similar provisions are made as to offences in Ireland by 47 & 48 Vict. c. 19, ss. 4, 5, 6, 7, 9, as amended by ss. 133, 134 of the *Children Act*, 1908.

Persons of unsound mind.]—Every person at the age of discretion is, unless the contrary is proved, presumed by law to be sane, and to be accountable for his actions. *R.* v. *Oxford*, 4 St. Tr. (N. S.) 497; 9 C. & P. 525: *R.* v. *Stokes*, 3 C. & K. 185: *R.* v. *Layton*, 4 Cox, 149. The presumption in probate cases is the other way, as the person propounding the will must prove the testator competent. *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; 39 L. J. (Q. B.) 237. Therefore a grand jury ought not to ignore a bill of indictment on the ground of the insanity of the accused. *R.* v. *Hodges*, 8 C. & P. 195. But if there is an incapacity, or defect of the understanding, as there can be no consent of the will, the act is not punishable as a crime.

This species of non-volition is classified by Coke (Litt. 247) and Hale (1 Hist. P. C. 29) as either natural, accidental, or affected; and as either perpetual or temporary; and is by them reduced to three general heads: 1. *A nativitate, vel dementia naturalis;* 2. *Dementia accidentalis, vel adventitia;* 3. *Dementia affectata.*

1. *Dementia naturalis* is idiocy, or natural fatuity. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals: Co. Litt. 247; and those are said to be idiots who cannot count twenty, or tell the days of the week, who do not know their fathers or mothers, or the like; but these instances are mentioned as tests of insanity only, and are not always conclusive; and although idiocy or natural fatuity is in general sufficiently apparent, the question, whether idiot or not, is a question of fact triable by a jury, Bac. Abr., Idiot (A); Bro. Abr., Idiot, 4; and ought to be clearly made out, in order to exempt the accused from punishment. *R.* v. *Arnold*, 16 St. Tr. 695, 704; 1 Russ. Cr. (7th ed.), 63. A person deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is an idiot; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, convicted, and punished, although great caution should be observed in such proceedings. 1 Hale, 34; Moore (K. B.) 4, pl. 12; Fitzh. N. B. 233. *See R.* v. *Jones*, 1 Leach, 102: *R.* v. *Steel*, *Id.* 451: *R.* v. *Dyson* [1831] Parke, J., York Spring Ass., 7 C. & P. 305 n.; Matthews' Dig. 410: *R.* v. *Pritchard*, 7 C. & P. 303: *R.* v. *Berry*, 1 Q. B. D. 447; 45 L. J. (M. C.) 123; 13 Cox, 187; *R.* v. *Governor of Stafford Prison, Ex parte Emery* [1909] 2 K. B. 81; 78 L. J. (K. B.) 629.

In the *Mental Deficiency Act*, 1913 (3 & 4 Geo. 5, c. 28), s. 1, idiots are defined as being persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers.

2. Adventitious insanity, or *dementia accidentalis*, proceeds from various causes, and is of several kinds or degrees; it is either *partial* (an insanity upon some one subject, the party being sane upon all others), or *total; permanent* (usually called madness), or *temporary, viz.*, at certain periods and vicissitudes only, with lucid intervals (usually denominated lunacy). 3 Bac. Abr. 16.

The distinction between lunacy and madness made by Hale and Coke is not now observed, and the one word "insanity" covers both classes of mental aberration.

In the *Lunacy Act*, 1890 (53 & 54 Vict. c. 5) "lunatic" is defined as meaning an idiot or person of unsound mind (s. 341). But the tests applied for the purposes of that Act are not the same as the tests of insanity from the point of view of criminal responsibility. *See* Wood-Renton on Lunacy, 5.

3. *Dementia affectata. See Drunkenness, post*, p. 19.

Where the deprivation of understanding and memory is total, fixed and permanent, it excuses all acts; so likewise a man labouring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree with one whose disorder is fixed and permanent. *Beverley's case*, 4 Co. Rep. 125; Co. Litt. 247; 1 Hale, 31. But difficulty arises in distinguishing between a total aberration of intellect and a partial or temporary delusion notwithstanding which the patient may be capable of distinguishing right from wrong; in which case he will be guilty in the eye of the law, and amenable to punishment. Partial insanity, says Lord Hale, is the condition of many, especially of melancholy persons, who generally discover their defects in excessive fear and grief, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 Hale, 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest, on the one side, there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes. He concludes by suggesting, as the best measure, that such a person as, labouring under melancholy distempers, hath yet as great understanding as ordinarily a child of fourteen years hath, is such a person as can be guilty of treason or felony. 1 Hale, 30, 412.

Considerable uncertainty has been shown by the judges as to the application or acceptance of Hale's rules. In *R.* v. *Arnold*, 16 St. Tr. 695, 764, and *R.* v. *Earl Ferrers*, 19 St. Tr. 885, it was ruled that a man could not be acquitted on the ground of insanity unless he was totally deprived of understanding and memory, and did not know what he was doing any more than an infant or a brute or wild beast. In *R.* v. *Hadfield*, 27 St. Tr. 1281, the test accepted was, that if a man is completely deranged so that he knows not what he does, if he

is lost to all sense so that he cannot distinguish good from evil, and cannot judge of the consequences of his actions, then he cannot be guilty of crime, because the will, which to a certain extent is the essence of every crime, is wanting. In *R.* v. *Bellingham*, Collinson, Lun. 636, add., and *R.* v. *Bowler*, *Id.* 673; 1 Russ. Cr. (7th ed.), 64, 65, the test applied was whether, when the act was done, the prisoner was capable of distinguishing right from wrong or was under the influence of any delusion which rendered his mind insensible of the nature of his act. *Cf. R.* v. *Parker*, Collinson, Lun. 477. And in *R.* v. *Oxford*, 4 St. Tr. (N. S.) 497; 9 C. & P. 525, the ruling was in substance the same. In *R.* v. *Offord*, 5 C. & P. 168, it was ruled, that, to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. The rule now generally adopted is based on the answers of the judges to the House of Lords given in consequence of *Macnaughton's case*, 4 St. Tr. (N. S.) 847; 10 Cl. & F. 200; 8 Eng. Rep. 718. Tindal, C.J., at the trial directed the jury: "If upon balancing the evidence in your minds you should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, he is then a responsible agent." This involves the proposition that if there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil,—then he will be responsible for his actions. *See R.* v. *Higginson*, 1 C. & K. 129. On this direction the jury returned a verdict of not guilty. In consequence of the direction and verdict a discussion took place in the House of Lords, and a series of questions was propounded to and answered by the judges, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusions. Below are given the questions asked of the judges and the answers of all except Maule, J., who gave a more qualified answer.

Question 1.—"What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?"

Answer.—"Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of *redressing or revenging some supposed grievance or injury, or of producing some public benefit*, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land." 4 St. Tr. (N. S.) 930. The words italicized appear to have special reference to the cases of Hadfield, Bellingham, and Macnaughton.

Question 2.—"What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?"

Question 3.—"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

Answers.—To the second and third questions:—"That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the *nature and quality* of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time *of doing the act, knew the difference between right and wrong*, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." 4 St. Tr. (N. S.) 931. The words italicized appear to distinguish between the physical character and legal aspect of the act done. *See* Mayne, Ind. Cr. Law (4th ed.), p. 178.

Question 4.—"If a person, under an insane delusion, as to the existing facts, commits an offence in consequence thereof, is he thereby excused?"

Answer.—"The answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he

killed him in revenge for such supposed injury, he would be liable to punishment." 4 St. Tr. (N. S.) 932. *See R.* v. *Townley*, 3 F. & F. 839.

Question 5.—" Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?"

Answer.—" We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide: and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." 4 St. Tr. (N. S.) 932.

These answers have in the main been accepted as laying down the law of England as to the definition of insanity with reference to criminal responsibility. *R.* v. *Townley*, 3 F. & F. 839: *R.* v. *Southey*, 4 F. & F. 864: *R.* v. *Leigh*, 4 F. & F. 915: *R.* v. *Smith*, 5 Cr. App. R. 123: *R.* v. *Alexander*, 23 Cox, 604: 9 Cr. App. R. 139; *and see* 1 Russ. Cr. (7th ed.), 68-82. But they have been the subject of much consideration and criticism by legal and medical writers. (*See* 2 Stephen, Hist. Cr. Law, 124-186; Mayne, Ind. Crim. Law (4th ed.), pp. 169 *et seq.*; Wood-Renton on Lunacy, 885, 914.) Sir James Stephen was of opinion (2 Hist. Cr. Law, 186) that *Macnaughton's case* admitted, as a further exemption, the proposition " that a person should not be punished for any act when he is deprived by disease of the power of controlling his conduct, unless the absence of control has been caused by his own default." So far as this admits the medical theory of uncontrollable impulse, it conflicts with the following cases: *R.* v. *Stokes*, 3 C. & K. 185, Rolfe, B.: *R.* v. *Barton*, 3 Cox, 275, Parke, B.: *R.* v. *Burton*, 3 F. & F. 772, Wightman, J.: *R.* v. *Dove* [1884] Bramwell, B.; 3 Stephen Hist. Cr. Law, 429: Wood-Renton, Lunacy, 900; and with the opinions of the judges appointed to report on the Draft Code of 1878; and with recent decisions of the Court of Criminal Appeal. *See R.* v. *Thomas*, 7 Cr. App. R. 36: *R.* v. *Coelho*, 10 Cr. App. R. 210, at p. 212: *R.* v. *Aughet*, 13 Cr. App. R. 101, at p. 106: *R.* v. *Holt*, 15 Cr. App. R. 10: *R.* v. *Quarmby*, 15 Cr. App. R. 163; but it is supported as a legal proposition by *dicta* of Denman, C.J., in *R.* v. *Oxford*, 9 C. & P. 525; and Lawrance, J., in *R.* v. *Duncan*, Wood-Renton, Lunacy, 901, 908; *and see R.* v. *Hay*, 22 Cox, 268; 75 J. P. 480; *R.* v. *Fryer*, 24 Cox, 403; *R.* v. *Jolly*, 83 J. P. 296, Bray, J.; Tuke, Dict. Psych. Med., vol. 1, p. 314; Journal of Mental Science, vol. 43, p. 420; Mercier, Criminal Responsibility (ed. 1906), p. 167; Taylor, Medical Jurisprudence (7th ed.): Parl. Pap. 1908, c. 4202: and *Brown's case* [1907] 9 Fraser (Just. Sc.) 67, 76.

Moral insanity—*i.e.*, disorder of the moral rather than of the mental powers

—when a man's intellectual faculties are sound and he knows quite well what he is doing, but his moral sense is affected or diseased, is not yet accepted in England as falling within the rules in *Macnaughton's case*. *R.* v. *Haynes*, 1 F. & F. 666; *R.* v. *Law*, 2 F. & F. 836 (*and see* Wood-Renton, Lunacy, 909): *R.* v. *Burton*, 3 F. & F. 772. (*a*)

The words "nature and quality of the act" in the answer to Questions 2 and 3 do not mean the physical act and the morality of the act respectively, but apply alone to the physical character, and were not intended to distinguish between the physical and the moral aspects of the act. *R.* v. *Codere*, 12 Cr. App. R. 21.

Proof of insanity.]—Whether the prisoner was sane or insane in the legal sense at the time the act was committed is a question of fact triable by the jury, and is dependent upon the previous and contemporaneous acts of the party. Evidence of insanity of ancestors or blood relations is admissible. *R.* v. *Ross Tucket*, 1 Cox, 103: *R.* v. *Vyse*, 3 F. & F. 247. So is evidence of illness exhausting the brain. *R.* v. *Law*, 2 F. & F. 836. Medical evidence is not essential. *R.* v. *Dart*, 14 Cox, 143. Mere absence of any evidence of motive for a crime is not a sufficient ground upon which to infer mania. *R.* v. *Haynes*, 1 F. & F. 666, Bramwell, B.: *R.* v. *Dixon*, 11 Cox, 341. A medical witness may be asked whether, assuming certain facts, proved by other witnesses, to be true, they, in his opinion, indicate insanity, but not whether, having

(*a*) *Colonial and American Views.*]—The tendency of judges and legislators in the United States and the British Colonies is not to accept the dicta in *Macnaughton's case* as an adequate definition of insanity with reference to criminal responsibility. In the *Queensland Code of* 1899 (*s.* 27), drafted by the Rt. Hon. Sir Samuel Griffith, C.J., of that Colony, after consideration of the English authorities and Continental and American legislation, the view of Sir J. Stephen is in substance adopted. The article runs: "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing or *of capacity to control his actions*, or of capacity to know that he ought not to do the act or make the omission."

And in *R.* v. *Hay* [1899] 16 Cape of Good Hope Rep. (Sup. Ct.) 290, the Rt. Hon. Sir H. de Villiers, C.J., after hearing a full argument dealing with the law of England and the United States and the Roman-Dutch law, laid down as the law of the Cape, and as the tendency of legal opinion elsewhere, the following rules which also in substance coincide with the opinion of Sir J. Stephen:—

"(1) Where the defence of insanity is interposed in a criminal trial the capacity to distinguish between right and wrong is not the sole test of responsibility in all cases.

"(2) In the absence of legislation to the contrary courts of law are bound to recognize the existence of a form of mental disease which prevents the sufferer from controlling his conduct and choosing between right and wrong, though he may have the mental capacity to distinguish between right and wrong.

"(3) The defence of insanity is established if it be proved that the accused had by reason of such mental disease lost the power of will to control his conduct in reference to the particular act charged as an offence.

"(4) The capacity of the accused to control his own conduct must be presumed till the contrary is proved."

For a strict statement of the law according to *Macnaughton's case*, see *R.* v. *Jessamine*, 19 Canadian Cr. Cases, 214, Riddell, J.

heard the whole evidence, he is of opinion that the prisoner at the time he committed the alleged act was of unsound mind. *Id. R.* v. *Frances*, 4 Cox, 57, Alderson, B., and Cresswell, J.: *R.* v. *Wright*, R. & R. 456: *R.* v. *Searle*, 1 M. & Rob. 75. But a medical witness, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, cannot, in strictness, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time, because each of these questions involves the determination of the truth of the matter deposed to, which it is for the jury to decide. (*See* the answer to the fifth question in *R.* v. *Macnaughton*, *ante*, p. 17). Nor can such a witness, although present in court during the whole trial, be asked whether, from the evidence he has heard, he is of opinion that the prisoner at the time he did the act was insane, nor whether the act with which the prisoner is charged was in his opinion an act of insanity, for these are the very points to be decided by the jury. *R.* v. *Frances*, *supra*: *R.* v. *Wright*, *supra*. Counsel will not be allowed, upon a question of insanity, to quote in his address to the jury the opinions of medical writers as expressed in their books. *R.* v. *Crouch*, 1 Cox, 94: *R.* v. *Taylor*, 13 Cox, 77, Brett, J.

Insanity being matter of defence, the onus of establishing it lies upon the defendant. *R.* v. *Oliver Smith*, 6 Cr. App. R. 19. Where evidence to establish insanity has been called for the defence, the prosecution may call rebutting evidence. *R.* v. *Smith*, 8 Cr. App. R. 72. And where it is clear from the cross-examination of witnesses for the prosecution that the defence of insanity will be raised, and it is ascertained that no evidence will be called to establish this defence, the Crown may, before closing its own case, call evidence to negative insanity. *R.* v. *Abramovitch*, 76 J. P. 287; 107 L. T. 416; 7 Cr. App. R. 145.

Drunkenness.]—Drunkenness, which produces a perfect though temporary frenzy or insanity (usually denominated *dementia affectata* or acquired madness), was formerly held not to excuse the commission of any crime; and an offender under the influence of intoxication could derive no privilege from a madness voluntarily contracted, but was regarded as equally answerable to the law as if he had been in the full possession of his faculties at the time; 1 Hale, 32: Co. Litt. 247: 1 Hawk. c. 1, s. 6: *Reniger* v. *Fogossa*, 1 Plowd. 1. But legal opinion has altered on this subject, and now insanity produced by drunkenness, even though temporary, is a defence just as it is when it is produced by other causes. Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime charged must be taken into consideration with the other facts proved in order to determine whether or not he had such intent. But evidence of drunkenness falling short of this, and merely establishing that the mind of the accused was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. *Director of Public Prosecutions* v. *Beard* [1920] A. C. 479. In a

limited class of case, *e.g.*, in charges of murder directly arising from acts of violence done with intent to do grievous bodily harm, where it is established that the accused was drunk at the time of committing the acts, the presumption that he intended the natural consequences of his act may be rebutted by showing his mind to have been incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury, and the crime thereby reduced to manslaughter. *R.* v. *Meade* [1909] 1 K. B. 895; 78 L. J. (K. B.) 476. But this is not a rule of general application, and does not apply to charges of murder where the violent act is done *in furtherance of* what is in itself a felony of violence, *e.g.*, rape. In such a case drunkenness can be no defence, unless it is of such a degree as to cause incapability of forming the intention to commit the particular felony. So where the accused ravished a girl of thirteen years of age, and in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation, and the only defence was drunkenness, it was held to be murder, there being no evidence of a state of drunkenness sufficient to negative the intent to commit the rape. *Director of Public Prosecutions* v. *Beard*, *supra*.

There is a distinction between the defence of insanity in the true sense produced by excessive drinking and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, and the test of criminal responsibility which is applied to the former should not be applied to the latter defence. *Director of Public Prosecutions* v. *Beard*, *supra* (*a*).

Drunkenness and consequent delusions may assist to make out a defence of provocation or self-defence. *R.* v. *Thomas*, 7 C. & P. 817: *R.* v. *Pearson*, 2 Lew. 144: *R.* v. *Monkhouse*, 4 Cox, 55: *R.* v. *Gamlen*, 1 F. & F. 90. The Scotch and Irish rulings on this subject are collected in Wood-Renton on Lunacy, 912, 913. If the primary cause of the frenzy is involuntary, or it has become habitual and confirmed, this species of insanity will excuse the offender to the same extent as any other form of insanity. Thus, for instance, if a man through the unskilfulness of his physician, or the contrivance of his enemies, takes that which produces a temporary frenzy, he will not, whilst under the influence of the frenzy, be accountable for his actions. Nor will he be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act. 1 Hale, 32. And *delirium tremens*, caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility for any act committed by him while under its influence. *R.* v.

(*a*) *See R.* v. *Egan* [1897] 23 Viet. L. R. 159, as to whether and when a woman can be convicted of murder or manslaughter by overlying her child when she has taken it to bed with her while she is drunk (*see* 8 Edw. 7, c. 67, s. 13). In *R.* v. *Glen*, 9 Queensland L. J. 140, a verdict of guilty coupled with a rider that the prisoner was in drink and did not know what he was doing was held to be a finding that he had no *animus furandi*: *cf. R.* v. *Mathieson* [1906] 25 N. Z. L. R. 879; 1 Russ. Cr. (7th ed.) 89. This point has not been decided in England (*R.* v. *Chapman*, 4 Cr. App. R. 54). In *R.* v. *Corbett* [1903] Queensland State Rep. 246, Griffith, C.J., said, "Drunkenness is never a defence unless it amounts to unsoundness of mind."

Davis, 14 Cox, 563, Stephen, J. The doctrine of criminal responsibility in case of drunkenness due to alcohol is equally applicable to mental or bodily conditions caused by the drinking of narcotics or non-alcoholic stimulants, or exciting drugs, or their hypodermic injection. 1 Hale, 32.

The Inebriates Act, 1898 (61 & 62 Vict. c. 60), provides for reformatory treatment of persons convicted on indictment who are habitual drunkards. The term "habitual drunkard" means "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs." *See Eaton* v. *Best* [1909] 1 K. B. 632; 78 L. J. (K. B.) 425. This definition appears to apply only to the habitual use of alcohol, and not to include the use of narcotics. *See* Wood-Renton, Lunacy, 954. The Act of 1898 does not appear to accept the view that drunkenness falling short of insanity is a defence on a charge of crime, but gives the courts latitude in the treatment of crimes directly or indirectly due to drunkenness, by permitting the reformative sentence as an alternative to the ordinary punishment for crime. *Cf.* 8 Edw. 7, c. 67, s. 26, as to offences by habitual drunkards against persons under sixteen.

Compulsion or coercion.]—The same principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crimes in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. 4 Bl. Com. 27 : 1 Hale, 44, 51. Thus, if A. by force takes the hand of B. in which is a weapon, and therewith kills C., A. is guilty of murder, but B. is excused; but if a merely moral force is used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. 1 Hale, 434; 1 East, P. C. 225. *M'Growther's case*, Fost. 13; 18 St. Tr. 391 : *R.* v. *Gordon*, 1 East, P. C. 71 : *R.* v. *Tyler*, 8 C. & P. 616. This protection also exists in the public and private relations of society : public, as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes coercion, which, in many cases, excuses the wife from the consequences of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime, of whatever denomination; for the command is void in law, and can protect neither the commander nor the instrument. 1 Hale, 44, 516. Obedience to usurped power is an excuse only where actual physical compulsion is used or directly available. *See M'Growther's case*, *supra*: *Sir H. Vane's case*, 6 St. Tr. 119; Kel. (J.) 14 : *Axtell's case*, Kel. (J.) 13.

Married women.—The mere fact that two persons jointly charged with crime are married does not create any presumption that the wife was coerced by the husband to commit the crime. *Brown* v. *Att.-Gen. of N.Z.* [1898] A. C. 234, 237; 67 L. J. (P. C.) 7 : *R.* v. *Mary Baines* [1900] 69 L. J. Q. B. 681; 19 Cox,

524; 64 J. P. 408. But, as a general rule, if a crime be committed by a *feme covert in the presence of* her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment; 1 Hale, 45, 516; 1 Hawk. c. 1, s. 9; *R.* v. *Caroubi*, 23 Cox, 177; 76 J. P. 262; 28 T. L. R. 248; *R.* v. *Green*, 78 J. P. 170; 30 T. L. R. 170; 9 Cr. App. R. 288. This protection, however, is not to be allowed in crimes which are *mala in se*, and prohibited by the law of nature, nor in such as are heinous in their character, or dangerous in their consequences; 1 Hale, 45, 47, 48; 1 Hawk. c. 1, s. 11; 4 Bl. Com. 29; 1 Harg. St. Tr. 28: *R.* v. *Squire*, 1 Russ. Cr. (7th ed.) 93, 912. It seems not to apply to murder, *R.* v. *Manning*, 2 C. & K. 903, n.: *R.* v. *Alison*, 8 C. & P. 418; but has been applied to burglary and larceny (*R.* v. *Knight*, 1 C. & P. 116); to forgery (*R.* v. *Hughes*, 2 Lew. 229); to felonious assaults (*R.* v. *Smith*, Dears. & B. 553); and to robbery (*R.* v. *Torpey*, 12 Cox, 45). In some cases the presumption has been extended to misdemeanors: *e.g.*, uttering base coin, *R.* v. *Connolly*, 2 Lew. 229; Matth. Dig. 262: *R.* v. *Price*, 8 C. & P. 19; *and see R.* v. *Torpey*, *supra*. But the contrary appears to have been held by all the judges in *R.* v. *Cruse*, 8 C. & P. 541; 2 Mood. 53; and this is the prevailing opinion. *See R.* v. *Ingram*, 1 Salk. 384. So a married woman may be indicted jointly with her husband for keeping a bawdy-house, *R.* v. *Williams*, 1 Salk. 384; 10 Mod. 63; or a gaming-house, *R.* v. *Dixon*, 10 Mod. 335; for these are offences connected with the government of the house, in which the wife has a principal share. 1 Hawk. c. 1, s. 12. So also they may be jointly convicted of an assault. *R.* v. *Cruse*, *supra*. And if, in the absence of her husband, the wife commits an offence, even by his order or procurement, her coverture will be no excuse; *Anon.*, 2 East, P. C. 559: *R.* v. *Morris*, R. & R. 270; 2 Leach, 1096; 1 Hawk. c. 1, s. 11; even though he appears at the very moment after the commission of the offence; and no subsequent act of his, though it may render him an accessory to the felony of his wife, can be referred to what was done by his wife in his absence. *R.* v. *Hughes*, 1 Russ. Cr. (7th ed.) 94, 99; 2 Lew. 229. This presumption of coercion of the wife by the husband may be rebutted by evidence; though it is doubtful whether a confession by a wife in presence of her husband should be received as such evidence. *R.* v. *Laugher*, 2 C. & K. 225. And if it appears that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. 1 Hale, 516: *R.* v. *Cohen*, 11 Cox, 99; 16 W. R. 941: *R.* v. *Caroubi*, *supra*. Thus, a married woman who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. *R.* v. *Dicks*, 1 Russ. Cr. (7th ed.) 97. So where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. *R.* v. *Hammond*, 1 Leach, 444. And where the wife in the absence of her husband induced the prosecutor by false representations to meet her at a place, where the husband, the wife being present but taking no active part, by threats of violence induced the prosecutor to execute a valuable security, and the husband and wife were jointly indicted for that offence under 24 & 25 Vict. c. 96, s. 48 (*rep.*), Brett, J., directed the jury

that if they should be of opinion that the wife in the husband's absence took an independent part in carrying out the crime, the fact of her being the wife would not absolve her. *R.* v. *John*, 13 Cox, 100. Where stolen goods are received by a married woman in the absence of her husband, and are concealed in his house, without his knowledge, she may be indicted and punished for the offence; but if the husband's ignorance of the transaction is not satisfactorily proved, the law will, in most cases, impute the receiving to him. Dalt. c. 157. Where husband and wife were convicted jointly of receiving stolen goods, it was held that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband. *R.* v. *Archer*, 1 Mood. 143; *R.* v. *Matthews*, 1 Den. 596; 4 Cox, 214: *R.* v. *McClarens*, 3 Cox, 425. *See R.* v. *Wardroper*, Bell, 249; 29 L. J. (M. C.) 116. But in *R.* v. *Mary Baines* (69 L. J. Q. B. 681; 19 Cox, 524; 64 J. P. 408), where a husband and wife were jointly indicted for receiving stolen goods, and there was evidence of a separate receiving by the wife in the absence of her husband, it was held that she was properly convicted in accordance with the provisions of 24 & 25 Vict. c. 96, s. 94 (*rep.*). And it is submitted that a married woman is indictable for receiving since the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), if she knowingly deals with goods stolen by her husband in a business carried on by her under her own name. At common law she is not indictable for receiving from her husband goods stolen by him. *R.* v. *Brooks*, Dears. 184: 22 L. J. (M. C.) 121; *and see R.* v. *Archer*, 1 Mood. 143. Husband and wife were jointly charged with felonious wounding, with intent to disfigure, and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding the wife was held entitled to an acquittal. *R.* v. *Smith*, Dears. & B. 553; 27 L. J. (M. C.) 204. And where the prisoner, a married woman, was indicted together with her husband, who was not in custody, for a robbery with violence, in which she had herself taken a very active part, and the jury returned as their verdict that they were of opinion that the whole matter was pre-arranged by the husband, and that the wife acted under his coercion and control at the time, it was held to amount to a verdict of not guilty. *R.* v. *Torpey*, 12 Cox, 45. Where upon an indictment for robbery with violence, D. and his wife were found guilty, the jury finding, however, that the wife had acted under her husband's compulsion, this was held to amount to a verdict of not guilty as to the wife. *R.* v. *Dykes*, 15 Cox, 771, Stephen, J. It has frequently been said in recent cases that the doctrine of coercion by the husband should not be extended. *R.* v. *Court*, 7 Cr. App. R. 127, 129; *R.* v. *Green*, 78 J. P. 170; 9 Cr. App. R. 228. Husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will. 1 Hawk, c. 72, s. 8.

If a married woman incites her husband to the commission of a felony, she is an accessory before the fact; 1 Hale, 516; 2 Hawk. c. 29, s. 34: *R.* v. *Manning*, 2 C. & K. 903, n.; but she cannot be treated as an accessory after the fact for receiving her husband, knowing that he has committed treason

or felony; 1 Hale, 47 : *R.* v. *Goode*, 1 C. & K. 185; nor for concealing a felon jointly with her husband; *Id.*; 1 Hawk. c. 1, s. 10. And she is not answerable for her husband's breach of duty, however fatal, though she is privy to his misconduct, if no duty is cast upon her, and she is merely passive. *R.* v. *Squire*, 1 Russ. Cr. (7th ed.), 93, 912.

If a married woman, indicted jointly with her husband, is described in the indictment as his wife, she need not prove her marriage, but will be entitled to protection if it appears that she acted under his coercion; *R.* v. *Knight*, 1 C. & P. 116; but the mere description will be no ground for dismissing the indictment as to the wife, for the indictment is joint and several, according to the facts as they may appear. 1 Hale, 46. If she is described as a single woman, she must prove her marriage; *R.* v. *Jones*, Kel. (J.) 37; and such evidence must be given as will satisfy the jury of her marriage, although it is not absolutely necessary that the actual marriage should be proved. *R.* v. *Atkinson*, 1 Russ. Cr. (7th ed.) 100 : *R.* v. *Hassall*, 2 C. & P. 434 : *R.* v. *Woodward*, 8 C. & P. 561 : *R.* v. *McGinnes*, 11 Cox, 391. Evidence of cohabitation and reputation will be sufficient. *Morris* v. *Miller*, 4 Burr. 2057, Lord Mansfield, C.J.

Ignorance of law.]—Ignorance of the *law* will not excuse from the consequences of guilt any person who has capacity to understand the law. 1 Hale, 42 : *R.* v. *Crawshaw*, Bell, 303; 30 L. J. (M. C.) 58; 8 Cox, 375. If the offence is committed in England, a foreigner cannot be excused because he does not know our law. *R.* v. *Esop*, 7 C. & P. 456; *R.* v. *Barronet*, 1 E. & B. 1; 22 L. J. (M. C.) 25. And the same applies if it is committed in an English ship on the high seas, which is in law part of the territory of England. *R.* v. *Lopez*, *R.* v. *Sattler*, Dears. & B. 525; 27 L. J. (M. C.) 48. Where, however, a defendant was indicted for maliciously shooting at A. B. upon the high seas, and the offence was perpetrated within a few weeks after the passing of 39 G. 3, c. 37, and before notice of it could have reached the place where the offence was committed, the judges held, that as he could not have been tried before that Act was passed, and as he could not have heard of it, he ought to be pardoned. *R.* v. *Bailey*, R. & R. 1 : *and see Burns* v. *Nowell*, 5 Q. B. D. 444, 454.

Ignorance or mistake of fact.]—Ignorance or mistake of *fact* may in some cases be allowed as an excuse for the inadvertent commission of a crime, where the accused acted under an honest and reasonable belief in a state of things which if true would have justified the act done. "At common law an honest and reasonable belief in the existence of facts, which if true would make the act for which the prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, *actus non facit reum nisi mens sit rea*. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty as in infancy, or perversion of that faculty as in lunacy." *R.* v. *Tolson*, 23 Q. B. D. 168, 181; 58 L. J. M. C. 97, Cave, J. For instance, if a man, intending to kill a thief in his own house, kills one of his own family, he will

be guilty of no offence. 1 Hale, 42, 43; 4 Bl. Com. 27; *R.* v. *Levett*, Cro. Car. 538 *cit.* But this rule proceeds upon a supposition that the original intention was lawful; for if an unforeseen consequence ensues from an act which was in itself unlawful, and in its original nature wrong and mischievous, the actor is criminally responsible for whatever consequences may ensue. 4 Bl. Com. 27.

"**Mens rea.**" (*a*)]—The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind; *Chisholm* v. *Doulton*, 22 Q. B. D. 736; 58 L. J. (M. C.) 183: *R.* v. *Twose*, 14 Cox, 327; but it is impossible now to apply the maxim as to "*mens rea*" generally to all statutes, and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created; *Cundy* v. *Lecocq*, 13 Q. B. D. 207; 53 L. J. (M. C.) 125, Stephen, J.; Craies on Statute Law (4th ed.), p. 433; Maxwell on Statutes (5th ed.), p. 157. It has been held that it is not necessary to prove that a defendant charged with assaulting a constable in the execution of his duty knew that the constable was so acting; *R.* v. *Forbes*, 10 Cox, 362, Gurney, Recorder. Where the defendant was indicted under 24 & 25 Vict. c. 100, s. 55, for unlawfully taking an unmarried girl under the age of sixteen years out of the possession and against the will of her father, it was held to be no defence that the defendant believed on good grounds that the girl was above sixteen years of age. *R.* v. *Prince*, L. R. 2 C. C. R. 154; 44 L. J. (M. C.) 122. All the judges in that case agreed on the general principle that an honest and reasonable mistake of facts furnishes a good defence for an act committed under such mistake, and which would otherwise be criminal, but they all, except Lord Esher, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights, it was to be supposed that they intended that the wrongdoer should act at his peril. *R.* v. *Tolson*, 23 Q. B. D. 168, 190, Stephen, J.: *and see R.* v. *Dennis*, 69 J. P. 256. The majority of the judges seem to have held that in order to make the defence of mistake of fact available in that case (*R.* v. *Prince*), the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only not criminal but also not immoral. *R.* v. *Tolson*, 23 Q. B. D. 168, 181, Cave, J. A defendant was convicted under 8 & 9 Vict. c. 100, s. 44 (*rep.*, but containing a provision similar to 53 & 54 Vict. c. 5, s. 315), of receiving two or more lunatics into her house, not being a registered

(*a*) As to statutory offences the true rule of English law seems to be correctly stated in Art. 23 of the Queensland Code of 1899, except as to public nuisances.

'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.

"Unless the intention to cause a particular result is declared to be an element of the offence constituted in whole or in part by an act or omission, the result intended to be caused by an act or omission is immaterial.

"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility."

asylum or hospital, or a house duly licensed under the above Act, or under any previous Act, but it was specially found by the jury who convicted that, though the persons so received were lunatics, the defendant honestly, and on reasonable grounds, believed that they were not lunatics. It was held that, having regard to the scope of the Act, and the object for which it was apparently passed, such mistaken belief was immaterial, and that the conviction was right. *R.* v. *Bishop*, 5 Q. B. D. 259; 49 L. J. (M. C.) 45. But where the prisoner was convicted under 24 & 25 Vict. c. 100, s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband, and the jury found that at the time of the second marriage she, in good faith and on reasonable grounds, believed her husband to be dead, it was held on a case reserved by the court for the consideration of all the judges, that a *bonâ fide* belief by the prisoner on reasonable grounds in the death of the husband at the time of the second marriage was a good defence, and that the conviction was wrong. *R.* v. *Tolson*, 23 Q. B. D. 168; 58 L. J. (M. C.) 97. The *ratio decidendi* of this decision, and the distinction between this case and that of *R.* v. *Prince*, ante, p. 25, seems to be contained in the following words of the judgment of Stephen, J., 23 Q. B. D. at p. 191—"The conduct of the woman convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. Assuming the facts to be as she supposed, the infliction of more than a nominal punishment on her would have been a scandal. Why, then, should the legislature be held to have wished to subject her to punishment at all?" It is not, perhaps, easy to draw a distinction between *R.* v. *Tolson* and *R.* v. *Bishop*, *supra*, but the same learned judge, at the page last cited, explained the decision in *R.* v. *Bishop* as having gone on "the scope of the Act constituting the offence, and the object for which it was apparently passed," *cf. Cundy* v. *Lecocq*, *supra*; and as to *R.* v. *Tolson*, see *R.* v. *Wheat* and *R.* v. *Stocks* [1921] 2 K. B. 119.

This question has been the subject of numerous decisions with regard to offences triable summarily against the statutes relating to licensing. *Bond* v. *Evans*, 21 Q. B. D. 249; *Brooks* v. *Mason* [1902] 2 K. B. 743; *Sherras* v. *de Rutzen* [1895] 1 Q. B. 918; 64 L. J. (M. C.) 218: and adulteration of food, *Coppen* v. *Moore* (No. 2) [1898] 2 Q. B. 306; 67 L. J. (Q. B.) 689. *Brown* v. *Foot*, 61 L. J. (M. C.) 110; 17 Cox, 509; 56 J. P. 581: *Parker* v. *Alder* [1899] 1 Q. B. 20; 68 L. J. (Q. B.) 7; 62 J. P. 792. *See also Joncs* v. *Davies* [1902] 20 Cox, 184: *Greenwood* v. *Backhouse*, 20 Cox, 196: *Christie* v. *Cooper* [1900] 2 Q. B. 522: *Laird* v. *Dobell* [1906] 1 K. B. 131: *Toppen* v. *Marcus* [1908] 2 Ir. Rep. 423: *Mogan* v. *Caldwell*, 88 L. J. (K. B.) 1141 (Merchant Shipping Act, 1906, s. 25): *Mousell Brothers, Ltd.* v. *London & North Western Railway Co.* [1917] 2 K. B. 836 (Railway Clauses Consolidation Act, 1845, ss. 98, 99). Knowledge by the defendant that he is offending against the penal provisions of a statute is sufficient to constitute *mens rea*. *Bank of N.S.W.* v. *Piper* [1897] A. C. 383; 66 L. J. (P. C.) 73.

SECT. 3.

THE FORM OF AN INDICTMENT.

AN indictment consists of three parts: the commencement, the statement of the offence, and the particulars of the offence. The caption is not part of it. *See post*, p. 61.

By the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 3—(1) "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge. (2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

Drawing the indictment.]—In ordinary cases, upon furnishing the clerk of assize, clerk of arraigns, or clerk of the indictments at the assizes, or the clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing the indictment, it is better to get it drawn by counsel.

"Where it appears to the court that an indictment contains unnecessary matter, or is of unnecessary length, or is materially defective in any respect, the court may make such order as to the payment of that part of the costs of the prosecution which has been incurred by reason of the indictment so containing unnecessary matter, or being of unnecessary length, or being materially defective as the court thinks fit." 5 & 6 Geo. 5, c. 90, s. 6.

"If any clerk of assize, clerk of the crown, clerk of the peace, clerk of the indictments, or other proper officer or their clerks or deputies, shall draw any bill of indictment defective, they shall draw new bills without demanding any fee or reward whatsoever, or forfeit the sum of £5 with full costs of suit." 10 W. 3, c. 12 (c. 23, Ruffhead), s. 8.

RULES UNDER INDICTMENTS ACT, 1915.

"The rules contained in the First Schedule to this Act with respect to indictments shall have effect as if enacted in this Act, but those rules may be added to, varied, or annulled by further rules made by the rule committee under this Act." 5 & 6 Geo. 5, c. 90, s. 1.

Sect. 2. *Powers of rule committee.*]—(1) There shall be established for the purposes of this Act a rule committee consisting of the Lord Chief Justice of England for the time being, and of a judge of the High Court, a chairman of quarter sessions, a recorder, a clerk of assize, a clerk of the peace, and another person having experience in criminal procedure, appointed in each case by the Lord Chief Justice.

(2) The rule committee shall have power from time to time, subject to the

approval of the Lord Chancellor, to make rules varying or annulling the rules contained in the First Schedule to this Act and to make further rules with respect to the matters dealt with in those rules, and those rules shall have effect subject to any modifications or additions so made.

(3) Any rules made by the rule committee shall be laid, as soon as may be, before both Houses of Parliament, and, if within forty days on which either House has sat since the rules were so laid before the House a petition is presented to his Majesty by that House praying that the rules or any part of them may be annulled, his Majesty may thereupon by Order in Council annul the same, and the same shall thenceforth be void, but without prejudice to the validity of anything done thereunder.

(4) The term of office of any person who is a member of the committee by virtue of appointment shall be such as may be specified in the appointment.

Rule 1. *Material, &c. for indictments.*]—(1) An indictment may be on parchment or durable paper, and may be either written or printed, or partly written and partly printed.

(2) Each sheet on which an indictment is set out shall be not more than 12 and not less than 6 inches in length, and not more than 14 and not less than 12 inches in width, and if more than one sheet is required, the sheets shall be fastened together in book form.

(3) A proper margin not less than 3 inches in width shall be kept on the left-hand side of each sheet.

(4) Figures and abbreviations may be used in an indictment for expressing anything which is commonly expressed thereby.

(5) There shall be endorsed on the back of an indictment the name of every witness examined or intended to be examined by the grand jury, and the foreman of the grand jury shall write his initials against the name of each witness so examined.

(6) An indictment shall not be open to objection by reason only of any failure to comply with this rule.

1. THE COMMENCEMENT.

(*a*) *Presentment.*

Rule 2. The commencement of the indictment shall be in the following form :—

The King v. *A.B.*

COURT OF TRIAL [e.g., *Central Criminal Court*, [or] *In the High Court of Justice, King's Bench Division*, [or] *Durham County Assizes held at Durham*, [or] *Hants Quarter Sessions held at Winchester*].

PRESENTMENT OF THE GRAND JURY.

A.B. is charged with the following offence [offences] :—

(*b*) *Venue.*

How stated.]—Prior to the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), the statute law relating to venue was expressed as follows by 14 & 15 Vict.

c. 100 (*Criminal Procedure Act*, 1851), sect. 23.]—"It shall not be necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment:

"Provided that, in cases where local description is, or hereafter shall be, required such local description shall be given in the body of the indictment;

"And provided also that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue."

By sect. 24 of the same Act it was provided: "No indictment for any offence shall be held insufficient . . . for want of a proper and perfect venue. . . ." [*This re-enacted and extended* 7 *G.* 4, *c.* 64, *s.* 20, *which took away the right to object by motion in arrest of judgment, or by writ of error, for the want of a proper or perfect venue. See R.* v. *Albert*, 5 Q. B. 37; Dav. & M. 89; 12 L. J. (N. S.) M. C. 117; *R.* v. *Stowell*, 5 Q. B. 44; Dav. & M. 189; 12 L. J. (N. S.) M. C. 111; *R.* v. *Gregory*, 7 Q. B. 274; 14 L. J. (N. S.) M. C. 82; *R.* v. *O'Connor*, 4 St. Tr. (N. S.) 935; 5 Q. B. 16.]

These provisions have now been repealed by the *Indictments Act*, 1915, and the venue is now sufficiently indicated by stating the court of trial at the commencement of an indictment in manner provided by Rule 2, *ante*, p. 28.

Definition.]—Venue is the common law term for the neighbourhood (*visne*) from which the jurors are to come (*venire*). At common law only a jury of the district in which the offence was committed could convict of it. "The old jurisdiction of counties was local; they were like different kingdoms. There was no jurisdiction out of the county, no process out of it." *R.* v. *Weston*, 4 Burr. 2507, 2511, Lord Mansfield. Venue or local jurisdiction is quite distinct from national or territorial jurisdiction. *Moçambique Co.* v. *Brit. South Africa Co.* [1893] A. C. 602; *R.* v. *Ellis* [1899] 1 Q. B. 230; 68 L. J. (Q. B.) 103; *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] A. C. 200, 204; 67 L. J. (Q. B.) 141.

The *Indictments Act*, 1915, has expressly left the law or practice relating to jurisdiction untouched. 5 & 6 Geo. 5, c. 90, s. 8 (1). *See post*, p. 60.

General rule.]—The courts of common law had apart from statute no power to try any offence not committed within the body of the realm, *i.e.*, their criminal jurisdiction was territorial and not personal. *Macleod* v. *Att.-Gen. of N.S.W.* [1891] A. C. 455; 60 L. J. (P. C.) 55; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670. Apart from the obsolete jurisdiction of the constable and marshal, no person can be tried under English law for an offence committed on land abroad, except under the authority of a statute. *See R.* v. *Lewis*, Dears. & B. 182; 26 L. J. (M. C.) 104; 7 Cox, 277.

The jurisdiction of the courts of British colonies is limited to offences com-

mitted within their territories, unless imperial legislation, including the provisions of their Constitution Acts, otherwise provides. *Macleod* v. *Att.-Gen. for N.S.W.* [1891] A. C. 455. (*a*). 60 L. J. (P. C.) 55.

The American decisions on this subject are collected in Dicey, Conflict of Laws (1st ed.) p. 231; *and see* Moore on Extra-territorial Crime, 23—33; Beale, Conflict of Laws.

Statutory exceptions.]—To the general rule there are many statutory exceptions. In some statutes jurisdiction is given over offences not triable at common law. In others, latitude is given as to the place of trial of existing offences.

Treason abroad.]—In indictments for high treason or misprision committed out of the realm, the venue might, before the passing of the *Local Government Act*, 1888, be laid in Middlesex if the trial was to be "where the King's Bench shall sit and be kept;" or by special commission in such shire as the King should appoint. 35 H. 8, c. 2, s. 1. But in consequence of 51 & 52 Vict. c. 41, s. 89, sub-s. 3, and R. S. C., Jan., 1903, the venue in indictments for treason abroad, if the trial was to take place in the King's Bench Division and not before a special commission, was laid in "the county of the county of London and the county of Middlesex." *See R.* v. *Lynch* [1903] 1 K. B. 744; 72 L. J. (K. B.) 167; *R.* v. *Casement* [1917] 1 K. B. 98; 86 L. J. (K. B.) 467. 35 H. 8, c. 2, applies to treasons committed in the Isle of Man, Guernsey, Jersey, Sark, or Alderney, or in foreign possessions which, although parts of the dominions of the British Crown, are not parts of the realm of England. *See* 3 Co. Inst. 11, 111; 4 Co. Inst. 124.

Murder.]—"Where any murder or manslaughter shall be committed *on land* out of the United Kingdom, whether within the King's dominions or without, and whether the person killed were a subject of his Majesty or not, every offence committed by any subject of his Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place." 24 & 25 Vict. c. 100, s. 9. A British subject, therefore, who, in a foreign country, within the dominion of a foreign power, murders either a British subject or a foreigner is triable in England under the express provisions of this section. *See R.* v. *Azzopardi*, 6 St. Tr. (N. S.) 21; 2 Mood. 288; 1 C. & K. 203; *R.* v. *Sawyer*, R. & R. 294. In *R.* v. *Bernard*, 8 St. Tr. (N. S.) 887; 1 F. & F. 240, the question was raised whether, under 9 G. 4, c. 31, s. 7 (*rep.*), a foreigner resident in England could be indicted as accessory (by means of acts done by him in England) to a murder committed by a foreigner on foreigners in France; the prisoner, however, was acquitted. Such a case is now covered by 24 and 25 Vict. c. 100, s. 4.

(*a*) *See R.* v. *Hilaire* [1903] 3 N. S. W. State Rep. 228: *Re Caruchet*, 9 Queensland L. J. 122, Griffith, C.J.: *Re Bigamy Law of Canada*, 27 Canada, 461.

Where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die in England or Ireland; or being feloniously stricken, etc., in England or Ireland, shall die of the same at sea, or at any place out of England or Ireland, the offence (whether in the case of principal or accessory) may be dealt with, etc., in the county or place in England or Ireland, in which the death, stroke, poisoning, or hurt happened. 24 & 25 Vict. c. 100, s. 10. Where a man in a boat at a short distance from the shore was shot by a person on the shore, and died instantly, it was held that the stroke and death were both upon the high seas, and therefore triable under 28 H. 8, c. 15 (*post*, p. 32), and not under 2 G. 2, c. 21 (*rep.*) *R.* v. *Coombes*, 1 Leach, 388; 1 East, P. C. 367; *and see* 1 Hawk. c. 37, s. 17.

Burning, etc., King's ships.]—In indictments for burning or destroying the King's ships, magazines, etc., out of the realm (*i.e.*, outside Great Britain), the venue may be laid in any county within the realm. 12 G. 3, c. 24, s. 2.

Offences by colonial governors, etc.]—Oppressions, crimes, and offences committed abroad by colonial governors, lieutenant governors, deputy governors, or commanders in chief, shall be inquired of, heard and determined in the King's Bench Division in England, or before such commissioners and in such county of this realm as shall be assigned by his Majesty's Commission. 11 W. 3, c. 12 (11 & 12 W. 3, Ruffhead). *Picton's case*, 30 St. Tr. 225; *R.* v. *Eyre*, L. R. 3 Q. B. 487; 36 L. J. (M. C.) 159.

Offences in India.]—Misdemeanors committed in India may be tried in the King's Bench Division in England. 13 G. 3, c. 63. And in indictments for offences committed by persons employed in any public service "out of Great Britain" the venue may be laid in Middlesex. 42 G. 3, c. 85, s. 1. *See R.* v. *Shawe*, 5 M. & Sel. 403. The counties of London and Middlesex are now one for purposes of trial. 51 & 52 Vict. c. 41, s. 89; R. S. C., Jan., 1903.

Offences against Foreign Enlistment Act.]—Offences against the *Foreign Enlistment Act*, 1870 (33 & 34 Vict. c. 90), may be tried in any place where the offence was wholly or partly committed, or in any place within the King's dominions where the accused is: and the offence may be averred generally to have been committed in his Majesty's dominions, and the marginal venue may be the county, city or place where the trial is held. 33 & 34 Vict. c. 90, ss. 16, 17; *R.* v. *Jameson* [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218; 18 Cox, 392.

Offences against Official Secrets Act.]—Offences against the *Official Secrets Act*, 1911 (1 & 2 Geo. 5, c. 28), alleged to have been committed out of the United Kingdom, may by s. 10 of that Act be tried in the High Court of Justice in England, or the Central Criminal Court.

Offences in the Admiralty jurisdiction.]—Apart from statute, offences in the Admiralty jurisdiction were triable by the admiral according to the civil law and

not according to the course of the common law, and controversies occasionally arose as to whether the offence was committed within the jurisdiction of the admiral or within the body of the realm. In *R.* v. *Coombes*, 1 Leach, 388, it was held that where a shot fired on land killed a man on the sea the offence was triable in the Admiralty jurisdiction. This decision is criticised in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] A. C. 200, 204; 67 L. J. (Ch.) 141, Halsbury, L.C. The distinction and difficulties are now to a great extent removed by legislation. By 28 H. 8, c. 15, s. 1, it was provided that treasons, felonies, robberies, murders and confederacies thereafter committed in or upon the sea, or in any other haven, river, creek, or place, whereon the admiral had or pretended to have jurisdiction should be inquired of, etc., in such shores and places in the realm as should be limited for that purpose by the King's commission. This mode of trial has been extended to the following offences if committed on the high seas :—Acts of hostility by a subject of this realm against a subject at sea under colour of a foreign commission; 11 W. 3, c. 7, s. 8; 18 G. 2, c. 30, s. 1; *see R.* v. *Evans*, 2 East, P. C. 798 : forcibly boarding a merchant ship, and throwing over or destroying the goods; 8 G. 1, c. 24, s. 1 : trading with pirates or fitting out a vessel for that purpose; 8 G. 1, c. 24, s. 1 : master or seaman running away with the ship, goods, etc., or laying violent hands on or confining the master, or making a revolt in the ship, etc.; 11 W. 3, c. 7, s. 9; *see R.* v. *M'Gregor*, 1 C. & K. 249: dealing in slaves upon the high seas, or in any place where the admiral has jurisdiction, except as therein mentioned; 5 G. 4, c. 113; *see R.* v. *Zulueta*, 1 C. & K. 215 : and to the offence of being accessory (before or after the fact, on land, or at sea) to piracy. 11 W. 3, c. 7, s. 10. *See* 8 G. 1, c. 24, s. 3. The offences above mentioned, when a commission was issued for their trial under 28 H. 8, c. 15, were inquired of, tried, and determined before the judge of the Admiralty Court, and two of the judges of the common-law courts, under a commission of oyer and terminer : and, in the indictment, no county was inserted in the margin as venue, but instead of it merely the words "*Admiralty of England.*" According to Coke, rivers in this country to the furthest point of land next the sea, creeks and arms of the sea within the body of a county, and the sea-shore between the high and low watermarks when the tide is out, are not within the jurisdiction of the Admiralty, or within the meaning of the term "high seas." *See Constable's case*, 5 Co. Rep. 107; Hale, de Jure Maris, c. 4, p. 10; *Admiralty case*, 12 Co. Rep. 79. According to Hale the Admiralty Court had concurrent jurisdiction in cases of murder and maiming, and exclusive jurisdiction in cases of piracy *jure gentium*, which is not a common-law offence. 2 Hale, 18. Hale's view is now accepted. *See R.* v. *Bruce*, R. & R. 243; 2 Leach, 1093 : *R.* v. *Keyn*, 2 Ex. D. 63, 76; 46 L. J. (M. C.) 17; 13 Cox, 403 : Mayne, Ind. Cr. L. [4th ed.] p. 57. The test whether an arm of the sea is within the body of a county is said to be, whether a man on one shore can see what is being done on the other. 2 East, P. C. 804. This has been held to include the Bristol Channel (*R.* v. *Cunningham*, Bell, 72; 24 L. J. (M. C.) 66) : Milford Haven (*R.* v. *Bruce*, 2 Leach, 1093) : and Roundstone Bay, Galway (*R.* v. *Mannion*, 2 Cox, 158 (C. C. R. Ir.)). *And see R.* v. *Schwab* [1907] 12 Canada Cr. Cas. 539. As to offences by

foreigners on foreign ships within British territorial waters, *see* 41 & 42 Vict. c. 73 (*post*, p. 34).

The jurisdiction of the Admiralty extends over British ships, not only on the high seas, (*a*) but also in foreign rivers, below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may have concurrent jurisdiction. *R.* v. *Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M. C.) 12. As to jurisdiction when a ship is in dock, *see U. S.* v. *Hamilton*, 1 Mason, 152, Story, J. If great ships go to the place, proof that the tide ebbs and flows is unnecessary. *R.* v. *Allen*, 1 Mood. 494. The jurisdiction extends to all persons on board the ship whether British subjects or foreigners. *R.* v. *Lopez: R.* v. *Sattler*, Dears. & B. 525; 27 L. J. (M. C.) 48: *R.* v. *Lesley*, Bell, 220; 29 L. J. (M. C.) 97. And therefore where a foreigner was convicted at the Central Criminal Court of manslaughter, committed on board a British ship in the river Garonne, in France, about 35 miles from the sea, and about 300 yards from the nearest shore, within the flow and ebb of the tide, the conviction was upheld. *R.* v. *Anderson*, *supra*. So also where a larceny was committed by a person unknown on board a British ship lying afloat in the ordinary course of trading, in the open river at Rotterdam, moored to the quay, in a place where large vessels usually lay, and 16 or 18 miles from the sea, between which and the ship there were no bridges, and within the ebb and flow of the tide, it was held that the larceny took place within the jurisdiction of the Admiralty, and therefore that a person who afterwards, in England, received the property so stolen could be tried at the Central Criminal Court, as the thief himself, even if he had been a foreigner and not one of the crew, might have been so tried. *R.* v. *Carr*, 10 Q. B. D. 76; 52 L. J. (M. C.) 12. The liability of a foreigner is not affected by the fact that he was in the first instance brought illegally and by force on board the ship, unless the offence was committed merely for the purpose of freeing himself from such unlawful restraint. Therefore, where the defendant, a foreigner, having committed a crime in England, had fled to Hamburg, and was there arrested and forced on board an English ship, and while he was kept in custody on board such ship on the high seas, killed the officer who had arrested him, not for the purpose of escaping, but of malice prepense, it was held that, even assuming such arrest and detention to be illegal, he was guilty of murder. *R.* v. *Sattler*, *supra*. Where on a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel, on board of which the offence was alleged to have been committed, was a British ship of Shields, and that she was sailing under the British flag, but no proof was given of the registration or ownership of the vessel; it was held that the court had jurisdiction, as the evidence was sufficient to prove that the vessel was British, and that being so, the court would have jurisdiction even if it had appeared that the vessel was not registered. *R.* v. *Seberg*, L. R. 1 C. C. R. 264; 39 L. J. (M. C.) 133: *R.* v. *Allen*, 10 Cox, 405; 33 L. J. (M. C.) 98.

In *R.* v. *Bjornsen*, L. & C. 545; 34 L. J. (M. C.) 180; 10 Cox, 74, the

(*a*) As to the Great Lakes of North America *see R.* v. *Meikleham* [1906] 11 Ontario L. R. 366.

prisoner was one of the crew of a ship built in Holstein, whence she sailed to London. All the officers and crew were foreigners; R., the registered sole owner, was an alien born, but described in the register as "of London, merchant." The ship sailed from London under the British flag. While on the voyage the prisoner killed the master on board the vessel when several thousand miles from England, and 200 miles from land. On the trial of the prisoner for murder these facts were proved, and no evidence was given that R. had been naturalized or had obtained letters of denization; under these circumstances it was held that there was no evidence that the ship was British, and that consequently the prisoner could not be convicted in England. Nor can a foreigner be indicted in this country for casting away a foreign ship in foreign waters, if the act do not amount to piracy; but he may be indicted here for a conspiracy in this country to commit such an offence, provided the conspiracy be not limited to doing the act abroad. *R.* v. *Kohn*, 4 F. & F. 68, Willes, J.

A foreigner who kills another foreigner or an Englishman on the high seas on board a foreign ship, is not amenable to the law of England, or triable in England, except in a case of piracy. *R.* v. *Lewis*, Dears. & B. 182; 26 L. J. (M. C.) 104; *R.* v. *De Mattos*, 7 C. & P. 458; *R.* v. *Depardo*, 1 Taunt. 26; R. & R. 134; 9 R. R. 693. This rule applies where the ship has been illegally seized as a slaver by a British vessel. *R.* v. *Serva*, 1 Den. 104; 2 C. & K. 53; 1 Cox, 298. The foreigner is liable to extradition where the ship belongs to a state as to which the Extradition Acts have been applied. 33 & 34 Vict. c. 52, s. 16. A foreigner was indicted at the Central Criminal Court for manslaughter under the following circumstances. He was in command of a foreign ship, passing within three miles of the shore of England on a voyage to a foreign port; and whilst within that distance his ship ran into a British ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as, apart from the question of jurisdiction, to amount to manslaughter by English law. It was held by the majority of a court of 13 judges that the offence was not committed on board the British ship, and that there was no jurisdiction in the courts of this country to try the prisoner, a foreigner passing the English coast on the high seas in a foreign ship, though the occurrence took place within three miles of the English coast. *R.* v. *Keyn*, 2 Ex. D. 63; L. J. (M. C.) 17; 13 Cox, 403. Parliament approved the view of the minority, and at once passed the *Territorial Waters Jurisdiction Act*, 1878 (41 & 42 Vict. c. 73). Sect. 2 of that Act *declares* (*see R.* v. *Dudley*, 14 Q. B. D. 273, 560; 54 L. J. (M. C.) 32) and enacts that "an offence committed by a person, whether he is or is not a subject of his Majesty, on the open sea, within the territorial waters of his Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly." The phrases and words "the territorial waters of his Majesty's dominions," "the jurisdiction of the Admiral," "offence," "ship," and "foreign ship," are defined by s. 7 of the same statute. And ss. 3 & 4 place certain restrictions on the prosecution of a person not a subject of his Majesty, and contain provisions as to procedure. The statute does not expressly exclude or include foreign public

vessels. As to their position, *see The Parlement Belge*, 5 P. D. 197 (C. A.); 48 L. J. (P. D. & A.) 18, and Report of Fugitive Slave Commission, 1876, Parl. Pap. 1878, vol. 28. The extent to which municipal jurisdiction outside the three miles' limit is internationally recognised was fully discussed in the Behring Sea Arbitration. *And see Mortensen* v. *Peters*, 9 Fraser (Justiciary Sc.), 93; 1 Russ. Cr. (7th ed.) 103.

The Central Criminal Court has jurisdiction to inquire of, hear, and determine any offence committed, or alleged to have been committed, within the jurisdiction of the Admiralty of England, and to deliver the appointed gaols of the Central Criminal Court of prisoners committed to or detained there for such offences; and all indictments found and proceedings had before the Court are valid. 4 & 5 W. 4, c. 36, s. 22; 44 & 45 Vict. c. 64, s. 2 (2): *R.* v. *Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M. C.) 12: *R.* v. *Carr*, 10 Q. B. 76: 52 L. J. (M. C.) 12.

By the *Admiralty Offences Act*, 1844 (7 & 8 Vict. c. 2), all offences alleged to have been committed on the high seas, and other places within the Admiralty of England, may be heard and determined by his Majesty's justices of the assize or others his Majesty's commissioners by whom any court shall be holden under any of his Majesty's commissions of oyer and terminer or general gaol delivery, and they shall have severally and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England, and may deliver the gaol, in every county and franchise within the limits of their several commissions, of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas, etc.; and all indictments found, and other proceedings had, by and before the said justices and commissioners shall be valid (s. 1). By sect. 2 of the same Act "in all indictments preferred before the said justices and commissioners under this Act, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts, which, in other indictments, would be averred to have taken place in the county where the trial is had, shall, in indictments preferred under that Act, be averred to have taken place 'on the high seas.'" It has been held that an indictment under this statute need not contain an averment that the offence was committed "within the jurisdiction of the Admiralty." *R.* v. *Jones*, 1 Den. 101; 2 C. & K. 165. The provisions of 7 & 8 Vict. c. 2 are left unrepealed by the *Indictments Act*, 1915, but it is clear from the express language of sect. 3 of the latter Act (*ante*, p. 27) that an offence committed within the jurisdiction of the Admiralty need not now even be averred to have taken place "on the high seas." Section 3 of the *Admiralty Offences Act*, 1844, provides for the commitment for trial of persons charged with such offences; and sect. 4 saves the jurisdiction of the Central Criminal Court, under 4 & 5 W. 4, c. 36, s. 22, *supra*. Where any person within the jurisdiction of the Admiralty of England or Ireland, becomes accessory to any felony, whether at common law or by any Act (past or future) and whether committed within that jurisdiction or elsewhere, or begun within it and completed elsewhere, or begun elsewhere and completed within it, his offence shall be felony.

and the venue in the margin of the indictment shall be the same as if the offence had been committed in the county or place in which he is indicted, and his offence shall be averred to have been committed "on the high seas." 24 & 25 Vict. c. 94, s. 9. This provision, although impliedly repealed, is similarly left standing by the *Indictments Act*, 1915. As to the trial of offenders in the British dominions beyond the seas for crimes committed on the high seas, or in places in which the Crown has power or jurisdiction out of his Majesty's dominions, *see* 12 & 13 Vict. c. 96; and 53 & 54 Vict. c. 37.

By the *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), s. 687, all offences against property or person committed in or at any place either ashore or afloat out of his Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or *within three months* previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner, and by the same courts, and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offences may be directed to be paid as in the case of costs and expenses of prosecution for offences committed within the jurisdiction of the Admiralty of England. This section applies to offences under the *Merchant Shipping Act*, 1906 (6 Edw. 7, c. 48). *See* ss. 84, 86 of that Act. *See R.* v. *Dudley*, 14 Q. B. D. 273; 54 L. J. (M. C.) 32, decided on the similar provision in s. 267 of 17 & 18 Vict. c. 104 (*rep.*) : Ilbert, Government of India (2nd ed.), 242; and as to colonial jurisdiction under the Act, *R.* v. *Hinde* (1902) 22 N. Z. L. R. 436. A hulk retaining the general appointments of a ship, registered as a British ship, and hoisting the British ensign, although only used as a floating warehouse, is a British ship within the meaning of the above enactment. *R.* v. *Armstrong*, 13 Cox, 184, Archibald, J. 57 & 58 Vict. c. 60, s. 686, sub-s. 1, also enacts, that where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is *found* (that is to say, is found to be at the time of his trial, *R.* v. *Lopez*, *R.* v. *Sattler*, Dears. & B. 525; 27 L. J. (M. C.) 48; 7 Cox, 431) within the jurisdiction of any court of justice in his Majesty's dominions, which would have had cognizance of such offence if committed on board a British ship within the limits of its ordinary jurisdiction, such court shall have jurisdiction to try the offence as if it had been so committed. Sub-s. 2 saves the effect of 12 & 13 Vict. c. 96.

Each of the *Criminal Law Consolidation Acts* of 1861 contains a provision by which all indictable offences in those Acts respectively mentioned committed within the jurisdiction of the Admiralty, are to be deemed to be offences of the same nature and subject to the same punishments as if they had been committed on the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all

respects as if the offence had been committed in that county or place. 24 & 25 Vict. c. 96 [Larceny, etc.], s. 115; c. 97 [Malicious Injuries to Property], s. 72; c. 98 [Forgery], s. 50; c. 99 [Offences relating to the Coin], s. 36; c. 100 [Offences against the Person], s. 68. These enactments give jurisdiction to a borough quarter sessions to try a man arrested in the borough for offences against the Acts of 1861 committed at sea. *R.* v. *Peel*, L. & C. 231; L. J. (M. C.) 69; 9 Cox, 220. These provisions appear to be no longer necessary in view of 57 & 58 Vict. c. 60, s. 686 (1), ante, p. 36, and have not been reproduced in the *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), nor in the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50).

Offences during journeys.]—In indictments for felonies or misdemeanors committed on any person, or on or in respect of any property, in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, the venue may be laid in any county through which the coach, etc., or vessel shall have passed in the course of the journey or voyage during which the felony or misdemeanor was committed, in the same manner as if it had been actually committed therein; and where the side, bank, centre or other part of the highway, river, etc., shall constitute the boundary of two counties, the venue may be laid in either of the counties through, or adjoining to, or by the boundary of any part whereof, the coach, etc., or vessel shall have passed in the course of the journey or voyage. 7 G. 4, c. 64, s. 13. This enactment is not confined to the carriages of common carriers, or to public conveyances, but extends to any carriage employed in any journey. *R.* v. *Sharpe*, Dears, 415; 24 L. J. (M. C.) 40; 6 Cox, 418. The fact that a person assaulted in a train changes into another carriage of the same train during the journey does not take away the jurisdiction. *R.* v. *French*, 8 Cox, 252. Similar provisions are contained in s. 21 of the *Fugitive Offenders Act*, 1881 (44 & 45 Vict. c. 69), as to offences on journeys or voyages in which the vehicle or vessel passes through one or more British possessions.

Offences in more than one county or place.]—Where a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of 500 yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein. 7 G. 4, c. 64, s. 12 (*cf.* 44 & 45 Vict. c. 69, s. 20). The distance is measured in a direct line, as the crow flies. *R.* v. *Wood*, 5 Jur. 225; 10 L. J. (Ex.) 168; *cf. Lake* v. *Butler*, 5 E. & B. 92, and 52 & 53 Vict. c. 63, s. 34, which governs statutes passed since 1889. The first branch of this enactment extends to the boundaries of counties only, and not to prosecutions in limited jurisdictions. *R.* v. *Welsh*, 1 Mood. 175. 7 G. 4, c. 64, s. 12, regulates venue only, and does not enable the prosecutor to *lay* the offence in one county and *try* it in the other; but only to lay *and* try it in either. *R.* v. *Mitchell*, 2 Q. B. 636; 2 G. & D. 274; 11 L. J. (M. C.) 55. In cases of murder or manslaughter, where the cause of death arises in one county, and the death takes place in another, the prisoner

may, under this statute, be indicted in either county. *See* 1 Russ. Cr. (7th ed.) 819.

Persons who anywhere incite, procure, and abet, or assist the commission of a misdemeanor may be indicted in the county in which the misdemeanor is committed. *R.* v. *Johnson*, 7 East, 65; 29 St. Tr. 81. Where an offence is done through an innocent agent, the principal may be indicted in the county in which the agent acted, or in that in which the principal procured him to act. Fost. 349: *R.* v. *Brisac*, 4 East, 164. In indictments for conspiracies or other misdemeanors, the venue may be laid in any county in which it can be proved that an act was done by any one of the offenders in furtherance of their common design. *R.* v. *Burdett*, 4 B. & Ald. 95; 1 St. Tr. (N. S.) 1, 116. *See R.* v. *Brisac*, 4 East, 164. So in indictments for compassing the King's death, or for any of the treasons in 36 G. 3, c. 7, s. 1 (made perpetual by 57 G. 3, c. 6, s. 1), the venue may be laid in any county in which a sufficient overt act can be proved. *R.* v. *Lord Preston*, 12 St. Tr. 645; *R.* v. *Vane*, Kel. (J.) 14, 15; 6 St. Tr. 119. *See Deacon's case*, Fost. 9: 18 St. Tr. 365. In an indictment for sending a threatening letter, the venue may be laid either in the county where the prosecutor received it; *R.* v. *Girdwood*, 2 East, P. C. 1120; 1 Leach, 142; *R.* v. *Esser*, 2 East, P. C. 1125; or in the county from which the offender sent it. So, if a libel, *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1, 124; 4 B. & Ald. 95: *R.* v. *Ellis* [1899] 1 Q. B. 230; *R.* v. *Watson*, 1 Camp. 215: or a letter containing a challenge (*R.* v. *Williams*, 2 Camp. 506) is sent from the county of A. to the county of B., the venue may be laid in either county. So, if an act done in one county causes a nuisance in another county, in an indictment for it, the venue may be laid in either county, although it has been said to be more correct to lay it in the county in which the act was done. Staundf. b. 2, 91.

It has been doubted whether these rules apply to offences part of the essential elements of which take place outside England. *R.* v. *Ellis* [1899] 1 Q. B. 230. *Cf. Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] App. Cas. 200, 204. But a person who from a foreign country initiates acts which take effect in England and are criminal by the law of England appears to be liable to indictment and punishment in the county or place in England in which the acts took effect. *See R.* v. *Oliphant* [1905] 2 K. B. 67; 75 L. J. (K. B.) 15; 21 Cox, 192: *R.* v. *de Marny* [1907] 1 K. B. 388; 76 L. J. (K. B.) 210: *R.* v. *Stoddart* [1909] 73 J. P. 348; 2 Cr. App. R. 217; 1 Russ. Cr. (7th ed.) 52 *et seq.* (*a*).

Offences in counties of cities or towns.]—Where an offence is committed within the county of a city or town corporate (except in London, Westminster, or the borough of Southwark, 38 G. 3, c. 52, s. 10), the prosecutor may prefer his indictment to the grand jury of the next adjoining county, at the sessions of oyer and terminer or gaol delivery, and may have the offender tried there.

(*a*) *And see R.* v. *Waugh* [1909] Victoria L. R. 379, where it was held that W. had been properly convicted in the State of Victoria of an attempt to obtain money by false pretences by a letter written and posted by W. in Victoria, addressed to T. in the State of Tasmania, with intent to induce T. to send money to W. in Victoria.

38 G. 3, c. 52, s. 2. *See R.* v. *Gough*, 2 Doug. 791; *R.* v. *Mellor*, R. & R. 144 : *R.* v. *Goff*, R. & R. 179 : *R.* v. *Pinney*, 3 St. Tr. (N. S.) 11. Or, if the bill has been found by a grand jury of the county of the city, etc., any court of oyer and terminer or gaol delivery, holden for such county of the city, etc., may order it to be tried by a jury of the next adjoining county. 38 G. 3, c. 52, s. 3. Under the former law the venue in such cases was required to be stated as prescribed by 14 & 15 Vict. c. 100, s. 23 *rep.* (*ante*, p. 28), but under the *Indictments Act*, 1915, it is sufficient to state the court of trial as prescribed by rule 2 (*ante*, p. 28). The Court before which the offender is tried and convicted may order the judgment to be executed either in the county of trial or in the county of the city or town corporate in which the offence was committed. 51 G. 3, c. 100, s. 1. By the *Criminal Justice Administration Act*, 1851 (14 & 15 Vict. c. 55, s. 19), "whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate, within which his Majesty has not been pleased for five years next before the passing of this Act (1 Aug., 1851) to direct a commission of oyer and terminer and gaol delivery to be executed, and until his Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter session of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act; and the recognizances to appear to prosecute and give evidence taken by such justice, justices or coroner, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county . . . and the justice, justices or coroner, by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit; and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such adjoining county, as in the case of persons charged with offences of the like nature committed within such county."

Section 23 of the same Act extends to prisoners tried in or removed for trial to the adjoining county (under s. 19) the provisions of 38 G. 3, c. 52, and 51 G. 3, c. 100, as to the execution of the sentences to be passed on such persons. By s. 188 of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), (1) "Until his Majesty is pleased to direct a commission of oyer and terminer and gaol delivery to be executed within any borough, being a county of a city or county of a town, all bills of indictment for offences committed within that borough shall be preferred, and all proceedings thereon shall be had in the manner authorized by 38 G. 3, c. 52. (2) For the purposes of that Act, each borough named in the 6th schedule shall be considered as next adjoining the county named in conjunction therewith." Under the 6th schedule,

Northumberland is considered the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne; Gloucestershire, to Bristol; Cheshire, to Chester; Devonshire, to Exeter; and Yorkshire, to Kingston-upon-Hull. As to the mode of stating that the county of trial is next adjoining, *see R.* v. *Goff*, R. & R. 179.

Separate commissions of assize, etc., are still issued and executed for the counties of the cities or towns of Newcastle-upon-Tyne, Exeter, Bristol, Norwich, Lincoln, Nottingham, Worcester, York, Haverfordwest, and Carmarthen, and for the borough of Leicester.

The other counties of cities or towns are Berwick-upon-Tweed, Kingston-upon-Hull, Gloucester, Canterbury, Chester, Southampton, Lichfield, and Poole.

Offences tried in the High Court.]—In the case of an indictment tried in the High Court, the venue was formerly the county in which the indictment was found, unless a change of venue was ordered (*see post*, p. 120), or unless the trial was at bar (*see post*, p. 121). *R.* v. *Amery*, 1 T. R. 363; Short and Mellor Cr. Pr. (2nd ed.) 298: *Att.-Gen.* v. *Churchill*, 8 M. & W. 171, 193: *Dixon* v. *Farrer*, 18 Q. B. D. 43 (C. A.).

Now, in the case of all indictments tried in the High Court, the proper commencement is "In the High Court of Justice, King's Bench Division. 5 & 6 Geo. 5, c. 90, r. 2" (*ante*, p. 28).

Offences in Central Criminal Court District.]—In indictments preferred at the Central Criminal Court (the jurisdiction of which extends to the city of London and counties of London and of Middlesex, and certain specified portions of the counties of Essex, Kent, and Surrey; 4 & 5 W. 4, c. 36, s. 2; 38 & 39 Vict. c. 77, s. 23; 51 & 52 Vict. c. 41, s. 89), the district within the limits of its jurisdiction is to be deemed and taken to be one county for all purposes of venue, local description, trial, judgment, and execution not "thereinbefore" specially provided for; and the venue laid in the margin was formerly to be as follows, "Central Criminal Court, to wit;" and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, were, in indictments preferred and tried in the said court, to be laid to have been committed and averred to have taken place "within the jurisdiction of the said court." 4 & 5 W. 4, c. 36, s. 3. This section has been left unrepealed by the *Indictments Act*, 1915, but the proper commencement of indictments preferred at the Central Criminal Court is now simply "Central Criminal Court," and it is unnecessary to aver that the offence took place "within the jurisdiction of the said court." 5 & 6 Geo. 5, c. 90, s. 3, and r. 2 (*ante*, pp. 27, 28). Persons subject to military law, who have been committed for the murder or manslaughter of any person subject to military law, may, under certain circumstances, where the offence has been committed in England or Wales, out of the jurisdiction of the Central Criminal Court, be indicted and tried before that court. 25 & 26 Vict. c. 65. As to the trial at this court of offences committed out of its jurisdiction, under 19 & 20 Vict. c. 16, *see post*, p. 118.

The history of the jurisdiction of the court is given in 6 St. Tr. (N. S.) 1135, Appendix C.

Accessories.]—Offences by accessories *before* or *after* the fact to any felony wholly committed within England or Ireland may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies, committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed: " and in every other case offences by accessories before the fact may be dealt with, etc., by any court having jurisdiction to try the principal felony or any felonies committed in any county or place in which the accessory shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within his Majesty's dominions or without, or partly within his Majesty's dominions and partly without." 24 & 25 Vict. c. 94, s. 7. *See R.* v. *Wallace*, C. & Mar. 200; 2 Mood. 200. An accessory before the fact may however be indicted, etc., *in all respects* as if he were the principal felon. 24 & 25 Vict. c. 94, s. 1. As to accessories where the offence is committed in the Admiralty Jurisdiction, *see ante*, p. 35.

Bigamy.]—In indictments for bigamy, the venue may be laid either in the county where the offender was apprehended, or is in custody, 24 & 25 Vict. c. 100, s. 57, or in the county in which the second marriage took place. If the defendant, being in custody for a felony, is detained for bigamy, he can be indicted for the bigamy in the county in which he is so detained. *R.* v. *Gordon*, R. & R. 48. The law is left unchanged by the *Indictments Act*, 1915, but it is now only necessary to state the court of trial. 5 & 6 Geo. 5, c. 90, r. 2 (*ante*, p. 28).

Coinage offences.]—In indictments for offences with reference to false or counterfeit coin, " where any person shall tender, utter, or put off any counterfeit coin in any county or jurisdiction, and shall also tender, utter, or put off any other counterfeit coin in any other county or jurisdiction on the same day or within ten days next ensuing, or where two or more persons have acted in concert in different counties or jurisdictions to commit any offence against the *Coinage Offences Act*, 1861, the offence may be laid and charged to have been committed, and the offender may be dealt with, etc., in any one of those counties or jurisdictions." 24 & 25 Vict. c. 99, s. 28.

Customs and excise.]—In indictments for violently assaulting or resisting officers of the excise (7 & 8 Geo. 4, c. 53, s. 43), or for offences against the *Customs Acts* (39 & 40 Vict. c. 36, s. 258), the venue may be laid in any county. In indictments for offences against the customs committed upon the water at a place which is not or is not certainly known to be within any county, the venue may be laid in any place on land where the offender may be or be brought. 39 & 40 Vict. c. 36, s. 229.

Escapes and prison breach.]—In indictments for escapes, breaches of prison, and rescues, the venue might formerly be laid either in the jurisdiction where the offence was committed, or in that where the offender should be apprehended and retaken. 4 Geo. 4, c. 64, s. 44. That statute was wholly repealed by 28 & 29 Vict. c. 126, s. 73, sched. 3: but provisions similar to s. 44 are in force as to escapes from Parkhurst Prison (1 & 2 Vict. c. 82, s. 18), and from Pentonville Prison (5 & 6 Vict. c. 29, s. 28).

In indictments for being at large before the expiration of a sentence of penal servitude, the venue may be laid either in the county where the defendant was apprehended or in that from whence he was ordered to be sent to penal servitude. 5 Geo. 4, c. 84, s. 22; 20 & 21 Vict. c. 3, s. 3.

Forgery.]—By s. 14, sub-s. 1, of the *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), a person charged with an offence against that Act, or with an offence indictable at common law or under any Act for the time being in force consisting in the forging or altering of any matter whatsoever, or in offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place, and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place: provided that, where the offence charged relates to documents made for the purpose of any Act relating to the suppression of the slave trade, it shall, for the purposes of jurisdiction and trial, be treated as an offence against the *Slave Trade Act*, 1873. By sub-s. 2, nothing in the section shall affect the laws relating to the government of his Majesty's naval or military forces.

Larceny, etc.]—At common law if a man commits larceny (whether simple or compound) in one county, and carries the goods with him into another, he may be indicted for the simple or compound larceny in the county in which he committed it, or he may be indicted for it as for a simple larceny in the county into which, or in any of the counties through which, he carried the goods; for in contemplation of law, there is such a taking and carrying away as constitute the offence of larceny at common law in every place through which, at any distance of time, the goods were carried by him. *R.* v. *Parkin*, 1 Mood. 45; 1 Hale, 507; 2 Hale, 163; 3 Co. Inst. 113; 1 Hawk. c. 33, s. 52; 4 Bl. Com. 304; 2 East, P. C. 771; *Griffith* v. *Taylor*, 2 C. P. D. 194, 202, Cockburn, C.J.: *R.* v. *Fenley*, 20 Cox, 252, Jelf, J. The larceny itself is ambulatory, but the aggravated circumstances are fixed and stationary. 1 Hale, 536: *R.* v. *Thomson*, 2 Russ. Cr. (7th ed.) 1304: R. v. *Millar*, 7 C. & P. 665: *R.* v. *Fenley*, *supra*.

By the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 39 (1): A person charged with any offence against this Act may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or

place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence it shall be deemed to have been committed in that county or place. [The Act applies to larceny, receiving, robbery, burglary, housebreaking, demanding money with menaces, threatening to publish with intent to extort, false pretences, corruptly taking a reward, accessories and abettors of offences under the Act.] (2): Every person who steals or otherwise feloniously takes any property in any one part of the United Kingdom may be dealt with, indicted, tried and punished in any other part of the United Kingdom where he has the property in his possession in the same manner as if he had actually stolen or taken it in that part. (3): Every person who receives in any one part of the United Kingdom any property stolen or otherwise feloniously taken in any other part of the United Kingdom may be dealt with, indicted, tried and punished in that part of the United Kingdom where he so receives the property in the same manner as if it had been originally stolen or taken in that part.

Mutiny.]—In indictments for endeavouring to seduce soldiers or sailors from their duty, or for inciting or stirring them up to mutiny, the venue may be laid in any county in England, whether the offence be committed on the high seas or in England. 37 G. 3, c. 70, s. 2.

Perjury.]—By s. 8 of the *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), where an offence against that Act or any offence punishable as perjury or as subornation of perjury under any other Act of Parliament is committed in any place either on sea or land outside the United Kingdom, the offender may be proceeded against, indicted, tried, and punished in any county or place in England where he was apprehended or is in custody as if the offence had been committed in that county or place, and for all purposes incidental to or consequential on the trial or punishment of the offence, it shall be deemed to have been committed in that county or place.

Post-office offences.]—By the *Post Office Act*, 1908 (8 Edw. 7, c. 48), s. 72, "(1) An offence against this Act may be tried either in the county or place in which it was actually committed, or in the county or place in which the alleged offender is apprehended or is in custody, or (when the offence is in respect of a mail, mail bag, postal packet or money order, or any chattel, money, or valuable security sent by post) in any county or place through which or any part thereof the mail, mail bag, postal packet, money order, chattel, money or valuable security passed in due course of conveyance by post. . . . (2) Where an offence is committed on any highway, harbour, canal, river, arm of the sea or other water, constituting the boundary of two or more counties or places, it may be tried in any of the said counties or places. (3) The offence of being accessory to or of aiding or abetting an offence against this Act may be tried in any county or place in which the last mentioned offence may be tried."

Slave trade.]—Offences in connection with the slave trade may be tried either where committed, or in Middlesex, or in any place where the accused for the time being is if it be within the King's dominions, or a place where his Majesty has jurisdiction under the *Foreign Jurisdiction Acts*. 36 & 37 Vict. c. 88, s. 26. *See* 1 Russ. Cr. (7th ed.) 280.

Unlawful oaths.]—Offences against the *Unlawful Oaths Acts* of 1797 & 1802, if committed on the high seas or outside the realm, or in England, may be tried by a court of oyer and terminer or gaol delivery for any county in England in the same manner as if committed in such county. 37 G. 3, c. 123, s. 6; 52 Geo. 3, c. 104, s. 7.

2. THE STATEMENT OF THE OFFENCE.

Statutes.

7 *Geo.* 4, *c.* 64 (*Criminal Law Act*, 1826).

Sect. 21. *Description of offences.*] . . . Where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

[This section, although left unrepealed by the *Indictments Act*, 1915, has in effect been rendered obsolete by the provisions of that statute, *infra*. As to the effect of it, *see R.* v. *Martin*, 8 A. & E. 481.]

5 *& 6 Geo.* 5, *c.* 90 (*Indictments Act*, 1915).

Sect. 3. *General provisions as to indictments.*]—(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act.

Rule 4. *Mode in which offences are to be charged.*]—(1) A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count.

(2) A count of an indictment shall commence with a statement of the offence charged, called the statement of offence.

(3) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.

It will be seen, by reference to the forms of indictment throughout this book, that the *Indictments Act*, 1915, is intended to secure brevity, simplicity, and lucidity in describing offences. Ordinary language is to be used, and technical terms are as far as possible to be avoided. Thus the crime of murder is not to be described as "wilful" or "felonious" murder, or as murder "of malice aforethought," but simply as "murder." Where the offence charged is one created by statute, the statement of offence in the indictment is to contain a reference to the section of such statute, *e.g.*, in the case of felonious wounding, the offence should be described as "wounding with intent, contrary to section 18 of the *Offences against the Person Act*, 1861"; and in the case of unlawful wounding, as "wounding, contrary to section 20 of the *Offences against the Person Act*, 1861."

The statement of the offence follows immediately after the presentment of the grand jury (*ante*. p. 28), and is in the following form :—

STATEMENT OF OFFENCE.

First Count.

Arson, contrary to section 2 of the *Malicious Damage Act*, 1861. [If the indictment contains only one count, the words "First Count" should be omitted.]

3. PARTICULARS OF THE OFFENCE.

(a) How Stated.

5 & 6 *Geo.* 5, *c.* 90 (*Indictments Act*, 1915).

Rule 4—(4) After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary :

Provided that where any rule of law or any statute limits the particulars of an offence which are required to be given in an indictment, nothing in this rule shall require any more particulars to be given than those so required.

(5) The forms set out in the appendix to these rules or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case.

(6) Where an indictment contains more than one count the counts shall be numbered consecutively.

Particulars of the offence should be stated immediately below the statement of the offence as follows :—

PARTICULARS OF OFFENCE.

A. B. on the 9th day of March A.D. 1916 in the County of London maliciously set fire to a dwelling-house, one C. D. being therein.

Common law.]—At common law, in the indictment, all the ingredients of the offence with which the defendant was charged, the facts, circumstances and intent constituting it, were required to be set forth with certainty and precision, without any repugnancy or inconsistency, and the defendant charged directly and positively with having committed it.

At common law these rules were strictly enforced *in favorem vitæ* (*see* 2 Hale, 193). They are now relaxed to the extent below indicated under the several sub-headings.

Words of art.]—In an indictment for murder, the words "did murder" (*murdravit*), Dy. 261 a; in an indictment for rape the words "did ravish" (*rapuit*), Staundf. 26 a; and in an indictment for larceny the words "feloniously did take and carry away" (*felonicè cepit et asportavit*), 4 Bl. Com. 305, were held to be absolutely necessary on the ground that they were technical words, essential to the definition of the offence, without which these offences respectively could not be described upon the record: and if they were omitted, the defendant could demur or move to quash the indictment, or move in arrest of judgment, or if convicted appeal. In future the use of technical terms is to be avoided as far as possible. 5 & 6 Geo. 5, c. 90, r. 4 (3), *ante*, p. 44.

Statutory offences.]—*Indictments Act*, 1915, rule 5. *Provisions as to statutory offences.*]—(1) Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

(2) It shall not be necessary, in any count charging a statutory offence, to negative any exception or exemption from or qualification to the operation of the statute creating the offence.

Rule 5 (1) does not authorise the inclusion of two or more *separate offences* in one count, even though they are charged in the alternative. *R.* v. *Molloy* [1921] 2 K. B. 364; *post*, p. 573 (*n*).

Exceptions and exemptions.]—By rule 5 (2) of the *Indictments Act*, 1915 (*supra*), it shall not be necessary in any count charging a statutory offence, to negative any exception or exemption from or qualification to the operation of the statute creating the offence.

This rule extends to exceptions generally the previous practice with regard to provisos in the case of statutory offences. The former law is stated in *Thibault* v. *Gibson*, 12 M. & W. 88, 94, by Lord Abinger, C.B., in the following terms:—

"In all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is

not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as ground for defence."

In *R.* v. *James* [1902] 1 K. B. 540, the effect of the authorities on this subject was held to be that it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause. *See R.* v. *Hall*, 1 T. R. 320; *Steel* v. *Smith*, 1 B. & Ald. 94. In *R.* v. *Audley* [1907] 1 K. B. 383, this rule was applied to the proviso to s. 57 of the *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100), that the section should not extend to a second marriage outside England or Ireland by a person not a British subject; and it was held unnecessary in an indictment for bigamy at Gibraltar to aver that the prisoner was a British subject. Bigham, J., said that all the provisos to the section were matters of confession and avoidance to be alleged and proved by the defence.

Ownership or occupation of property.]—*Indictments Act*, 1915, rule 6. *Description of property.*]—(1) The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.

(2) Where property is vested in more than one person, and the owners of the property are referred to in an indictment it shall be sufficient to describe the property as owned by one of those persons by name with others, and if the persons owning the property are a body of persons with a collective name, such as " Inhabitants," " Trustees," " Commissioners," or " Club," or other such name, it shall be sufficient to use the collective name without naming any individual.

Notwithstanding the above rule, Form No. 9 (relating to larceny) and Form No. 10 (relating to burglary and larceny) of the forms of indictment printed in the appendix to the *Indictments Act*, 1915, contain the name of the owner of the property, and it will probably be found convenient in practice to name the owner where he is known. Form No. 10 contains a statement of the value of the property, because the offence under s. 8 (2) (*c*) of the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), depends on special value of property.

Property of deceased persons.]—An indictment for stealing the shroud of a dead person may state it to be the property of the executor or administrator; 2 Hale, 181 (*a*). If there is no will and no administration, it may be laid to be the goods of the person who defrayed the expenses of the burial (*R.* v. *Haynes*, 12 Co. Rep. 113), or formerly of the ordinary, if the shroud were purchased with the money of the deceased: 2 Hale, 181. So, if a coffin is stolen, it may be described in the same manner. But if the property is described in

(*a*) As to property in a dead body, etc., *see Spence* v. *Doodeward*, 6 Australia C. L. R. 406.

ordinary language and so as to indicate with reasonable clearness the property referred to, *e.g.*, "the shroud covering the dead body of A. B.," it is unnecessary to name the owner. 5 & 6 Geo. 5, c. 90, r. 6 (1), *supra*.

Larceny from bailees.]—Property stolen out of the possession of a bailee may be described in the indictment as the property either of the bailor or bailee; 2 Hale, 181; although the goods were never actually in the real owner's possession, but in the possession of the bailee only. *R.* v. *Remnant*, R. & R. 136; *R.* v. *Wymer*, 4 C. & P. 391. *See* Pollock and Wright on Possession in the Common Law. As, for instance, goods left at an inn, *R.* v. *Todd*, 2 East, P. C. 653, or entrusted to a person for safe keeping, *R.* v. *Taylor*, 1 Leach, 356 : *R.* v. *Statham*, *Id.* 357 cit.; or to a carrier for carriage, *R.* v. *Deakin*, 2 East, P. C. 653; 2 Leach, 862; *see R.* v. *Spears*, 2 Leach, 825; 2 East, P. C. 568; cloth to a tailor to make into clothes; linen to a laundress to wash, *R.* v. *Packer*, 2 East, P. C. 653; 1 Leach, 357 n.; goods pawned and the like—may be said to be the goods and chattels of the person to whom they are so entrusted, etc., or of the owner, at the option of the prosecutor. *See* 2 Hale, 181; 1 Hale, 513; 2 East, P. C. 652; 1 Hawk. c. 33, s. 47; *R.* v. *Wilkins*, 1 Leach, 520; 2 *Ib.*, 875 cit.; 2 East, P. C. 678.

Married women.]—Where the person named as owner appears to be a married woman, the defendant must formerly, unless the indictment was amended, have been acquitted, because in law the goods were the property of the husband; 1 Hale, 513; and must have been described as such except where the woman had married after the larceny and before indictment found. *R.* v. *Turner*, 1 Leach, 536, *and see R.* v. *French*, R. & R. 491; *R.* v. *Wilford*, *Ib.* 517. This rule of the common law that the wife could have no property was made subject to exceptions by statute where the husband and wife had been judicially separated, or where the wife had obtained a protection order; 20 & 21 Vict. c. 85, ss. 21, 25; and is now virtually abolished by 45 & 46 Vict. c. 75 (*Married Women's Property Act*, 1882), which enacts, s. 12, that—"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceedings shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving

or deserting, or about to leave or desert his wife :" and (s. 16) that " a wife doing any act with respect to any property of her husband which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband." And by the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 36—(1) " a wife shall have the same remedies and redress under this Act for the protection and security of her own separate property as if such property belonged to her as a *feme sole* : Provided that no proceedings shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife. (2) A wife doing an act with respect to any property of her husband, which if done by the husband would make the husband liable to criminal proceedings by the wife under this Act, shall be in like manner liable to criminal proceedings by her husband." It is not necessary that an indictment against a wife for stealing the goods of her husband should contain averments that the prisoner was the wife of the prosecutor, or that she took the goods in question when leaving or deserting, or about to leave or desert, her husband. *R.* v. *James* [1902] 1 K. B. 541; 71 L. J. (Q. B.) 211; 20 Cox, 156; 66 J. P. 217. If goods described in an indictment as goods of A. B. turn out to be the separate property of his wife living with him, the indictment may be amended : *R.* v. *Murray* [1906] 2 K. B. 385; 75 L. J. (K. B.) 593; 21 Cox, 250; 70 J. P. 295.

Joint Owners.]—The *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), r. 6 (2), *ante*, p. 47, extends and makes of general application the provisions of the *Criminal Law Act*, 1826 (7 Geo. 4, c. 64), ss. 14, 15 (*rep.*), and gets rid of numerous special Acts relating to the property of joint owners.

Most of the trading companies, familiarly known as joint-stock companies, are incorporated under the *Companies Acts*, now consolidated in 8 Edw. 7, c. 69 (*see* ss. 16, 17), but they may now be described by their corporate name, whether incorporated under that Act or not. The existence of a company under its corporate name is sufficiently proved by parol evidence that it has carried on business under that name. *R.* v. *Langton*, 2 Q. B. D. 296; 46 L. J. (M. C.) 136; 13 Cox, 345. But it is preferable to prove the existence and name of the company by the certificate of incorporation given under 8 Edw. 7, c. 69, ss. 16, 17. *R.* v. *May*, 64 J. P. 570.

Description of persons.]—*Indictments Act*, 1915, rule 7 : The description or designation in an indictment of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as " a person unknown."

The defendant should be described in the indictment by his christian name and surname. 2 Hale, 175. But these need not necessarily be stated correctly, provided that he is described in a manner which is reasonably sufficient to identify him. When a corporation is indicted it should be described by its proper corporate name or style, subject to the above provisions of rule 7. But where the inhabitants of a parish are indicted for not repairing a highway, or the inhabitants of a county for not repairing a bridge, it was always enough to describe them as the inhabitants of a parish or county without naming any of them. 2 Rolle Abr. 79 : 2 Hawk. c. 25, s. 68.

The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*, thus : "*Richard Wilson, otherwise called Richard Layer*" (Bro. Misnom. 47).

In indictments for offences against the persons or property of individuals, the christian name and surname of the person injured should be stated, if known; 2 Hawk. c. 25, ss. 71, 72. A bastard is *quasi nullius filius*, and can have no name or reputation immediately on birth : Co. Litt. 36; but may soon acquire a name by reputation. *R.* v. *Scarborough*, 3 Cox, 72. A newly born child may be sufficiently described as "then lately before born of the body of A. B. and not named."

Where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it. "His Royal Highness the Duke of Cambridge" has been considered sufficient without setting forth any of his christian names. *R.* v. *Frost*, Dears. 474; 24 L. J. (M. C.) 116.

Description of document. —*Indictments Act*, 1915, rule 8 : Where it is necessary to refer to any document or instrument in an indictment it shall be sufficient to describe it by any name or designation by which it is usually known or by the purport thereof, without setting out any copy thereof.

At common law, written instruments wherever they formed a part of the gist of the offence charged (*see R.* v. *Coulson*, 1 Den. 592; 19 L. J. (M. C.) 182), had to be set out *verbatim*. Thus, in the case of forgery, the instrument forged must, before 2 & 3 W. 4, c. 123, s. 3 (*rep.*), have been set out in the indictment in words or figures : *R.* v. *Mason*, 1 East, 180, n.; 2 East, P. C. 975 : *R.* v. *Powell*, 1 Leach, 77 : *R.* v. *Hart*, *Id.* 145 : *R.* v. *Lyon*, 2 Leach, 597, 608; and on an indictment for not executing a warrant, the nature and tenor of the warrant must have been shown. *R.* v. *Burrough*, 1 Vent. 305 : Com. Dig. Indictment (G. 3). The strictness of the common law rule was relaxed by 14 & 15 Vict. c. 100, ss. 5, 7 (*rep.*), by ss. 42, 43 (*rep.*) of the *Forgery Act*, 1861 (24 & 25 Vict. c. 98), and by s. 17 (1) of the *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27). Under these enactments it is sufficient to describe an instrument referred to in an indictment by any name or designation by which it is usually known without setting out a copy or facsimile.

General rule as to description.]—*Indictments Act*, 1915, rule 9. *General rule as to description.*]—Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act, or omission whatsoever

to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.

Certainty as to age of person injured.]—Where it is essential to constitute the offence that the person injured should have been under a certain age, the person should be stated in the indictment to be under that age. *R.* v. *Martin*, 9 C. & P. 213. *See R.* v. *Sarah Waters*, 1 Den. 356; 18 L. J. (M. C.) 53; 3 Cox, 300.

Statements as to time.]—The date of the commission of the offence should be stated in the indictment. Staundf., 95 a. *R.* v. *Hollond*, 5 T. R. 607; *R.* v. *Aylett*, 1 T. R. 63, 69: *R.* v. *Haynes*, 4 M. & Sel. 214. But it was never necessary that it should be laid according to the truth *unless time was of the essence of the offence:* in other cases if the time stated were previous to the finding of the indictment, a variance between the indictment and evidence in the time when the offence was committed was not material, 2 Co. Inst. 318; 3 Co. Inst. 230: *Sir H. Vane's case*, Kel. (J.) 16: *R.* v. *Aylett, supra: R.* v. *Dossi*, 13 Cr. App. R. 158. For this reason, in practice all the facts in an indictment usually were stated to have occurred at the same time, time and special venue being laid as to the first fact, and afterwards referred to by the words "*then and there*," as to the others.

The time, if laid, should be the day of the month and year upon which the act is supposed to have been committed. In burglary the offence should be stated to have been committed "*in the night.*" Where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited. *See R.* v. *Brown*, M. & M. 163; *and post*, p. 63.

In cases of offences against children under Part II. of the *Children Act*, 1908 (8 Edw. 7, c. 67), or of offences mentioned in the First Schedule to that Act, where any such offence is continuous, it is not necessary to specify in the indictment the date of the acts constituting the offence. 8 Edw. 7, c. 67, s. 32, sub-s. 4. This provision is specially safeguarded by rule 12 of the *Indictments Act*, 1915 (*post*, p. 62).

Statements as to place.]—At common law it was necessary to lay with certainty statements of place in the indictment, but it was never necessary that the averments should be according to the truth unless local description was of the essence of the offence, for if the place stated were within the county or other extent of the court's jurisdiction, a variance between indictment and evidence was not material *if the place proved were within the jurisdiction of the court.* 2 Hawk. c. 25, s. 84. Under the *Indictments Act*, 1915, it is quite sufficient to state the county in which the offence was committed.

Value.]—It is unnecessary to state value, *except where it is of the essence of the offence* (5 & 6 Geo. 5, c. 90, rule 6 (1), *ante*, p. 47), such as an offence against the *Larceny Act*, 1916, s. 13 (a), or the *Bankruptcy Act*, 1914, s. 154, sub-s. 4. Where value is essential to constitute the offence, and the value is

ascribed in the indictment to many articles collectively, the offence must be made out as to all or a sufficient number of the articles, for the grand jury have ascribed the value to all the articles collectively. *R.* v. *Forsyth*, R. & R. 274.

Money.]—Until 1851, *money* was described in an indictment as so many "pieces of the current gold," or "silver," or "copper coin of the realm, called ——," and the particular species of coin must have been specified. *See R.* v. *Fry*, R. & R. 482: *R.* v. *Warshaner*, 1 Mood. 466: *R.* v. *Radley*, 1 Den. 450; 18 L. J. (M. C.) 154. And if a larceny of particular pieces of coin, as sovereigns, half-sovereigns, crowns, etc., was charged, the indictment was not supported by proof of the stealing of a sum of money, which must have consisted of *some or other* of the coins mentioned in the indictment, without proof of the stealing of some one or more of the specific coins named. *R.* v. *Bond*, 1 Den. 517; 19 L. J. (M. C.) 138.

But by s. 18 of the *Criminal Procedure Act*, 1851 (14 & 15 Vict. c. 100), it is provided that "in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note: and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved." And by the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 40 (2), "an allegation in an indictment that money or bank notes have been embezzled or obtained by false pretences can so far as regards the description of the property be sustained by proof that the offender embezzled or obtained any piece of coin or any bank note or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly."

Notes of a provincial bank, which were not at the time of the commission of the offence in circulation for value, but which were paid in at one branch of the bank, and were in course of transmission to another branch, at which they had originally been issued, in order that they might there be re-issued or otherwise disposed of—it not being the practice of the bank to re-issue at one branch notes originally issued at another—were held to be bank notes within 14 & 15 Vict. c. 100, s. 18. *R.* v. *West*, Dears. & B. 109; 26 L. J. (M. C.) 6.

Statement of intent.]—*Indictments Act*, 1915, rule 10. *Statement of intent.*]—It shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person where the statute creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence.

The rule will not apply to an indictment framed under s. 24 of the *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100), for administering poison

or other destructive or noxious thing to any person, with intent to injure, aggrieve, or annoy *such person*.

Charge of previous convictions, etc.]—*Indictments Act*, 1915, rule 11. *Charge of previous convictions, etc.*]—Any charge of a previous conviction of an offence or of being a habitual criminal or a habitual drunkard shall be charged at the end of the indictment by means of a statement—in the case of a previous conviction that the person accused has been previously convicted of that offence at a certain time and place without stating the particulars of the offence, and in the case of a habitual criminal or habitual drunkard, that the offender is a habitual criminal or a habitual drunkard, as the case may be.

This provision merely reproduces the former practice under the *Prevention of Crime Act*, 1908 (8 Edw. 7, c. 59), s. 10, sub-s. 3, and the *Inebriates Act*, 1898 (61 & 62 Vict. c. 60), s. 1, sub-s. 2, the provisions of which, with regard to indictments, are repealed by the *Indictments Act*, 1915.

Figures and abbreviations in indictment.]—It was formerly held that no part of the indictment should be in *figures*; and therefore numbers, dates, etc., were stated in words at length. 2 Hale, 170.

Now, by rule 1 (4) of the *Indictments Act*, 1915 (*ante*, p. 28), figures and abbreviations may be used in an indictment for expressing anything which is commonly expressed thereby.

(*b*) *Duplicity.*

The indictment must not be double (*a*); that is to say, *no one count* of the indictment should charge the defendant with having committed two or more separate offences. *See R.* v. *Molloy* [1921] 2 K. B. 364; and *post*, p. 573 (n). So, two defendants cannot be jointly charged with murder or manslaughter by means of an injury done by one of them to the deceased on one day and another injury done by the other of them on a different day. *R.* v. *Devett*, 8 C. & P. 639. Nor should the accused be charged in one count with many offences of the same kind (not being continuous offences) committed against the same person on different dates extending over a very considerable period of time (*e.g.*, "*on divers dates* between January, 1909, and October 4th, 1910," and, in another count, "*on divers dates* between the 4th October, 1910, and the end of February, 1913"). *R.* v. *Thompson* [1914] 2 K. B. 99; 83 L. J. (K. B.) 643; 9 Cr. App. R. 252. But where the offences charged consist of one single act they may be made the subject of a single count. For instance, where the prisoner was charged in one count with uttering a number of forged receipts, and it was proved that all the forged receipts were uttered at one and the same time, in one bundle, the count was held good. *R.* v. *Thomas*, 2 East,

(*a*) Informations for offences punishable on summary conviction are governed by 11 & 12 Vict. c. 43, s. 10, which forbids the inclusion of two offences in one information. As to the effect of the section *see Smith* v. *Perry* [1906] 1 K. B. 262; 75 L. J. (K. B.) 124; *R.* v. *Cable* [1906] 1 K. B. 719; 75 L. J. (K. B.) 381.

P. C. 934. So, the indictment may charge the prisoner, in the same count, with felonious acts with respect to several persons—as in robbery, with having assaulted A. and B., and stolen from A. one shilling, and from B. two shillings—if it was all one transaction. *R.* v. *Giddins*, C. & Mar. 634. A man may be indicted for the battery of two or more persons in the same count where the battery is one transaction, or for a libel upon two or more persons when the publication is one single act, without rendering the count bad for duplicity. *R.* v. *Benfield*, 2 Burr. 980, 983, 984: where *R.* v. *Clendon*, 2 Str. 870; 2 Ld. Raym. 1572, was held not law: and *see R.* v. *Jenour*, 7 Mod. 400. A count charging a man with one endeavour to procure the commission of two offences is not bad for duplicity, because the endeavour is the offence charged. *R.* v. *Fuller*, 1 B. & P. 180; 2 Leach, 790.

An exception to the rule as to duplicity is to be found in indictments for burglary, in which it is usual and proper to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. Laying several overt acts in a count for high treason is not duplicity, Kel. (J.) 8, because the charge consists of the compassing, etc., and the overt acts are merely evidence of it; and the same applies to conspiracy. Another exception is to be found in the case of continuous offences under Part II. of the First Schedule of the *Children Act*, 1908, where dates need not be specified in the indictment but a series of acts may be treated as constituting one continuous offence. 8 Edw. 7, c. 67, s. 32 (4): 5 & 6 Geo. 5, c. 90, r. 12; *post*, p. 61.

In criminal cases, the mode of objecting to duplicity is the same as in civil proceedings prior to the *Common Law Procedure Act*, 15 & 16 Vict. c. 76; *i.e.*, by demurrer: or the court on motion may quash the indictment, which is now the usual procedure. Duplicity cannot be made the subject of a motion in arrest of judgment; *Nash* v. *R.*, 4 B. & S. 935; 33 L. J. (M. C.) 94; but it is a ground of appeal under the *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23), s. 3 (a). *R.* v. *Thompson* [1914] 2 K. B. 99; 83 L. J. (K. B.) 643; 78 J. P. 212; 30 T. L. R. 223; 9 Cr. App. R. 252. Duplicity is distinct from the joinder in one indictment of counts for *different* offences, as to which *see post*, p. 57.

(*c*) *Amendment.*

Indictments Act, 1915, s. 5. *Orders for amendment of indictment, separate trial, and postponement of trial.*]—(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

(2) Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for

the purposes of the trial and for the purposes of all proceedings in connection therewith as having been found by the grand jury in the amended form.

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.

(5) Where an order of the court is made under this section for a separate trial or for the postponement of a trial—

(*a*) if such an order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and

(*b*) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and

(*c*) the court may make such order as to costs and as to admitting the accused person to bail, and as to the enlargement of recognizances and otherwise as the court thinks fit.

(6) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

Wide powers of amending misdescriptions in indictments were conferred upon courts of Assize and Quarter Sessions by the now repealed provisions of the *Criminal Procedure Act*, 1848 (11 & 12 Vict. c. 46), the *Quarter Sessions Act*, 1849 (12 & 13 Vict. c. 45), and the *Criminal Procedure Act*, 1851 (14 & 15 Vict. c. 100). But even under those statutes an amendment which altered the nature or quality of the offence charged was not usually made: *e.g.*, where the defendant was indicted for a forgery charged as a statutable *felony*, but the offence turned out to be a forgery at common law, and therefore only a *misdemeanor*, the judge refused to order the word "feloniously" to be struck out of the indictment. *R.* v. *Wright*, 2 F. & F. 320. Nor could an indictment drawn as for a misdemeanour be amended by the court by inserting "feloniously," even if the omission of that word were obviously accidental. *See R.* v. *Garland* [1910] 1 K. B. 154. Nor could an indictment be amended by substituting for one of two offences created by the same enactment the other offence so created. *R.* v. *Benson* [1908] 2 K. B. 270; 77 L. J. (K. B.) 644. An indictment for obtaining money by false pretences was amended by striking out a statement of a false pretence that certain articles were worth a certain sum of money. It was held that the

amendment ought not to have been made, but the conviction was affirmed on the ground that no substantial miscarriage of justice had resulted from the amendment. *R.* v. *Cohen*, 3 Cr. App. R. 180. As to the common law, *see Wilkes' case*, 19 St. Tr. 1075; 4 Burr. 2527. In an indictment for obtaining money, etc., by false pretences, it was held necessary to allege that the obtaining was "with intent to defraud," and that where those words were omitted the indictment could not be amended by inserting them. *R.* v. *James*, 12 Cox, 127, Lush, J.

It may be doubted whether any of the above decisions will be followed in future under the very ample powers given by the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 5 (1), *supra*. An amendment of a matter which is not material may, *semble*, be made after verdict. *See R.* v. *Dossi*, 13 Cr. App. R. 158.

(d) Joinder of two or more defendants in one indictment.

Where several persons join in the commission of an offence, all or any number of them may be jointly indicted for it, or each of them may be indicted separately. Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly, 2 Hale, 173, or separately; and the same where two or more together commit a battery, or are together guilty of extortion or the like. *R.* v *Atkinson*, 1 Salk. 382. And though they have acted separately, yet if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence. *R.* v. *Trafford*, 1 B. & Ad. 874. Where money has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of the others, all of whom acted in concert together, they may all be indicted jointly. *Young* v. *R.*, 3 T. R. 98. The same rule applies where two or more persons join in singing a libellous song; *R.* v. *Benfield*, 2 Burr. 980, 985, or in any other mode of publishing a defamatory libel. But if the publication by each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. But two or more cannot be jointly indicted for perjury; *R.* v. *Philips*, 2 Str. 921, or for speaking seditious or blasphemous words, or the like, because such offences are in their nature several. And even where several commit a joint act, which act is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally and not jointly, they must be indicted separately; 2 Hawk. c. 25, s. 89. Thus several partners could not be indicted jointly for exercising their trade, without having served an apprenticeship. *R.* v. *Atkinson*, 1 Salk. 382; *R.* v. *Weston*, 1 Str. 623.

Principals in the first and second degree, and accessories before and after the fact may all be joined in the same indictment; 2 Hale, 173; or the principals may be indicted separately, and the accessories may be indicted either before or after the conviction of the principals as for a substantive offence (24 & 25 Vict. c. 94, ss. 2, 3). It is said that several may be jointly indicted for severally erecting common inns, *ad commune nocumentum*, if it is said that they *separaliter erexerunt*, etc.: and the same as to keeping disorderly

houses, etc.; 2 Hale, 174; but it is much better, and more usual in practice, to indict the proprietor of each house separately.

Misjoinder of defendants may be made the subject of demurrer or motion in arrest of judgment or appeal; or the court may quash the indictment (*see post*, p. 98). But where there are different counts against different persons in the same indictment, this, though it may be a ground for moving to quash the indictment, is no cause for demurrer, *R.* v. *Kingston*, 8 East, 41, if the counts are such in substance as may be joined.

By section 40 (3) of the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), in an indictment for feloniously receiving any property under the Act, any number of persons who have at different times so received such property or any part thereof may be charged and tried together. Where several persons are indicted for burglary and larceny, one may be found guilty of burglary and larceny, and the others of the larceny only. *R.* v. *Butterworth*, R. & R. 520. On an indictment against A. and B. for larceny, with another count against B. for receiving, A. was acquitted; B. was found guilty, on evidence which proved that he was an accessory before the fact to the larceny, and a receiver, and the verdict against him was entered generally; it was held that he was not (since 11 & 12 Vict. c. 46, s. 1, repealed but re-enacted by 24 & 25 Vict. c. 94, s. 1) entitled to an acquittal for the larceny. *R.* v. *Hughes*, Bell, 242; 29 L. J. (M. C.) 71 : *R.* v. *Godspeed*, 85 J. P. 232; 27 T. L. R. 255; 6 Cr. App. R. 133.

(e) Joinder of several offences in different counts in one indictment.

We have already seen (*ante*, p. 53) that if a defendant is charged with two or more distinct offences in the same count of an indictment, the count will be bad for duplicity. Different considerations apply to charging a defendant with different offences in different counts of the same indictment. Each count in an indictment is for the purposes of evidence and judgment a separate indictment; *Latham* v. *R.*, 5 B. & S. 635 : *and see hereon Selvester* v. *U.S.*, 170 U. S. 262, where is pointed out the error in *R.* v. *Hayes* (1727, 2 Ld. Raym. 1518), where the contrary was held.

Indictments Act, 1915, sect. 4. *Joinder of charges in the same indictment.*] Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanor, and charges for both felonies and misdemeanors, may be joined in the same indictment, but where a felony is tried together with any misdemeanor, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies.

Rule 3. *Joinder of charges in one indictment.*]—Charges for any offences, whether felonies or misdemeanors, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.

Joinder of different treasons.]—In an indictment for high treason there may be different counts, each charging the defendant with a different species of

treason against the King and his government, such as compassing the King's death, levying war, adhering to the King's enemies, within 25 Edw. 3, st. 5, c. 2, and the conspiracies to imprison or do bodily harm to the King, within 36 G. 3, c. 7, s. 1. And this power was extended by statute to treason felony, 11 & 12 Vict. c. 12, s. 5 (*repealed by* 5 & 6 Geo. 5, c. 90). *See R.* v. *Mitchel*, 6 St. Tr. (N. S.) 599, 619.

Joinder of different felonies.]—Although before the *Indictments Act* it was no objection in point of law to an indictment that it charged the prisoner with several distinct felonies in different counts; *R.* v. *Heywood*, L. & C. 451; 33 L. J. (M. C.) 133; 9 Cox, 479: *R.* v. *Holman*, 9 Cox, 201 (C. C. R.): *Castro* v. *R.*, 6 A. C. 229, 244; 50 L. J. (Q. B.) at p. 504: *R.* v. *Lockett* [1914] 2 K. B. 720; 83 L. J. (K. B.) 1193; 78 J. P. 196; 30 T. L. R. 233; 9 Cr. App. R. 268, yet it had been a general rule of practice not to allow a prisoner to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count and a burglary in another, or a burglary in the house of A. in one count, and a distinct burglary in the house of B. in another, or a larceny of the goods of A. in one count and a distinct larceny of the goods of B., at a different time, in another, because such a course of proceeding is calculated to embarrass the prisoner in his defence. The true test in each case was whether or not the accused was so embarrassed. *R.* v. *Lockett*, *supra*. It was well established by a long series of decisions that the joinder of two felonies in one indictment (except where the same facts may constitute several felonies, *Campbell* v. *R.*, 11 Q. B. 799, 812) is so necessarily unfair to the prisoner that the judge ought, upon an application being made to him, to put the prosecutor to his election and send them to two trials; *Castro* v. *R.*, 6 A. C. at p. 244; 50 L. J. (Q. B.) at p. 504: *R.* v. *Elliott*, 1 Cr. App. R. 15, 16. Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Byles, J., compelled the prosecutor to elect upon which count he would proceed; *R.* v. *Ward*, 10 Cox, 42. But the prosecution should not be put to their election where it is plain from the nature and circumstances of the offence charged that the accused is not embarrassed in his defence (*e.g.*, where the acts relied upon as proving the different offences charged are in substance the same). *R.* v. *Lockett*, *supra*.

Now under the *Indictments Act* any offences, whether felonies or misdemeanors, may be joined in the same indictment provided they are founded on the same facts or form or are part of a series of offences of the same or a similar character. Rule 3, *ante*, p. 57.

And by s. 5, sub-s. 3 (*ante*, p. 55), where, before trial, or at any stage of a trial, the court is of opinion that the accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that he should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

The proper course is to enter up the verdict and judgment separately on each count. *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1: *Latham* v. *R.*, 5 B. & S. 635.

Joinder of counts for felony and misdemeanor.]—The joinder of a count for felony, with a count for misdemeanor, would formerly have been held bad on demurrer, or, after a *general* verdict, on motion in arrest of judgment. *Young* v. *R.*, 3 T. R. 98, 108; Starkie Cr. Pl. (2nd ed.) 43. The reason was that the challenges and the incidents of trial are not the same in felony and misdemeanor, and therefore felony and misdemeanor could not be tried together. *Castro* v. *R.*, 6 A. C. at p. 244. But now charges for both felonies and misdemeanors may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character. In such a case the accused is to have the same right of challenging jurors as if all the offences charged were felonies, and the court to have power to order a separate trial of any count or counts in the indictment if such a course seems desirable. *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), ss. 4, 5; r. 3, *ante*, pp. 57, 54. Thus a person may now be charged in one count of an indictment with forging a cheque, in a second count with uttering the forged cheque, and in a third count with obtaining or attempting to obtain money by the false pretence that the cheque was genuine. Counts for larceny and for obtaining by false pretences may similarly be joined in the same indictment, although such a precaution is now hardly necessary, owing to the effect of the *Larceny Act*, 1916, s. 44 (3), (4).

Joinder of different misdemeanors.]—It has long been established that indictments for misdemeanor may contain several counts for different misdemeanors, even, as it seems, though the judgments upon each are different. *Young* v. *R.*, 3 T. R. 98, 105, 106 : *R.* v. *Towle*, R. & R. 314; 3 Price, 145; 2 Marsh. (C. P.) 466 : *R.* v. *Johnson*, 3 M. & Sel. 539 : *R.* v. *Kingston*, 8 East, 41, 46 : and *see R.* v. *Benfield*, 2 Burr. 980, 984 : *R.* v. *Jones*, 2 Camp. 131; Pritchard Q. S. (2nd ed.) 151; Starkie Cr. Pl. (2nd ed.) 43. Even where several persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, though it might be for an application to the discretion of the court to quash the indictment. *R.* v. *Kingston*, 8 East, 41, 46. And the provisions of the *Indictments Act*, 1915, as to joinder of offences in the same indictment apply equally in the case of misdemeanors. 5 & 6 Geo. 5, c. 90, ss. 4, 5; r. 3 (*ante*, pp. 57, 54). Still, if an indictment for misdemeanor contains several counts charging distinct misdemeanors against the defendant committed on totally different occasions and relating to different subject matters, and the presiding judge sees that the accused may be embarrassed in his defence by the number of charges, the probability is that he would order a separate trial of one or more of the counts under s. 5, sub-s. 3 of that Act (*ante*, p. 54). *See R.* v. *Castro*, 5 Q. B. D. 490, 501, 510 : *Castro* v. *R.*, 6 A. C. 229, 245; 49 L. J. (Q. B.) 747; 50 L. J. (Q. B.) 497 : *R.* v. *Warren*, 71 J. P. 566. Though not illegal, it is hardly fair to put a man upon his trial on an indictment containing forty counts, involving several distinct charges of false pretences; for it would be almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others. In such a case it would not be unreasonable for the defendant to make an application that each count or set of counts should

be taken separately; Hawkins, J., *R.* v. *King* [1897] 1 Q. B. 214, 216; 66 L. J. (Q. B.) 81. There can, of course, be no objection to any number of charges which are founded on the same facts or form or are a part of a series of offences of the same or a similar character. 5 & 6 Geo. 5, c. 90, r. 3 (*ante*, p. 57).

Where the presiding judge orders a separate trial of any count or counts under sub-s. 3 of s. 5 of the *Indictments Act*, 1915 (*supra*), he may, under sub-s. 4, make an order for the postponement of the trial. *See ante*, p. 54.

Where a prisoner is indicted for an offence, it is not necessary to add another count for an attempt to commit it; because upon an indictment for felony or misdemeanor, if upon the trial it appears that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt. 14 & 15 Vict. c. 100, s. 9. Upon an indictment for any misdemeanor, if the facts given in evidence to prove the misdemeanor amount in law to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury, and order the defendant to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12. *See R.* v. *Garland* [1910] 1 K. B. 154; 26 T. L. R. 130.

When persons jointly indicted plead not guilty the court has power to order them to be separately tried where the interests of justice seem to require that course to be taken. *See* Kel. (J.) 8, 9 (*treason*); *R.* v. *Ahearne*, 2 Ir. C. L. Rep. 381; 6 Cox, 7 (*conspiracy*): *R.* v. *Bradlaugh*, 15 Cox, 217. Separate trials are sometimes ordered where evidence admissible against one of the accused would not be admissible against the others, or where the separate trial would enable the accused to call for the defence persons jointly indicted with him, or the crown to call an accomplice, or where persons jointly indicted for felony refuse to join in their challenges. The matter is one within the discretion of the judge at the trial. *R.* v. *Gibbons and Proctor*, 82 J. P. 287; 13 Cr. App. R. 134. *See* now *Indictments Act*, 1915, s. 5 (3), set out *ante*, p. 54.

(f) Miscellaneous provisions.

Indictments Act, 1915, sect. 7. *Provisions as to Vexatious Indictments Acts.*]—Nothing in this Act shall prevent an indictment being open to objection if it contravenes or fails to comply with the *Vexatious Indictments Act*, 1859, as amended by s. 1 of the *Criminal Law Amendment Act*, 1867, or any other enactment: Provided that an indictment shall not be open to objection under those Acts on the ground that a count is joined with the rest of the indictment which could not at the time of the passing of the *Criminal Law Amendment Act*, 1867, be lawfully joined, if that count can be lawfully joined under the law for the time being in force.

Sect. 8. *Savings and interpretation.*]—(1) Nothing in this Act or the rules thereunder shall affect the law or practice relating to the jurisdiction of a court or the place where an accused person can be tried, nor prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the laws of evidence in criminal cases.

(2) In this Act, unless the context otherwise requires, the expression "the court" means the court before which any indictable offence is tried or prosecuted.

(3) The provisions of this Act relating to indictments shall apply to criminal informations in the High Court and inquisitions, and also to any plea, replication, or other criminal pleading, with such modifications as may be made by rules under this Act.

Sect. 9. *Extent, etc.*]—(2) This Act shall not extend to Scotland or Ireland.

Rule 12. *Saving for s.* 32 (4) *of* 8 *Edw.* 7, *c.* 67.]—Nothing in these rules or in any rules made under section two of this Act shall affect the provisions of sub-section (4) of section thirty-two of the *Children Act*, 1908.

Rule 14. *Interpretation.*]—The *Interpretation Act*, 1889, applies for the interpretation of these rules as it applies for the interpretation of an Act of Parliament.

SECT. 4.

THE CAPTION.

THE caption is no part of the indictment. 2 Hale, 165: *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1, 35; Arm. & Trevor (Ir.) 41. It is merely a copy of the entry of the style, and commission of the court where the indictment is preferred, and of the proceedings leading up to the finding of the bill (*R.* v. *Martin*, 6 St. Tr. (N. S.) 925, 1091; 12 Ir. L. R. 399), which is prefixed as a kind of preamble to the indictment upon the record, when the record is returned in obedience to a writ of a *certiorari*. The following is a form of the caption to an indictment in a court of quarter sessions:—

"WESTMORELAND: *Be it remembered that at the general quarter sessions of the peace of our sovereign lord the King, holden at Appleby, in and for the county aforesaid, the —— day of ——, in the —— year of the reign of our sovereign lord George the Fifth, of the United Kingdom of Great Britain and Ireland, and of the British dominions beyond the seas, King, Defender of the Faith, before A. B. and C. D., Esquires, and other their fellows, justices of our said lord the King, assigned to keep the peace of our said lord the King in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, by the oath of*" [the grand jurors, naming them] "*good and lawful men of the county aforesaid, sworn and charged to inquire for our said lord the King, and for the body of the county aforesaid, it is presented, in manner and form as appears by the indictment hereunto annexed.*"

By the Court,
A.B., Clerk of the Peace.

(*See* 2 Hale, 165 : *R.* v. *Fearnley*, 1 Leach, 425 ; 1 T. R. 316 ; *and the forms*, 4 Went. 41, 105, 132, 150, 174, 222; 6 Went. 1, 357, 373; 2 Hawk. c. 25, ss. 118, 126, 127, 128; 2 Salk. 605 : *R.* v. *Warre*, 2 Str. 698. The words "sworn and charged" are not essential. *R.* v. *Martin*, 6 St. Tr. (N. S.) 925, 1091, and cases there cited. *See* also the form of caption suggested in Short & Mellor Cr. Pr. (2nd ed.) 605.)

In *R.* v. *McKeever* [1871] Ir. Rep. 5 C. L. 86, a caption describing a session as held before "A. B., Esq., deputy chairman" of Quarter Sessions, was held sufficient.

A proper caption should show that the court of trial had jurisdiction, and that the indictment was found by a sufficient number of grand jurors. It has been usual to insert the names of twelve grand jurors at the least in the caption, and Hale says that this is necessary; for it may be that the presentment was by a less number than twelve, in which case it is not good; 2 Hale, 167; but in *Aylett* v. *R.*, 3 Bro. Parl. Cas. 529; 1 Eng. Rep. 1479; 6 A. & E. 247 n., where it was objected (upon a writ of error) that the caption did not contain the names of any of the jurors, the House of Lords, after consulting the judges, affirmed the judgment of the court of King's Bench, that this was not essential; and in *R.* v. *Marsh*, 6 A. & E. 236, Denman, C. J., agreed that the insertion of the names is not necessary. *See also R.* v. *Darley*, 4 East, 174, 176 n. : *R.* v. *Davis*, 1 C. & P. 470. The caption ought to state them to be jurors *of the county; Whitehead* v. *R.*, 7 Q. B. 582. It should also state them to be good and lawful men (*probi et legales homines*), *Id.*, 2 Hale, 167, and early cases collected in Huband, Grand Jury (Ir.), 201, 202. But the court will presume them to be so even if the statement is not made. *Mansell* v. *R.*, 8 St. Tr. (N. S.) 831; 8 E. & B. 54; 27 L. J. (M. C.) 4 : *and see Martin* v. *R.*, 6 St. Tr. (N. S.) 925; 12 Ir. L. R. 399. No objection can be sustained to the caption of an indictment for an allegation that the grand jurors were "sworn and affirmed," without showing that those who were sworn were persons who ought to have been affirmed, or that those who were affirmed were persons who ought to have been sworn. *Mulcahy* v. *R.*, L. R. 3 H. L. 306, 322; Ir. Rep. 1 C. L. 13. As to the mode of rectifying a mistake in the caption, *see R.* v. *Justices of Middlesex*, 5 B. & Ad. 1113, and *R.* v. *Marsh*, *supra*.

The caption if erroneously drawn up may be amended. *R.* v. *Darley*, *supra* : *R.* v. *Davis*, *supra: Faulkner's case*, 1 Wms. Saunders (6th ed.) 248.

There is, it would seem, only one original general caption for the whole sessions. *R.* v. *Marsh*, 6 A. & E. 236, 249, Williams, J., Coleridge, J. Objection may be taken to the caption by demurrer; *R.* v. *Fearnley*, 1 T. R. 316; and formerly could be taken by writ of error, whether the error were of fact or law. *R.* v. *Marsh*, *supra*, at p. 243, Denman, C. J. : *R.* v. *McKeever* [1871] Ir. Rep. 5 C. L. 86.

SECT. 5.

WITHIN WHAT TIME THE BILL MUST BE PREFERRED.

AT common law, there is no time limited for commencing a suit by the King (*nullum tempus occurrit regi*); and therefore, in all cases of treason, felony, and misdemeanor, where a time is not limited by statute, a prosecution may be commenced at any length of time after the offence. In the case of offences punishable summarily, the summary proceedings must be instituted within six months of the offence, unless it is a continuing offence; *London County Council* v. *Worley* [1894] 2 Q. B. 826; *and see* 73 J. P. 562, 574; or unless another limitation is given by statute for the particular prosecution. 11 & 12 Vict. c. 43, s. 11; *see* Douglas, Summary Jurisdiction Procedure (9th ed.). In criminal cases within the *Summary Jurisdiction Acts*, the laying of the information is the commencement of the prosecution; *Beardsley* v. *Giddings* [1904] 1 K. B. 847; 20 Cox, 645: *Brooks* v. *Bagshaw* [1904] 68 J. P. 514: *R.* v. *Priestley* [1886] 49 J. P. 148; but *quære* when, though the information is laid before, process is granted after, the expiration of the time limited. The oldest authorities seem to treat the arrest as the commencement of the prosecution at common law; 2 Hale, 72; but under the different statutes creating limitations (stated below) there have been somewhat varying interpretations of what constituted the commencement of the prosecution.

The following are the chief statutory limitations on the prosecution of indictable offences :—

Treason.]—Indictments for such high treasons as caused corruption of blood (with the exception of treason, by "designing, endeavouring, or attempting any assassination on the body of the King by poison, or otherwise" (7 & 8 W. 3, c. 3, s. 6)), must be found by the grand jury within three years next after the offence committed, if the offence has been committed within England, Wales, Berwick-upon-Tweed (7 & 8 W. 3, c. 3, s. 5), or Scotland (*see* 7 Anne, c. 21, Fost. 249); but if committed on the high seas or in a foreign country, there is no time limited to the prosecution.

Misdemeanors by British officials in India.]—Certain offences by British officials in India may be prosecuted in England within three years (*see* 24 G. 3, sess. 2, c. 25, s. 82); or six years (33 G. 3, c. 52, s. 141) after the offence. *See* Ilbert, Government of India (2nd ed.) 256. In 21 G. 3, c. 70, s. 7, the limitation is five years after commission of the offence or arrest in England.

Blasphemy.]—An "information" for blasphemy by words spoken must be laid within four days of the speaking, and the prosecution must be within three months of the information. 9 W. 3, c. 35 (9 & 10 W. 3, c. 32, Ruffhead), s. 2. *Cf.* 19 G. 2, c. 21, s. 12, as to profane swearing.

Riot.]—Prosecutions for offences against the *Riot Act* (1 G. 1, st. 2, c. 5) must be commenced within twelve months after the offence committed (s. 8).

Strictly speaking, this would mean lunar months. *See Bruner* v. *Moore* [1904] 1 Ch. 305; 73 L. J. (Ch.) 377.

Unlawful drilling.]—Prosecutions under the *Unlawful Drilling Act*, 1820 (60 G. 3 & 1 G. 4, c. 1), must be "commenced within six calendar months after the offence committed" (s. 7).

Night poaching.]—Prosecutions by indictment under the *Night Poaching Act*, 1828, must be "commenced within twelve calendar months after the commission of the offence." 9 G. 4, c. 69, s. 4.

Revenue offences.]—"Indictments or informations brought or exhibited for any offence against the *Customs Acts*, in any court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed." 39 & 40 Vict. c. 36, s. 257. *See R.* v. *Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183; 5 Cox, 166, on the similar provisions of a repealed *Customs Act*. Proceedings for the recovery of any fine or penalty incurred under the *Income Tax Acts* may be commenced within three years next after the fine or penalty is incurred. 7 Edw. 7, c. 13, s. 23 (I).

Penal statutes.]—All indictments or informations upon any penal statute, whereby the forfeiture is limited to the King, must be brought within two years after the offence committed; if the forfeiture is limited to the King and the prosecutor, the suit must be within one year; and in default thereof, the same must be sued for by the King within two years after that year ended; but where a statute limits a shorter time, the suit must be brought within such time limited. 31 Eliz. c. 5, s. 5. This Act does not apply to penalties under the *Income Tax Acts* (*supra*) and is repealed (by 11 & 12 Vict. c. 43, s. 36) as to informations instituting summary proceedings.

Charges against officials.]—Prosecutions for "any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, shall not lie or be instituted unless commenced within six months next after the act, neglect, or default complained of, or 'in case of a continuance of injury or damage'" (*e.g.*, in case of a public nuisance) "within six months next after the ceasing thereof." 56 & 57 Vict. c. 61, s. 1 (*a*). This Act expressly or impliedly repeals the particular limitation clauses in prior public general Acts. *See* s. 2, Schedule.

Corrupt or illegal practices at elections.]—A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence at parliamentary elections must be commenced within one year after the offence was committed, or if it was committed in reference to an election with respect to which an inquiry is held by election commissioners must be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires,

so that it be commenced within two years after the offence was committed. The issue of a summons, warrant, writ, or other process, shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender; but save as aforesaid the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencemnt of the proceeding. 46 & 47 Vict. c. 51, s. 51. The same period of limitation applies to proceedings for similar offences at municipal elections, as the above section is incorporated in the *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 Vict. c. 70), by s. 30 of the later Act; and it also applies to municipal elections in the city of London; 47 & 48 Vict. c. 70, s. 35; and to offences in connection with elections for county councils (51 & 52 Vict. c. 41, s. 75), district or parish councils and boards of guardians (56 & 57 Vict. c. 73, s. 48), and metropolitan boroughs (62 & 63 Vict. c. 14).

Offences against girls.]—Prosecution for the offences of unlawfully and carnally knowing, or attempting to have unlawful carnal knowledge, of any girl who is of or above the age of thirteen years and under the age of sixteen years, may not be commenced more than six months after the commission of the offence. 48 & 49 Vict. c. 69, s. 5, as amended by 4 Edw. 7, c. 15, s. 27; *see R.* v. *Chandra Dharma* [1905] 2 K. B. 335; 74 L. J. (K. B.) 450. Commencement of a prosecution for rape within the six months is sufficient though in the result the accused is indicted and convicted under 48 & 49 Vict. c. 69, s. 5. *R.* v. *West* [1898] 1 Q. B. 174; 18 Cox, 675.

Marriages.]—Prosecutions for the felony of unduly solemnising marriage must be commenced "within the space of three years after the offence committed." 4 G. 4, c. 76, s. 21. A like limitation applies to prosecutions for offences under the *Marriage Act*, 1836 (6 & 7 W. 4, c. 85, s. 41).

Merchandise Marks.]—No prosecution for an offence against the *Merchandise Marks Act*, 1887, shall be commenced after the expiration of three years next after the commission of the offence, or of one year next after the first discovery thereof by the prosecutor, whichever expiration first happens. 50 & 51 Vict. c. 28, s. 15.

Commencement of prosecution.]—The commencement of the prosecution is the preferring of the indictment when it is sent up without a preliminary inquiry: or the laying of the information; or, it would seem, the arrest of the accused or the application for summons or warrant in respect of the offence. *See R.* v. *West* [1898] 1 Q. B. 174, 177. The time is calculated by excluding the day on which the offence is said to have been committed, and including the day on which the prosecution begins. *Pellew* v. *Inhabitants of East Wonford*, 9 B. & C. 134: *Williams* v. *Burgess*, 12 A. & E. 635: *Radcliffe* v. *Bartholomew* [1892] 1 Q. B. 161; 61 L. J. (M. C.) 63. Sundays are included in computing the time unless expressly excluded. *R.* v. *Middlesex Justices*,

2 Dowl. (N. S.) 719, 724; Maxwell on Statutes (5th ed.), p. 562. An amendment of an information does not necessarily prevent the information as originally laid from being the commencement of the prosecution. *R.* v. *Wakeley* [1920] 1 K. B. 688; 89 L. J. (K. B.) 97; 84 J. P. 31; 14 Cr. App. R. 121. In Acts passed since 1850 "month" means calendar month. 52 & 53 Vict. c. 63, s. 3.

The provisions of the *Night Poaching Act*, 1828 (9 G. 4, c. 69), s. 4, are satisfied if information is laid and warrant is issued *and executed* within the year. *R.* v. *Brooks*, 1 Den. 217; C. & K. 402; 2 Cox, 436. So, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, this was held sufficient. *R.* v. *Austin*, 1 C. & K. 621. But the mere issuing of a warrant to apprehend the defendant has been held not to be a commencement of the prosecution, unless it is shown to have been executed within the time limited for the commencement of the prosecution. *R.* v. *Hull*, 2 F. & F. 16: *R.* v. *Casbolt*, 11 Cox, 385. And proof of the existence of a warrant to apprehend the defendants is not evidence of the commencement of such a prosecution, although the warrant was issued within the twelve months prescribed by that section, and although it recites the laying of the information. The information itself must be given in evidence. *R.* v. *Parker*, L. & C. 459; 33 L. J. (M. C.) 135. Where a man was indicted in 1869 for night poaching alleged to have been committed in 1863, and pleaded guilty, he was allowed to withdraw that plea and to plead not guilty, and an acquittal was directed on failure to produce an information and warrant showing that the prosecution had been commenced within twelve calendar months. *R.* v. *Casbolt*, 11 Cox, 385. In *R.* v. *Killminster*, 7 C. & P. 228, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offence, and was ignored; four years afterwards another bill was found against him for the same offence, and upon an objection that the proceeding was out of time, Coleridge, J., doubted whether the first indictment was not a proceeding sufficient to entitle prosecutor to proceed: he reserved the point, but the defendant was acquitted upon the merits. *See also* *Adam* v. *Bristol Inhabitants*, 2 A. & E. 389; 4 N. & M. 144; 4 L. J. (K. B.) 35.

As to "commencement of proceedings" within the *Criminal Law Amendment Act*, 1912 (2 & 3 Geo. 5, c. 20), *see* *R.* v. *O'Connor* [1913] 1 K. B. 557; 82 L. J. (K. B.) 335; 23 Cox, 334.

SECT. 6.

FINDING THE INDICTMENT.

Vexatious Indictments.

AT common law any person was at liberty to prefer a bill of indictment before a grand jury against another for any indictable offence, without any previous inquiry before a justice into the truth of the accusation. Such indictments are usually referred to as voluntary bills. This right is not taken away by the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), which provides for the procedure in the case of a preliminary inquiry by justices as to indictable offences. By the *Assizes and Sessions Act*, 1908 (8 Edw. 7, c. 41), s. 1 (5), "any person having by law the right to present a bill of indictment to a grand jury in a case where no person has been 'committed for trial,' and proposing to do so at any assizes or quarter sessions, shall give notice of his intention to do so to the proper officer more than five days before the commission day or day appointed for holding the court of quarter sessions as the case may be."

The right to prefer voluntary bills is liable to abuse, because as the grand jury only hear the evidence for the prosecution, and the accused is unrepresented before them, a person innocent of the charge made against him, and who has had no notice that any proceedings were about to be instituted, might find that a grand jury had been induced to find a true bill against him, and so to injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation. Accordingly the right has by legislation been taken away in the case of many crimes. The *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17), provides (s. 1) that "no bill of indictment for any of the offences following" (*see list infra*) "shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster (*i.e., now of the High Court of Justice*) or of his majesty's attorney-general or solicitor-general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin (*i.e., now of the Supreme Court of Ireland*), or of his majesty's attorney-general or solicitor-general for Ireland or (in the case of an indictment for perjury) by the direction of any court, judge or public functionary, authorized by the *Criminal Procedure Act*, 1851 (14 & 15 Vict. c. 100—*repealed and re-enacted by*

the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6)), to direct a prosecution for perjury." The offences within the Act of 1859 are:

(*a*) Perjury and subornation of perjury (*repealed and re-enacted* by 1 & 2 Geo. 5, c. 6);

(*b*) Conspiracy;

(*c*) Obtaining money or other property by false pretences (but not the mere attempt to obtain: *R.* v. *Burton*, 13 Cox, 71 C. C. R.);

(*d*) Keeping a gambling house or a disorderly house;

(*e*) Any indecent assault.

To these have been added:

(*f*) All misdemeanors under Part 2 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62, s. 18), and the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59, s. 164);

(*g*) All libels or alleged libels, apparently including blasphemous, defamatory, seditious and obscene libel (44 & 45 Vict. c. 60, s. 6);

(*h*) All misdemeanors under the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69, s. 17);

(*i*) All offences punishable on indictment under the *Merchandise Marks Act*, 1887 (50 & 51 Vict. c. 28, s. 13);

(*j*) Offences under the *Prevention of Corruption Act*, 1906 (6 Edw. 7, c. 34, s. 2 (2));

(*k*) Offences under the *Punishment of Incest Act*, 1908 (8 Edw. 7, c. 45, s. 4 (1)); and

(*l*) Misdemeanors under Part 2 of the *Children Act*, 1908 (8 Edw. 7, c. 67, s. 35).

In the case of offences under heads (*j*) and (*k*) the sanction of the attorney-general is also required, unless in cases under (*k*) the prosecution is commenced by the director of public prosecutions (6 Edw. 7, c. 34, s. 2 (1); 8 Edw. 7, c. 45, s. 6). (*a*).

A committal for trial by justices sitting in and acting for one petty sessional division of a county on a charge arising in another petty sessional division of the same county is a good committal under 22 & 23 Vict c. 17, s. 1. *R.* v. *Beckley*, 20 Q. B. D. 187; 57 L. J. (M. C.) 22. By s. 2 of the Act of 1859, "where any charge or complaint shall be made before any one or more of his majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required, to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed

(*a*) *See* 6 Edw. 7, c. 34, s. 2 (1): 8 Edw. 7, c. 45, s. 6. The first of these enactments requires the sanction of the attorney-general. The second requires such sanction or action by the director of public prosecutions. Both nevertheless apply the *Vexatious Indictments Act*. The effect seems to be to make a preliminary inquiry essential, even in the case of a public prosecution.

the person charged to be tried for such offence." Where a prosecutor *bonâ fide* prefers before a justice a charge in respect of an offence in the above list, alleged to have been committed within his jurisdiction, and the justice dismisses the charge for want of evidence,—even where there is no evidence in support of the charge,—the dismissal is equivalent to a refusal to commit, and the prosecutor is entitled under s. 2 to require the justice to take his recognizance to prosecute the charge. *R.* v. *Lord Mayor of London, ex parte Gostling*, 13 Cox, 77; 54 L. T. 646; 50 J. P. 711. And where a magistrate committed the accused for trial for certain offences, and no further evidence was called in respect of other charges, and the magistrate was not asked to commit on other charges, and expressed no opinion on them, but counts were subsequently added to the indictment in respect of such other charges, it was held that these facts amounted to refusal to commit, and the counts thus added were quashed. *R.* v. *Coyne*, 69 J. P. 151, Fulton, Recorder. Where a magistrate has refused to grant process he cannot be compelled to do so, nor to take recognizances under the Act, unless an indictable offence is disclosed by the information: *Ex parte Wason*, L. R. 4 Q. B. 573: and *see R.* v. *Battier or Bather*, 42 L. T. 532; 44 J. P. 490: *Ex parte Reid*, 49 J. P. 600. Where a justice refuses to grant process for an offence within the *Vexatious Indictments Acts*, the prosecutor may (1) obtain the sanction of the attorney-general to prefer a bill; (2) obtain (on an *ex parte* application) the consent of a judge of the High Court (K. B. D.) to prefer a bill. *R.* v. *Bray*, 3 B. & S. 255; 32 L. J. (M. C.) 11; or (3) apply for an order to the justice to hear and determine the application according to law. *R.* v. *Adamson*, 1 Q. B. D. 201; 45 L. J. (M. C.) 46: *R.* v. *Bennett*, 72 J. P. 362: *R.* v. *Bros*, 66 J. P. 54.

In considering the sufficiency of a recognizance to prosecute under s. 1 of the *Vexatious Indictments Act*, reference may be made to the accompanying depositions to ascertain the particulars of the offences charged. *R.* v. *Bell*, 12 Cox, 37.

If a prosecutor is bound over under s. 2 after a refusal to commit for trial, but fails to send up a bill to the grand jury at the sessions for which he is bound before that body is discharged, the court cannot enlarge his recognizances to the next sessions. *R.* v. *Eayres*, 64 J. P. 217. The fiat of the attorney-general may be issued even in cases where the magistrates have already refused to commit for trial. *R.* v. *Rogers*, 66 J. P. 825, Fulton, Recorder. Where the prosecution is instituted on the fiat of the attorney-general, it has been held to be sufficient to lodge the fiat with the clerk of the court of trial, and unnecessary to produce or prove it at the trial. *R.* v. *Dexter*, 19 Cox, 360; *see also R.* v. *Metz*, 84 L. J. (K. B.) 1462; 79 J. P. 384; 31 T. L. R. 401; 11 Cr. App. R. 164.

It is not necessary that the performance of any of the conditions mentioned in the *Vexatious Indictments Act*, 1859, should be averred in the indictment or proved before the petty jury. *Knowlden* v. *R.*, 5 B. & S. 532; 33 L. J. (M. C.) 219; 9 Cox, 483. If a defendant committed for obtaining a chattel by false pretences is indicted in one count for that offence, and in another count for obtaining another chattel by false pretences, without any authority having been obtained under the statute to prefer such second charge [*excepting*

where the second charge is founded upon facts disclosed in the depositions, 30 & 31 Vict. c. 35, s. 1, *infra*], the proper course is for the judge at the trial to direct the second count to be quashed, and not to put the prisoner to plead to it. If, however, the two counts are allowed to go to the jury, and evidence is given respecting each charge, and the jury convict on each count, the conviction cannot be supported on either—not on the second, because it ought to have been quashed; nor on the first, because improper evidence has been received. *R.* v. *Fuidge*, L. & C. 390; 33 L. J. (M. C.) 74; 9 Cox, 430. When the indictment is preferred by the direction or with the consent in writing of a judge of one of the superior courts, it is for the judge, to whom the application is made for such direction or consent, to decide what materials ought to be before him, and it is not necessary to summon the party accused, or to bring him before the judge. *R.* v. *Bray*, 3 B. & S. 255; 32 L. J. (M. C.) 11. Where three persons were committed for conspiracy, and afterwards the solicitor-general, acting under this statute, directed a bill to be preferred against a fourth person who had not been committed, and all four were indicted together for the same conspiracy, such a course was held to be unobjectionable. *Knowlden* v. *R.*, *supra*.

The Act of 1859 was found to be attended by the inconvenience that it was frequently objected on the trial of a prisoner charged with an offence falling under its provisions, that when before the magistrates he had not been charged with, nor committed by them for, the precise offence stated in the indictment, although it was abundantly evident from the depositions that the charge made in the indictment was substantially, although perhaps not in form, gone into before the magistrates. This inconvenience was remedied by the *Criminal Law Amendment Act*, 1867 (30 & 31 Vict. c. 35), which, *after reciting that it is found that delay and inconvenience are frequently caused by the provisions contained in s.* 1 *of* 22 *&* 23 *Vict. c.* 17, *in cases not within the mischief for remedy whereof that Act was made and passed, and that it is expedient to restrict the operation thereof, enacts* (s. 1) that, "the said provisions of the said first section of the said Act shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may [*now*] be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred." *See hereon*, *R.* v. *Brown* [1895] 1 Q. B. 119; 64 L. J. (M. C.) 1; 18 Cox, 81. This section is to be read with 22 & 23 Vict. c. 17, for the purposes of 32 & 33 Vict. c. 62 (*Debtors Act*, 1869), s. 18. *R.* v. *Bell*, 12 Cox, 37, Montague Smith, J. Where A. had been committed for trial for conspiracy with B. who had not been arrested, it was held that the court of

trial could, under 30 & 31 Vict. c. 35, s. 1, give leave to prefer an indictment against B. for conspiracy. *R.* v. *Kopelewitch*, 69 J. P. 216, Fulton, Recorder. The "consent of the court," mentioned in the last part of s. 1, is not a mere formality, and if the court grants such consent without having before it materials on which it may exercise a discretion, the indictment, or any counts contained in it, preferred in pursuance of such consent may be quashed. *R.* v. *Bradlaugh*, 15 Cox, 156. But it is not necessary to obtain the consent of the court to the *addition of counts* for offences within the *Vexatious Indictments Act* before the bill is presented to the grand jury, if the facts on which the counts are founded appear upon the depositions. *R.* v. *Clarke*, 59 J. P. 248, Collins, J. *Semble*, it is necessary so to obtain such consent where it is desired to prefer *a fresh bill of indictment*, whether it charges offences disclosed upon the depositions or not, as is the practice at the Central Criminal Court. Charges preferred before the justices on which they have refused to commit cannot be joined in an indictment with those on which the justices did commit, unless the prosecutor has been bound over as to the dismissed charges. *R.* v. *Crabbe*, 59 J. P. 247, Fulton, C. S. : *R.* v. *Coyne*, 69 J. P. 151, *ante*, p. 69.

The words "legal proceedings" in section 1 of the *Vexatious Actions Act*, 1896 (59 & 60 Vict. c. 51), which enables the High Court under certain circumstances to order that no legal proceedings shall be instituted without the leave of the High Court by a person who has habitually and persistently instituted vexatious legal proceedings, do not include criminal proceedings. *In re Boaler*, 30 T. L. R. 580 (C. A.).

The law relating to vexatious indictments is not affected by the *Indictments Act*, 1915, which provides that "nothing in this Act shall prevent an indictment being open to objection if it contravenes or fails to comply with the *Vexatious Indictments Act*, 1859 (*ante*, p. 67), as amended by s. 1 of the *Criminal Law Amendment Act*, 1867 (*ante*, p. 70), or any other enactment : provided that an indictment shall not be open to objection under those Acts on the ground that a count is joined with the rest of the indictment which could not at the time of the *Criminal Law Amendment Act*, 1867, be lawfully joined, if that count can be lawfully joined under the law for the time being in force." 5 & 6 Geo. 5, c. 90, s. 7 (*ante*, p. 60).

(*b*) *Finding Bills of Indictment.*

The grand jurors have duties and powers with reference to four classes of indictments :—

1. Presentments made by them of their own knowledge and information without the intervention of any prosecutor or the examination of any witnesses. Their powers as to presentment in the case of highway indictments are limited by 5 & 6 W. 4, c. 50, s. 99; and 51 & 52 Vict. c. 41, s. 78 (3).

2. Voluntary bills sent before them without any preliminary inquiry before justices (*ante*, p. 67).

3. Bills sent before them after a preliminary inquiry followed by a committal for trial under the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42).

4. Bills sent before them after a preliminary inquiry not followed by committal for trial but falling within the provisions of the *Vexatious Indictments Acts*, 1859, as amended and extended by subsequent legislation (*ante*, p. 69 *et seq.*).

Summoning the grand jury.]—The grand jurors are summoned by the sheriff, or if he is disqualified for any cause, by the coroner. *See R.* v. *McGuire* [1898] 34 New Brunswick, 430, and as to objections to the grand jurors, *infra*.

A grand jury is not summoned for the purpose of indictments in the High Court of Justice (King's Bench Division) unless the master of the Crown Office has before the fourth day of the sittings (term) received notice of some business intended to be brought before them, 35 & 36 Vict. c. 52. *See* Short and Mellor Cr. Pr. (2nd. ed.) 85.

By the *Assizes and Quarter Sessions Act*, 1908 (8 Edw. 7, c. 41), s. 1, provision is made for dispensing with the attendance of grand jurors if not more than five days before the commission day, in the case of assizes, and before the day appointed for holding the court in the case of quarter sessions, it appears to the proper officer (or the clerk of assize or clerk of the peace) that the attendance of the grand jurors will not be required by reason of there being no business to be transacted for which they will be required.

Qualification.]—Grand jurors must be *probi et legales homines*, and ought to be of the same county where the crime was committed. At common law a grand juror must not be an alien or an outlaw; he must be returned by the proper officer, and not at the instance of the prosecutor. Bacon, Abr. III., Juries A., 725.

The grand jurors of county sessions of the peace must be qualified under s. 1 of the *Juries Act*, 1825 (6 G. 4, c. 50). In quarter-session boroughs every burgess may be a grand juror unless exempt or disqualified (45 & 46 Vict. c. 50, s. 186, sub-s. 1). Grand jurors at assizes need not be freeholders, *Anon.*, R. & R. 177. British peers are not liable, but an Irish peer, who is a member of the House of Commons, is liable to serve upon the grand jury at the assizes. *Lord Headley's case* [1806] R. & R. 117. "No man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever." 33 & 34 Vict. c. 77, s. 10. Since the abolition of attainder (33 & 34 Vict. c. 23, s. 1) and the repeal of statutes referring to infamous crimes, it is difficult to say whom this section disqualifies. *But see* 6 & 7 Geo. 5, c. 30, s. 29 (3).

Objections to grand jurors.]—In Ireland it has been held that the proper mode of objecting to a grand juror is by plea in abatement and not by challenge. *R.* v. *Sheridan*, 31 St. Tr. 543. In England it is not clear that the objection would not be taken by way of challenge: 2 Hale, 155; 2 Hawk. c. 25, s. 16:

R. v. *Lewis*, 7 St. Tr. 250 : *R.* v. *Sheares*, 27 St. Tr. 255, 267; 8 Rep. Crim. Law Commrs., 1841, c. 2, art. 15. It may also be taken in arrest of judgment : *R.* v. *Jackson*, 25 St. Tr. 885. (*a*)

Swearing the grand jury.]—The grand jurors must be sworn or affirmed before they can find a bill of indictment laid before them. The form of oath administered to the foreman, as modified by the *Oaths Act*, 1909 (9 Edw. 7, c. 39) is as follows :—

"*I, as foreman of the grand inquest for our Sovereign lord, the King, for the body of this county of* ——, *swear by Almighty God that I will diligently enquire and true presentment make of all such matters and things as shall be given me in charge, or shall otherwise come to my knowledge touching this present service. The King's counsel, my fellows' and my own I will observe and keep secret: I will present no one through envy, hatred, or malice: nor will I leave any one unpresented through fear, favour or affection, gain, reward, or the hope thereof: but I will present all things truly and indifferently as they shall come to my knowledge, according to the best of my skill and understanding.*" [*So Help me God.*] (*See* 2 Hale, 161.) The grand jurors if they wish may be sworn in the old form, *q.v.* Archb. Cr. Pl. (23rd ed.) 98.

The other jurors take a similar oath. When all the grand jurors are sworn they are charged by the presiding judge as to the bills of indictment to be sent before them and advised as to whether the evidence (as disclosed by the depositions taken before the committing magistrates) is such as to constitute a *primâ facie* case against the accused : but they are entitled to exercise their own discretion on each bill when it comes before them. After being charged they retire to the grand jury chamber to receive and consider the bills.

Swearing the witnesses.]—It has always been usual in England to swear the witnesses to be called before the grand jury : *R.* v. *Dickinson*, R. & R. 401. In Ireland they were neither sworn nor examined until 1816 (56 G. 3, c. 87).

At common law it was necessary that some officer of the court (which term includes the crier), after the indictment was engrossed (*R.* v. *Tew*, Dears. 429; 24 L. J. (M. C.) 62), should administer the oath to the witnesses in open court, and then the indictment was laid before the grand jury by the proper officer. The *Grand Juries Act*, 1856 (19 & 20 Vict. c. 54), dispensed with the swearing of the witnesses in open court (s. 2). Under that Act the "foreman" of the grand jury, or any other member of the grand jury who may for the time being act on behalf of the foreman in the examination of witnesses in support of any bill or indictment (s. 3), is authorised and required to administer an oath (or an affirmation, where by law it is required or allowed to be taken in lieu of an oath (s. 3)) to all persons who appear before the grand jury to give

(*a*) For full discussion of the law as to objecting to grand jurors *see R.* v. *Hayes* [1903] 9 Canada Cr. Cas. 101, and notes p. 121: *R.* v. *Belanger*, 6 Canada Cr. Cas. 295: *and see R.* v. *Duffy*, 4 Cox, 172: *R.* v. *Mitchell*, 3 Cox, 93: and as to the U. S. cases on the subject, *U. S.* v. *Gale*, 109 U. S. 65.

evidence in support of any bill of indictment, and all such persons, attending before any grand jury to give evidence, may be sworn and examined upon oath by the grand jury touching the matters in question. The *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), rule 1 (5), superseding similar provisions in the *Grand Juries Act* (*supra*), provides that there shall be endorsed on the back of an indictment the name of every witness examined or intended to be examined by the grand jury, and the foreman of the grand jury shall write his initials against the name of each witness so examined. The *Grand Juries Act* (*supra*) does not affect the fees by law payable to any officer of any court for swearing witnesses. Similar provisions are made as to Ireland by 1 & 2 Vict. c. 37, which repealed 56 G. 3, c. 87.

Proceedings before the grand jury.]—*Administration of Justice Act*, 1920 (10 & 11 Geo. 5, c. 81), s. 4 (1): Where any person charged before any justice or justices with an offence pleads guilty or admits the truth of the charge before the justice or justices and is committed for trial, the clerk to the justice or justices shall, before the day fixed for the holding of the assizes or quarter sessions at which the person so committed is to be tried, transmit to the clerk of the assize or clerk of the peace, as the case may be, a certificate stating that the person so committed so pleaded guilty or admitted the truth of the charge, and the grand jury, on the production to them of the certificate, shall forthwith, without hearing or examining any witnesses, return a true bill as respects that charge. (2) This section shall come into operation on the date on which the Grand Juries (Suspension) Act, 1917, expires, or, if His Majesty in Council so directs, on such earlier date as may be specified in the Order, and, if any Order is so made, the Grand Juries (Suspension) Act, 1917, shall cease to have effect on the date so specified. By order in Council December 23rd, 1921 (St. R. & O. 1921, No. 1879 L. 27, this section came into operation on the 23rd December, 1921. Indictments for offences within the *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17), or requiring the sanction of the attorney-general or the director of public prosecutions, must not be sent before the grand jury unless the conditions prescribed by the statutes (*ante*, pp. 67, 70) have been satisfied; and, if presented or found in contravention of the statutes, may be quashed. *See post*, p. 98.

After the indictment has been taken to the grand jury room, it comes under the consideration of the grand jury in its turn. The witnesses for the prosecution are then called in, in the order in which their names are indorsed on the indictment, and are sworn and examined by the grand jury. Refusal to be sworn is punishable as contempt of court. *R.* v. *Lord Preston*, 12 St. Tr. 645. As a general rule the solicitor for the prosecution is not admitted to the grand jury chamber; but at the Central Criminal Court the solicitor is admitted in difficult and very complicated cases by written order of the clerk of the court. (Rules, Dec. 12, 1892, r. 6). If there appears to a majority of the grand jury (consisting of twelve at least) "probable evidence" of the offence charged (2 Hale, 157), the clerk of the grand jury will indorse on the indictment, "*True bill;*" but if the majority are of opinion that the offence has not been sufficiently proved, the words "*No true bill*" are in that case indorsed

on the indictment. Afterwards, the foreman, accompanied by other grand jurors, carries the indictments so endorsed into court, and delivers them to the clerk of the court, who thereupon states to the court the substance of each, and the indorsement upon it, and the grand jurors who bring in the bills express their assent to his statement. In strict legal parlance, an indictment is not so called, until it has been found a "*true bill*" by the grand jury; before that it is named a "bill of indictment" merely.

The grand jury may present an indictment on their own knowledge, nor can any inquiry be made as to whether witnesses were properly sworn before them (*see form of oath*, *ante*, p. 73, *R.* v. *Russell*, C. & Mar. 247: *R.* v. *Bullard*, 12 Cox, 353): but they may if they think fit require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to the documentary evidence; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist on the same strictness of proof as must be observed at the trial it is prudent in all cases to be provided, at the time the bill is preferred, with the same evidence with which it is intended afterwards to support the indictment. In *R.* v. *Clements*, 2 Den. 251; 20 L. J. (M. C.) 193, the deposition of the prosecutrix, which had been allowed by the judge to be read in evidence before the grand jury after a statement by counsel for the prosecution that she was so ill as to be unable to travel, that the deposition had been taken by the magistrate in the presence of the prisoners, who had an opportunity for cross-examination, and was signed by the prosecutrix and the magistrate, and that witnesses to prove all the above facts were in attendance, was held to have been rightly so read; but the point as to whether evidence on oath should have been first given does not seem to have been raised. In *R.* v. *Philip*, 1 F. & F. 105, Erle, J., the evidence of a medical man was held necessary as a condition precedent to the deposition being read before the grand jury (*cf. R.* v. *Wilson*, 12 Cox, 622, Lush, J.). In *R.* v. *Beaver*, 10 Cox, 274, Byles, J., held that the deposition could not be laid before the grand jury unless the presiding judge had, by evidence taken in the presence of the accused, satisfied himself of the existence of the facts required by 11 & 12 Vict. c. 42, s. 17, to make the deposition admissible. But this decision is adversely criticised in a note (p. 275), and in a subsequent case, *R.* v. *Bullard*, 12 Cox, 353, the same judge, on the foreman of the grand jury coming into court and asking for the deposition of an absent witness, without whose evidence they had no materials for finding the bill, granted the application, without any proof that the deposition was admissible as evidence under 11 & 12 Vict. c. 42, s. 17, observing that the grand jury were not bound by any rules of evidence, that they were a secret tribunal, and might lay by the heels in gaol the most powerful man in the country by finding a bill against him, and for that purpose might even read a paragraph from a newspaper. So in *R.* v. *Gerrans*, 13 Cox, 158, where it was stated by counsel for the prosecution that a witness was unable to attend the trial through illness, Denman, J., permitted his deposition to be presented to the grand jury without any preliminary proof that the witness was ill, or that

his deposition had been regularly taken, and directed that the grand jury should be told that the court permitted them to look at the deposition, and to act upon it if they thought proper. And in *R.* v. *Lynch* (K. B. D. 19, Dec., 1902), Alverstone, C.J., allowed the deposition of a witness absent through illness to be read before the grand jury without requiring to hear evidence as to his condition, stating that such evidence was unnecessary.

Where a witness refuses to give evidence before the grand jury, they cannot use his deposition as evidence to enable them to find the bill. *R.* v. *Rendle*, 11 Cox, 209, Channell, B.

An improper mode of swearing the witnesses before the grand jury will not vitiate the indictment. *R.* v. *Russell*, C. & Mar. 247. *See O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1; 11 Cl. & F. 155; 8 Eng. Rep. 155. A witness who gives false evidence before a grand jury is indictable for perjury (1 & 2 Geo. 5, c. 6, s. 1), and the other witnesses examined on the same bill are good witnesses to prove it. *R.* v. *Hughes*, 1 C. & K. 519; but a grand juror is not an admissible witness in such a case: *Id.*; and *see R.* v. *Marsh*, 6 A. & E. 236, 237.

If witnesses will not come forward voluntarily to give evidence before the grand jury, the course is to sue out a *subpœna* or *subpœna duces tecum*, either at the crown office in London (*see* Short and Mellor Cr. Pr. (2nd ed.) 405) or with the clerk of assize for the assizes, or with the clerk of the peace for the sessions, and serve each of them with a copy, or *subpœna* ticket, as it is termed. If the witness is in prison, he may, if in civil custody, be brought up by *hab. corp. ad testificandum*; or if in criminal custody, he may be brought up by an order from a judge, under 16 & 17 Vict. c. 30, s. 9: and whether in civil or criminal custody, under an order of a secretary of state, under s. 11 of the *Prison Act*, 1898 (61 & 62 Vict. c. 41).

The grand jury have nothing to do with the defence (2 Hale, 157) and are not entitled to hear the evidence of the defendant's witnesses, nor of the defendant himself, under the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36). *R.* v. *Rhodes* [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83. Nor, it would seem, is it necessary to have him in court when the grand jurors are sworn. *See R.* v. *Mathurin* [1903] 12 Quebec L. R. (K. B.) 494. Nor is it their business to inquire into the sanity of the accused, which is for a petty jury to determine: nor have they any authority to ignore a bill on the ground of insanity. *R.* v. *Hodges*, 8 C. & P. 195.

Finding the bill.]—The bill must be found by a majority of the jurors, and that majority must consist of twelve at least; 2 Hale, 161: *R.* v. *Clyncard*, Cro. Eliz. 654; for which reason it is that the number of persons on the grand jury by inveterate practice never exceeds twenty-three, nor is less than twelve; 2 Burr. 1088 n.: *R.* v. *Marsh*, 6 A. & E. 236, 241, Denman, C.J.; 6 L. J. (M. C.) 153.

The finding must be indorsed on the indictment, and is "parcel of the indictment and the perfection of it," and "touches it principally, for it is the life of it." *R.* v. *Ford*, Yelv. 99. And the bill as found must be delivered in open court; *R.* v. *Thompson*, 1 Cox, 268; and it should be signed by the foreman; but absence of the signature is not fatal if the bill was delivered by the foreman in open court and read in his presence. *R.* v. *Sidoli*, 1 Lew. 55.

It is said that the grand jury cannot find *billa vera* as to part, and *ignoramus* as to the other part of an indictment; for they ought to find the whole or nothing. 2 Hawk. c. 25, s. 2; *R.* v. *Ford*, Yelv. 99 : *R.* v. *Serjant*, 1 Sid. 414. Thus, where upon an indictment for libel, they found "*quoad* the words *billa vera*," "*sed utrum malitiose ignoramus*," the finding was held void. 1 Leon, 287. But this has reference only to the same count in the indictment : for it is clear that they may find *billa vera* as to one count, and *ignoramus* to another. *R.* v. *Fieldhouse*, 1 Cowp. 325. They cannot, however, find the bill conditionally; as, for instance, "*si messuagium sit in possessione domini regis, tunc billa vera.*" *R.* v. *Lord Cromwell*, Yelv. 15. Upon an indictment for murder against A. and B., the grand jury found *billa vera* as to A., and as to B., manslaughter only. The court, after holding that such a finding was possible, decided that the best course was to proceed on the indictment so far as it found murder, and to have a new indictment on the manslaughter charge. *R.* v. *Carew*, 3 Bulstr. 206; 1 Rolle Rep. 407. In *R.* v. *Bubb*, 4 Cox, 455, 457, a similar finding was on the authority of the case above cited, and 1 Chit. Cr. L. 322, treated as good for the murder and nugatory as to the manslaughter. And they may find *billa vera* as to A., and *ignoramus* as to B.; *R.* v. *Cholmley*, Cro. Car. 464; or they may find bills against one or both of them for manslaughter, although, in such a case, it is more usual for the grand jury to return the indictment to the court, with a desire that it may be altered to a bill for manslaughter, and, when so altered (which may readily be done), to find a true bill generally. Upon an indictment for murder, however, the jury even under the old law could not find *billa vera se defendendo*. *R.* v. *Powle*, 2 Rolle Rep. 52. Nor can they do so now, as such a finding would be practically a finding of no offence. *See* 24 & 25 Vict. c. 100, s. 7.

Since 5 & 6 Vict. c. 38 (*post*, p. 107) the grand jurors at quarter sessions can find bills which the sessions have no jurisdiction to try. *R.* v. *Allum*, 2 Cox, 62, Parke, B. : *R.* v. *Atkinson*, 1 Wms. Saund. (6th ed.) 249, note 1. Prior to that Act the contrary was held. *R.* v. *Rigby* [1839] 8 C. & P. 770 : *R.* v. *Bainton*, 2 Str. 1088. Where such a bill is found the proper course is to transmit it to the assizes for trial, or for the judge of assize to remove it to the assizes by *certiorari* under 5 & 6 Vict. c. 38, s. 2 (*post*, p. 110). *See R.* v. *Wildman*, 12 Cox, 354, Keating, J. For form of order to transmit, *see* Archb. Q. S. (6th ed.) 550; Pritchard, Q. S. (2nd ed.). Indictments found at the sessions, and transmitted by the justices to the assizes, must be tried at the assizes, although not removed by *certiorari*. *R.* v. *Wetherell*, R. & R. 381. The power of the justices at quarter sessions to remit indictments found there for trial at the assizes is not affected by the *Assizes Relief Act*, 1889 (52 & 53 Vict. c. 12) : *see* s. 5 of that Act. Such transmission is, however, a matter in the discretion of the justices, and the judge of assize has now power to order it, even although the defendant may, after the finding of the indictment at sessions, have been bound by recognizance to appear and plead to it at the assizes. *R.* v. *Wildman*, *supra*.

Although the grand jury have been formally discharged, yet if they have not separated, they may be recalled and charged with other bills. *R.* v. *Holloway*, 9 C. & P. 43.

If a bill is thrown out, it can be preferred to the same grand jury during the same assizes or sessions. *R.* v. *Simmonite*, 1 Cox, 30; *sub nom. R.* v. *Newton*, 2 M. & Rob. 503, Wightman, J. There are, however, authorities to the contrary: *R.* v. *Humphreys*, C. & Mar. 601, Patteson, J.: *R.* v. *Austin*, 4 Cox, 387.

The grand jury are not liable to action or prosecution for anything done by them with reference to finding a bill of indictment. *Floyd* v. *Barker*, 12 Co. Rep. 23; *Earl of Macclesfield* v. *Starkey*, 10 St. Tr. 1329, 1413.

Evidence by grand jurors as to what passed in the grand jury room will not be received. *R.* v. *Marsh*, 6 A. & E. 236, 237: and *see R.* v. *Brown* [1907] 7 N. S. W. State Rep. 290.

Copy of indictment for accused person.]—By rule 13 of the *Indictments Act*, 1915, (1) "It shall be the duty of the clerk of assize, after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge.

"(2) The cost of any copy supplied to the accused person whether under this rule or otherwise shall be treated as part of the costs of the prosecution for the purpose of s. 1 of the *Costs in Criminal Cases Act*, 1908. [*See post*, p. 267.]

"(3) In the application of this rule to quarter sessions, the clerk of the peace shall be substituted for the clerk of assize."

SECT. 7.

PROCESS, AFTER INDICTMENT FOUND, TO COMPEL APPEARANCE OF THE ACCUSED.

Proceedings by writ.]—If a defendant against whom an indictment has been found is present in court, or is in the custody of the court, he may at once be arraigned upon the indictment, without any previous process. 2 Hawk. c. 27; 1 Chit. Cr. L. 338. Where the defendant is in the custody of another court, the course is to remove him by *habeas corpus ad respondendum*, and bring him up to plead. "Where recognizances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such person, in order that he may be arraigned upon such indictment without writ of *habeas corpus*, and the said governor shall thereupon obey such order." 30 & 31 Vict. c. 35, s. 10. The attendance of the prisoner can also, it would seem, be obtained under a secretary of state's order. 61 & 62 Vict. c. 41, s. 11. Where a prisoner after his committal for trial, but before trial, has been removed to a lunatic asylum by

warrant from the secretary of state, under 27 & 28 Vict. c. 29 (*rep.*), whether he was or was not under recognizance to appear he could be brought up for trial by a *habeas corpus* issued by the judge of assize. *R.* v. *Peacock*, 12 Cox, 21, Brett, J. But it is doubtful whether this power exists in the case of a warrant of the secretary of state, issued under s. 2 of the *Criminal Lunatics Act*, 1884 (47 & 48 Vict. c. 64). *See Ex parte Collins* (Q. B. D. Feb. 16, 1899); 34 L. J. Newsp. 132; 43 Sol. Journ. 280.

When an indictment for a misdemeanor has been found, a writ of *venire facias ad respondendum* may be issued either by the King's Bench Division, a judge of assize, or a court of quarter sessions. Cr. Off. Rules, 1906, rr. 32, 83, 84; Short and Mellor Cr. Pr. (2nd ed.) 87, 98, 165; Com. Dig. Process, A. 1; 5 Edw. 3, c. 11. On default in appearance a writ of *distringas* may be issued. Cr. Off. Rules, 1906, r. 85; and on default of appearance within four days of a return to the writ of *distringas*, a writ of *capias ad respondendum* may be issued. Cr. Off. Rules, 1906, r. 86.

In the case of indictments in the High Court against the inhabitants of a county, parish, or district, or against a corporation aggregate, writs of *venire facias* and *distringas* are issued to compel appearance. Cr. Off. Rules, 1906, r. 87. When the indictment is found in or removed to the High Court, the proper procedure in the case of defendants not parties to the removal, nor bound by recognizances to answer, is by issue of a writ of *venire facias*, or in the case of an information by issue of a *subpœna* to answer, or *venire facias:* r. 83. If the defendant does not appear within four days of a return by the sheriff to a *venire facias* the prosecutor may issue a writ of *distringas:* r. 85. And if default in appearance is made after execution of the *distringas* the prosecutor may sue out a *capias ad respondendum:* r. 86.

The form of a writ of *venire facias* is as follows :—

George the Fifth, etc., to the sheriff of ——, *greeting. We command you that you cause to come before us in* [the King's Bench Division of our High Court of Justice at the Royal Courts of Justice, London] *on the* —— *day of* ——, A. B. *to answer to us for certain misdemeanors whereof he is indicted: and have you there then this writ. See* Cr. Off. Rules, 1906, Form 52. *Witness, etc.*

This writ was issued by ——.

The form of a writ of *distringas* to answer is as follows :—

George the Fifth, etc., to the sheriff of the county of ——, *greeting. We command you that you distrain* A. B., *of* ——, *in your county* [yeoman], *by all his lands and chattels in your bailiwick, so that neither he nor any one for him do put his hands to the same until you shall have another command from us for that purpose, and that you answer to us for the issues thereof, so that you may have him before* [*our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, at* —— *in your said county*], *on the* —— *day of* —— *next ensuing, to answer unto us concerning certain misdemeanors* [*or felonies*] *whereof he is indicted, and to hear his judgment for his many defaults, and*

have you there then this writ. Witness C. D. *and* E. F. [two justices of the peace] *at* ——, *the* —— *day of* ——, *in the* —— *year of our reign* [*see* Cr. Off. Rules, 1906, Form 56].

If the defendant appears to the writ of *distringas*, a *supersedeas* may be obtained, either to stay the execution of the writ, or to procure a return of the amount levied. Cr. Off. Rules, 1906, r. 104, and form 171 : Bac. Abr. *tit. Attorney, B.* But if the defendant fails to appear within the time limited, and the sheriff makes a return that he has no lands, a writ of *capias ad respondendum* may be issued, and if he cannot be taken upon the first *capias*, second and third writs of *capias* called *alias* and *pluries*, may issue. 4 Bl. Com. 389 : as to the duties and power of the sheriff, *see Bengough* v. *Rossiter*, 4 T. R. 506; 2 H. Bl. 419; *R.* v. *Yandell*, 4 T. R. 521. Upon an indictment for felony a writ of *capias* is issued in the first instance; but this mode of proceeding is now rarely adopted, except as a step towards outlawry. *See post*, p. 85.

The following is the form of the writ of *capias* :—

George the Fifth, etc., to the sheriff of the county of ——, *greeting. We command you that you take* A. B., *of* ——, *in your county* [labourer], *if he shall be found in your bailiwick, and him safely keep, so that you may have him before* [*our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed at* —— *in your county*], *on the* —— *day of* —— *next ensuing, to answer to us concerning certain misdemeanors* [*or felonies*] *whereof he is indicted, and have you then there this writ. Witness* C. D. *and* E. F. [two justices of the peace] *at* ——, *the* —— *day of* ——, *in the* —— *year of our reign* [*see* Cr. Off. Rules, 1906, Form 57].

If the proceedings above fail the prosecutor can proceed to outlawry, *post*, p. 85.

Proceeding by warrant of a justice.]—Proceedings in ordinary cases are regulated by s. 3 of the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), by which it is provided that " where any indictment shall be found by the grand jury in any court of oyer and terminer or general gaol delivery, or in any court of general or quarter sessions of the peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such court of oyer and terminer or gaol delivery, or as clerk of the peace at such sessions, at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of oyer and terminer or gaol delivery or sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate ((F) *infra*) of such indictment having been found; and upon production of such certificate to any justice or justices of the peace for any

county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required to issue his or their warrant ((G) *infra*) to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law: and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment shall, without further inquiry or examination, commit ((H) *infra*) him for trial, or admit him to bail, in manner hereinafter mentioned. . . ." (*See Bail, post*, p. 87).

The forms scheduled to the *Indictable Offences Act*, 1848, are as follows :—

(F)

Form of certificate of indictment being found.]—*I hereby certify that at* [a court of oyer and terminer and general gaol delivery, *or* a court of general quarter sessions of the peace], *holden in and for the* [county] *of* ——, *at* ——, *in the said* [county], *on* —— *a bill of indictment was found by the grand jury against* A. B., *therein described as* A. B., *late of* —— [labourer], *for that he* [*etc.*, stating shortly the offence], *and that the said* A. B. *hath not appeared or pleaded to the said indictment. Dated this* —— *day of* ——, 19—.

J. D., *clerk of the indictments on the* —— *circuit*, [*or clerk of the peace of and for the said* [county]].

(G)

Form of warrant to apprehend a person indicted.]—*To the constable of* —— *and to all other peace officers in the said* [county] *of* ——. *Whereas it hath been duly certified by* J. D., *clerk of the indictments on the* —— *circuit* [*or clerk of the peace of and for the* [county] *of* ——] [that, etc., stating the certificate] : *These are therefore to command you, in his Majesty's name, forthwith to apprehend the said* A. B., *and to bring him before* [me], *or some other justice or justices of the peace in and for the said* [county], *to be dealt with according to law. Given under my hand and seal this* —— *day of* ——, *in the year of our Lord* ——, *at* ——, *in the* [county] *aforesaid.*

J. S. (L.S.)

(H)

Form of warrant of commitment of a person indicted.]—*To the constable of* ——, *and to the keeper of the* [common gaol *or* house of correction], *at* ——, *in the said* [county] *of* ——. *Whereas by* [my] *warrant under* [my] *hand and seal, dated the* —— *day of* ——, *after reciting that it had been certified by* J. D. [etc., as in the certificate], [*I*] *commanded the constable of* —— *and all other peace officers of the said county, in his Majesty's name, forthwith to apprehend the said* A. B., *and to bring him before* [me], *the undersigned,*

[one] *of his Majesty's justices of the peace in and for the said* [county]; *or before some other justice or justices of the peace in and for the said* [county], *to be dealt with according to law: and whereas the said* A. B. *hath been apprehended under and by virtue of the said warrant, and being now brought before* [me], *it is hereupon duly proved to* [me] *upon oath that the said* A. B. *is the same person who is named and charged in and by the said indictment: These are therefore to command you, the said constable, in his Majesty's name forthwith to take and safely convey the said* A. B. *to the said* [house of correction] *at —— in the said* [county], *and there to deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said* A. B. *into your custody in the said house of correction, and him there safely to keep until he shall be thence delivered by due course of law. Given under my hand and seal this —— day of ——, in the year of our Lord ——, at ——, in the* [county] *aforesaid.*

J. S. (L.S.)

Backing justice's warrants.]—If a person against whom a justice's warrant has been issued with respect to an indictable offence has escaped or gone into, or resides, or is supposed to reside or be "in any place in England or Wales, out of the jurisdiction of the justice issuing such warrant," upon proof alone being made on oath of the handwriting of the justice issuing such warrant, it is lawful for any justice of the peace for the county or place in which the person against whom the warrant has been issued is, or is supposed to be, to indorse the warrant in the following form (K); and such indorsement shall be sufficient authority for the execution of the warrant in that county or place. 11 & 12 Vict. c. 42, s. 11. An arrest under a warrant not backed by a justice of the county or borough within which it is executed is illegal. *R.* v. *Cumpton*, 5 Q. B. D. 341; 49 L. J. (M. C.) 41. A warrant issued by a Metropolitan Police Magistrate in respect of an offence committed within the Metropolitan Police District may be executed outside that district without backing by any of the constables to whom it is directed. 2 & 3 Vict. c. 71, s. 17.

Under 11 & 12 Vict. c. 42, ss. 12, 13, 14, English warrants may be backed in Ireland, Scotland, or the Isles of Man, Guernsey, Jersey, Alderney or Sark. English warrants may also be executed in Ireland, after indorsement by the inspector-general or a deputy or assistant inspector of the Irish Constabulary, under 14 & 15 Vict. c. 93, s. 19, and 30 & 31 Vict. c. 19, s. 1.

The form of indorsement used is as follows:—

(K)

—— *to wit: Whereas proof upon oath hath this day been made before me, one of his Majesty's justices of the peace for the said* [county] *of ——, that the name of* J. S. *to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize* W. T., *who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said* [county] *of ——, to execute the same within the said last-mentioned* [county], *and to bring the said* A. B., *if*

apprehended within the same [county], *before me* [or *before some other justice or justices of the peace of the same county*], *to be dealt with according to law. Given under my hand this —— day of ——*, 19—. J. L.

Offenders fleeing from the United Kingdom.]—Where the offender has fled to a British possession or a place to which the *Foreign Jurisdiction Acts* apply, the warrants for his arrest are executed under the *Fugitive Offenders Act*, 1881 (44 & 45 Vict. c. 69). As to this Act, *see R.* v. *Cohen* [1907] 71 J. P. 190 : *R.* v. *Phillips* [1858] 1 F. & F. 105 : *Ex parte Percival* [1907] 1 K. B. 696; 71 J. P. 148; 23 T. L. R. 238 : *R.* v. *Spilsbury* [1898] 2 Q. B. 615.

Where the accused has fled to a foreign country to which the *Foreign Jurisdiction Acts* do not apply, his surrender is obtainable under the Extradition Treaty in force with such country, or in some cases by application to the foreign government, independently of any treaty. The procedure to be followed depends on the terms of the treaty or the requirements of the foreign government. *See* Clarke on Extradition (4th ed.); Biron and Chalmers on Extradition. The Orders in Council bringing each treaty into effect and setting out its text are published as Statutory Rules and Orders. The *Extradition Acts* of 1870, 1873, and 1895, in the main regulate only procedure for extradition from British dominions, but they forbid the trial of fugitives surrendered by foreign states, except on charges founded on the facts on which their surrender was made.

Where the defendant is already in prison.]— . . . If the person against whom an indictment has been found is "confined in any gaol or prison for any other offence than that charged in the said indictment, at the time of such application and production of the said certificate to such justice or justices as aforesaid (*ante*, p. 81) it shall be lawful for such justice or justices, and he and they are hereby required, upon it being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant ((I.) *infra*), directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in custody until by his Majesty's writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law." 11 & 12 Vict. c. 42, s. 3.

(I)

Form of warrant to detain a person indicted who is already in custody for another offence.]—*To the keeper of the* [common gaol or house of correction], *at ——, in the said* [county] *of —— : Whereas it hath been duly certified by* J. D., *clerk of the indictments on the —— circuit* [or *clerk of the peace of and for the county of ——*], *that* [etc., stating the certificate] : *And whereas* [I am] *informed that the said* A. B. *is in your custody in the said* [common gaol] *at —— aforesaid, charged with some offence or other matter; and it*

being now duly proved, upon oath before [me] *that the said* A. B. *so indicted as aforesaid and the said* A. B. *in your custody as aforesaid are one and the same person; These are therefore to command you, in his Majesty's name, to detain the said* A. B. *in your custody in the* [common gaol] *aforesaid, until by his Majesty's writ of habeas corpus he shall be removed therefrom for the purpose of being tried upon the said indictment or until he shall otherwise be removed or discharged out of your custody by due course of law. Given under my hand and seal this —— day of ——, in the year of our Lord ——, at ——, in the* [county] *aforesaid.*

J. S. (L.S.)

Proceeding by bench warrant.]—By a long course of practice, it is an established rule that any court of record before which an indictment is found may forthwith issue a bench warrant for arresting the party charged, and bringing him immediately before such court, to answer such indictment. 8th Rep. Crim. Law Commrs. 99; Dick. Sess. 230 (6th ed.); *and see* 5 Edw. 3, c. 11; 34 Edw. 3, c. 1; Cro. Cir. Comp. 15 (10th ed.); 1 Chitty Cr. L. 340; Pritchard Q. S. (2nd ed.) 194; Short and Mellor, Cr. Pr. (2nd ed.) 87; Cr. Off. Rules, 1906, rr. 32, 76. In 3 Burn's J., *tit. Process*, 1338 (30th ed.), it is said that the practice refers only to cases of *misdemeanor*. If the warrant is issued at the assizes, it is signed by a judge: if at sessions, by two justices of the peace. Hawkins, Book II., c. 27, s. 8, says that the warrant is granted when the court is sitting. This statement applies to commissions of the peace, and is only another way of saying that the court is not continuous, and the act must be done in sessions. Where a party against whom the indictment has been found is already under recognizance to appear and answer any indictment that may be preferred against him, and he does not appear, the prosecutor may bespeak a bench warrant, which will be signed by the justices at the close of the sessions; for the sessions being in law but one day, the defendant has the whole period of the sessions to appear. 2 Salk. 607; Cro. Cir. Comp. 15 (10th ed.). When a prosecutor applies for a bench warrant at the Central Criminal Court, a recognizance to prosecute with effect against the defendant is required. Reg. Gen., Jan. 1847; C. & Mar. 254. It is said that at that court the warrant is only current for the session in which it is issued. *See R.* v. *Nichols*, 64 J. P. 217, Fulton, Recorder; Encycl. Laws of England (2nd ed.), vol. ii., p. 156. This opinion probably rests on the theory that the court is not a continuing court, which was held to be erroneous by Wright, J., in *R.* v. *Madge & Armstrong*, Q. B. D. May 8, 1894, 29 Law Journ. Newsp. 301; Times, May 9, 1894, cited *R.* v. *Parke* [1903] 2 K. B. at 440. It is not now the practice to grant a bench warrant unless immediate arrest is necessary, or it is shown that the party charged was about to quit the country; *R.* v. *Whittaker*, 2 F. & F. 1; and it is not granted for the arrest of defaulting witnesses. *R.* v. *Crawford*, 6 Cox, 481 (Ir.).

The following is the form of a bench warrant:—

County of London.]—*To all constables, headboroughs, and other his Majesty's officers and ministers within the county of London, and to every one of them whom it may concern: These are to will and require, and in his Majesty's*

name to charge and command you, upon sight hereof, to bring before us his Majesty's justices of the peace for the county aforesaid, at the sessions of the peace [or *general quarter sessions of the peace*] *now holden at the Sessions House on Clerkenwell Green, in and for the said county, the body of* A. B., *who stands indicted before us at this same session for a trespass and assault* [nature of the offence], *if the court be then and there sitting, or if not, before us or some other of his Majesty's justices of the peace for the same county, to find sufficient sureties for his personal appearance at this present sessions, to answer the said indictment and all such other matters as on his Majesty's behalf shall be objected against him: and if he cannot be taken during this present session, that then, as soon after as he shall be taken, you bring or cause him to be brought before us or some other of his Majesty's justices of the peace of the said county to find sufficient sureties: that is to say, two sureties in £—— each for his personal appearance at the next session of the peace to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law. Hereof you are not to fail at your peril. Dated in open session at the Sessions House, Clerkenwell Green, aforesaid, this —— day of ——, in the year of our Lord ——.*

C. D. and E. F.

Warrant by judge of the High Court.]—Under 48 G. 3, c. 58, s. 1, any judge of the King's Bench Division of the High Court of Justice upon affidavit or certificate of the fact (*R.* v. *Redfern*, 2 A. & E. 387) that an indictment has been found, or information filed in that court, against any person for an offence other than treason or felony, may issue his warrant under his hand and seal for apprehending him and taking him before a judge of the high court or a justice of the peace, to be by him held to bail with two sufficient sureties in such sum as the court specifies in the warrant for appearance in the King's Bench Division at the time mentioned in the warrant to answer the indictment or information: and if such defendant neglects or refuses to provide bail, the judge or justice before whom he is brought may commit him to prison. Where an indictment has been removed into the High Court, on production of a certificate from the crown office that the indictment has been filed, a judge of the King's Bench Division may, by warrant under his hand, cause the party indicted to be arrested, and, in default of bail, commit him for trial. Crown Office Rules, 1906, rr. 75, 76. *R.* v. *Downey*, 7 Q. B. 281; 15 L. J. (M. C.) 29; 4 Bl. Com. 319. *See* Cr. Off. Rules, 1906, rr. 75, 76. The above statute does not preclude the use of a *capias ad respondendum* (ss. 1, 3), but that is now only needed as a step to outlawry. For form of warrant, *see* Cr. Off. Rules, 1906, rr. 32, 74, 75, 76, and Form 43; *see* Short and Mellor Cr. Pr. (2nd ed.) 92; 8 Rep. Crim. Law Commrs. 348.

Outlawry.]—Where an indictment for treason, felony, or misdemeanor has been found by a grand jury against any person, whether a peer or a commoner, and summary process proves ineffectual to the apprehension of the defendant, process of outlawry is issued:—outlawry being a punishment inflicted upon an offender by the law for contumacy, in refusing to render himself amenable to

the justice of the King's courts (*a*) Doct. & Stud. dial. 2, cap. 3; Bac. Abr. Outlawry; Com. Dig., Utlagary; 1 Chitty Crim. L. 347; 2 Hale, 194; 2 Hawk. c. 27, s. 113. An outlawry in treason or felony still amounts to a *conviction* and *attainder* of the offence charged in the indictment, as much as if the offender had been found guilty by a jury; 4 Bl. Com. 319; 2 Hawk. c. 48, ss. 21-25; 33 & 34 Vict. c. 23, s. 1; but outlawry, in a case of misdemeanor, does not enure as a conviction for the offence, but merely as a conviction of the contempt for not answering. *R.* v. *Tippin*, 2 Salk. 494. Process of outlawry may be awarded by justices of oyer and terminer, and also by justices of the peace at quarter sessions, on indictments taken before them; 3 Burn's J., Process, 1339 (30th ed.); Dick. Q. Sess. (6th ed.) 228; but the practice of proceeding to outlawry in courts of quarter sessions seems to have become obsolete: 8 Rep. Crim. L. 103; and the usual course is to remove the indictment found at sessions by *certiorari*, and proceed to outlawry in the King's Bench Division. The most scrupulous exactness was required in all the proceedings in outlawry, which might be set aside on writ of error for any informality. 1 Chitty Crim. L. 347. Although outlawry is still an integral, and has been described as an essential, part of the criminal law (*R.* v. *Wilkes*, 4 Burr. 2527, 2551, Lord Mansfield, C.J., 19 St. Tr. 1075), proceedings in outlawry are exceedingly rare, and may almost be said to be extinct. Short and Mellor Cr. Pr. (2nd ed.) 270. It is therefore sufficient to refer to that work, which contains a full account of the proceedings in outlawry, and to the Crown Office Rules, 1906, rr. 88-110, which now regulate the practice in outlawry and reversal of outlawry, when the proceedings are in the King's Bench Division. Under s. 1, sub-s. 2, of the *Statute Law Revision Act*, 1888 (51 & 52 Vict. c. 3), the Lord Chancellor may, if he thinks fit, by order extend the Crown Office Rules in force for the time being, as to proceedings in Outlawry, to proceedings in outlawry in courts of assize, oyer and terminer, and gaol delivery, and in other courts in England, with such modifications as to him may seem expedient, and as from the date of the order the old statutes as to outlawry scheduled to that Act are to be repealed. No order has been made by the Lord Chancellor, and the old statutes remain in force as to the courts last named.

(*a*) As to New South Wales law of outlawry, *see R.* v. *Jemmy Governor* [1900] 21 N. S. W. R. (Law), 278.

SECT. 8.

BAIL.

Nature of bail.]—Bail are sureties taken by a person duly authorised, for the appearance of an accused person at a certain day and place, to answer and be justified by law. Hale's Sum. 96; Dalt. c. 166, pt. 2. The defendant is placed in the custody of his bail; who may re-seize him (1 Hale, 124; Dalton, c. 166, pt. 2) if they have reason to suppose that he is about to fly, and may bring him before a justice, who will commit the prisoner in discharge of the bail: *R.* v. *Butcher*, Peake (3rd ed.) 226. Any attempt to rescue him from their custody is illegal. *Id.*

Where persons who have become bail for any defendant discharge themselves by taking and surrendering him before the court or magistrate by whom he has been bailed, it is competent for the defendant to find new sureties. 2 Hale, 124; Hawk. c. 15, s. 3.

When granted.]—Bail in treason or felony is discretionary in the High Court or courts having jurisdiction to try the offence. *R.* v. *McCartie* [1859] 11 Ir. C. L. R. 188, 192: *R.* v. *Platt*, 1 Leach, 157; Short and Mellor Cr. Pr. (2nd ed.) 280. It is questionable whether bail in misdemeanor is of right at common law. *See R.* v. *Spilsbury* [1898] 2 Q. B. 615, 620: *R.* v. *Badger*, 4 Q. B. 468, 472; 12 L. J. (M. C.) 66; 4 St. Tr. (N. S.) 1387: *Re Frost*, 4 T. L. R. 757, Coleridge, L.C.J.; and *see* 31 Car. 2, c. 2; 2 Hawk. c. 15, ss. 7, 13, 16, and *post*, p. 89.

Refusal or delay by any judge or magistrate to bail any person bailable is at common law an offence against the liberty of the subject. 4 Bl. Com. 297. It is also a violation of the *Habeas Corpus Act*, 1679 (31 Car. 2, c. 2) and of the *Bill of Rights* (1 W. & M., Sess. 2, c. 2). But the duty of a magistrate as to admitting a prisoner to bail is judicial, and not merely ministerial, and therefore an action will not lie against him without proof of malice for refusing to admit to bail a person charged with a misdemeanor, and entitled to be admitted to bail. *Linford* v. *Fitzroy*, 13 Q. B. 240; 18 L. J. (M. C.) 108; *R.* v. *Badger*, 4 Q. B. 468; 12 L. J. (M. C.) 66: *Osborne* v. *Gough*, 3 B. & P. 551. *See* Bac. Abr., Bail; Com. Dig. Bail, F. 5, K. 6.

Bail is not to be withheld merely as a punishment. The requirements as to bail are merely to secure the attendance of the accused at the trial. *R.* v. *Rose*, 67 L. J. (Q. B.) 289; 17 Cox, 717 (C. C. R.).

The proper test of whether bail should be granted or refused is whether it is probable that the accused will appear to take his trial. *Re Robinson*, 23 L. J. (Q. B.) 286: *R.* v. *Scaife*, 10 L. J. (M. C.) 144; 9 Dowl. Pr. Cas. 553.

The test should be applied by reference to the following considerations:

(1) The nature of the accusation. *R.* v. *Barronet*, 1 E. & B. 1; 22 L. J. (M. C.) 15; Dears. 51: *R.* v. *Butler* [1881] 8 L. R. Ir. 39; 14 Cox, 530.

(2) The nature of the evidence in support of the accusation. *Re Robinson (supra)*: *R.* v. *Butler (supra)*: *R.* v. *McCormick* [1864] 17 Ir. C. L. R. 411.

(3) The severity of the punishment which conviction will entail. *Re Robinson (supra)*. The character or behaviour of the accused is said to be irrelevant. (*Id.*)

(4) Whether the sureties are independent, or indemnified by the accused. *See R.* v. *Butler*, 8 L. R. Ir. 39; 14 Cox, 530: *Hermann* v. *Jeuchner*, 15 Q. B. D. 561; 54 L. J. (Q. B.) 340: *Consolidated Exploration, &c., Co.* v. *Musgrave* [1900] 1 Ch. 37; 64 J. P. 89: *R.* v. *Porter* [1910] 1 K. B. 369; 79 L. J. (K. B.) 241; 26 T. L. R. 200; 3 Cr. App. R. 237.

It is not usual to grant bail on charges of murder; *Re Barthelemy*, 1 E. & B. 8; Dears. 60; or after indictment found; *R.* v. *Chapman*, 8 C. & P. 558 (and *see post*, p. 93), except where the trial is adjourned. *Anon.*, 2 Lew. 260. If insufficient bail has been taken, or if the sureties become afterwards insufficient, the accused may be ordered by any magistrate to find sufficient sureties, and in default may be committed to prison; and the justice who admitted a defendant to bail upon insufficient securities is responsible if the defendant does not appear. Hale's Sum. 97.

Who may be bail.]—The bail must be of ability sufficient to answer for the sum in which they are bound. 2 Hawk. c. 15, s. 4. They are usually householders; but it is for the magistrate or judge to act upon his discretion as to the sufficiency of the bail; *R.* v. *Saunders*, 2 Cox, 249; 1 Burn's J., Bail, 373 (30th ed.); 1 Chitty Crim. L. 99; and the proposed bail may be examined upon oath as to his means, though in criminal cases justification of bail is said not to be essential. *R.* v. *Hall*, 2 W. Bl. 1110; 1 Chitty Crim. L. 100; *but see* Short and Mellor, Cr. Pr. (2nd ed.) 287. The court or magistrate may, at discretion, order that reasonable notice shall be given to the prosecutor and the police, to enable him or them to inquire or object as to the sufficiency of the bail. No person convicted of any crime by which he had become infamous was allowed to be surety for any person charged or suspected of an indictable offence. *R.* v. *Edwards*, 4 T. R. 440. It is not expedient to accept the solicitor of the accused as bail for his client. *R.* v. *Scott-Jarvis* (Q. B. D., Times, 20th Nov., 1876): Douglas, Summary Jurisdiction Procedure (8th ed.) 364. A person who has been indemnified by the accused is not accepted as his bail; *supra* (4): while an agreement by an accused person to indemnify his bail is illegal in that it tends to produce a public mischief, and the parties to the agreement are therefore guilty of the offence of conspiracy, although they may have entered into the agreement without any wrongful intent. *R.* v. *Porter* [1910] 1 K. B. 369; 79 L. J. (K. B.) 241; 22 Cox, 295. Persons in custody cannot be bail. Infants cannot be bail; nor could a married woman at common law; but since the *Married Women's Property Act*, 1882, married women, having separate estate, are accepted as bail. Personation of bail is a felony under 24 & 25 Vict. c. 98, s. 34.

By s. 24 of the *Criminal Justice Administration Act*. 1914 (4 & 5 Geo. 5, c. 58), for removing doubts it is declared that where as a condition of the release of any person he is required to enter into a recognizance with sureties,

the recognizances of the sureties may be taken separately, and either before or after the recognizances of the principal, and if so taken the recognizances of the principal and sureties shall be as binding as if they had been taken together and at the same time. By s. 19 of the same Act, bail may be made continuous (*post*, p. 90).

Bail by justices of the peace: when discretionary.]—"Where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace *may, in his discretion*, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance (S. 1, 2, *post*, pp. 90, 91) of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave." . . . 11 & 12 Vict. c. 42, s. 23; *and see* 1 Chitty Crim. L. 95; 4 Bl. Com. 298: *Linford* v. *Fitzroy*, 13 Q. B. 240; 18 L. J. (M. C.) 108: *R.* v. *Rose*, 67 L. J. (Q. B.) 289; 18 Cox, 717; *and* Short and Mellor, Cr. Pr. (2nd ed.) 280 *et seq.*, 322 *et seq.* [The costs of all felonies and misdemeanors may now be allowed out of the local rate; 8 Edw. 7, c. 15, s. 1.]

By s. 23 of the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58) where a court of summary jurisdiction commits a person charged with any misdemeanor for trial and does not admit him to bail the court shall inform the person accused of his right to apply for bail to a judge of the High Court of Justice.

In the case of persons apparently under sixteen admission to bail and detention without bail are regulated by the *Children Act*, 1908 (8 Edw. 7, c. 67), ss. 94-96.

When compulsory.]— . . . "Where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those hereinbefore mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, *shall admit him to bail* in manner aforesaid, or if he have been committed to prison and shall apply to any one of the visiting justices of such prison, or to any other justice of the peace for the same county, riding, division, liberty, city, borough

or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid." . . . 11 & 12 Vict. c. 42, s. 23: *and see* 2 Hale, 127; 4 Bl. Com. 298; Burn's J. (30th ed.) Bail; 1 Chitty Crim. L. 97; and remarks of Lord Denman, *Linford* v. *Fitzroy, supra.*

Under the *Bail Act*, 1898 (61 & 62 Vict. c. 7, s. 1), "where a justice has power under s. 23 of the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), to admit to bail for appearance, he may dispense with sureties, if it is his opinion the so dispensing will not tend to defeat the ends of justice:" and it is his duty to admit to bail in all cases where there is a reasonable belief that the accused will attend to take his trial.

Persons apparently under sixteen who are apprehended without warrant must with certain exceptions be admitted to bail by the police until the time of appearance before a justice. 8 Edw. 7, c. 67, s. 94.

When forbidden.]—"No justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of his Majesty's secretaries of state, or by the High Court of Justice (King's Bench Division), or a judge thereof in vacation." 11 & 12 Vict. c. 42, s. 23; 36 & 37 Vict. c. 66, ss. 16, 34; 38 & 39 Vict. c. 77, s. 19.

Bail on remand.]—11 & 12 Vict. c. 42, s. 23, applies only where the accused is committed for trial: and does not apply to bail on remand. There is some difference of opinion as to the power of the High Court to interfere where justices have refused bail on remand. *See* Douglas, Summary Jurisdiction Procedure (9th ed.): but in *R.* v. *Beall* (Q. B. D., July, 1899), Channell, J., said that if the power existed the Court would be very slow to interfere with the justices' decision, *and see* Short and Mellor, Cr. Pr. (2nd ed.) 281.

Continuous Bail.]—By s. 19 of the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), where a person is remanded on bail the recognizance may be conditioned for his appearance at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned, without prejudice, however, to the power of the court to vary the order at any subsequent hearing.

Form of recognizance of bail taken by a justice of the peace.]—The following is the form of the recognizance to be entered into by bail before a justice of the peace, prescribed by 11 & 12 Vict. c. 42:—

(S. 1.)

Be it remembered, that on the —— day of ——, in the year of our Lord ——, A. B. *of* —— [labourer], L. M. *of* —— [grocer], *and* N. O. *of* —— [butcher], *personally came before* [us] *the undersigned, two of his Majesty's justices of the peace for the said* [county], *and severally acknowledged themselves to owe to our lord the King the several sums following: (that is to say), the said*

A. B. *the sum of* —— *and the said* L. M. *and* N. O. *the sum of* —— *each of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said lord the King, his heirs and successors, if he the said* A. B. *fail in the condition indorsed. Taken and acknowledged the day and year first above mentioned, at* ——, *before us,* J. S.
J. N.

The condition of the within-written recognizance is such, that whereas the said A. B. *was this day charged before* [us], *the justices within mentioned for that* [etc., as in the warrant]; *if therefore the said* A. B. *will appear at the next court of oyer and terminer and general gaol delivery* [or *court of general quarter sessions of the peace*] *to be holden in and for the county of* ——, *and there surrender himself into the custody of the keeper of the* [common gaol] *there, and plead to such indictment as may be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void. or else to stand in full force and virtue.*

(S. 2.)

Notice of the said recognizance to be given to the accused and his bail.]—*Take notice, that you,* A. B. *of* ——, *are bound in the sum of* ——, *and your sureties* [L. M. and N. O.] *in the sum of* —— *each, that you* A. B. *appear* [etc., as in the condition of the recognizance], *and not depart the said court without leave; and unless you the said* A. B. *personally appear and plead, and take your trial accordingly, the recognizance entered into by you and your sureties shall be forthwith levied on you and on them. Dated this* —— *day of* ——, 19—. J. S.

The condition of the recognizance, as respects the sureties, is performed by the *appearance* of the accused, though he stands mute. Bac. Abr., *tit. Bail:* 2 Hawk. c. 15, s. 84.

Mode of admitting to bail where the defendant has been committed to prison.]—"In all cases where a person charged with any indictable offence shall be committed to prison to take his trial for the same, it shall be lawful, at any time afterwards and before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, for the justice or justices of the peace who shall have signed the warrant for his commitment, in his or their discretion, to admit such accused person to bail in manner aforesaid (*ante*, p. 89), or if such committing justice or justices shall be of opinion that for any of the offences hereinbefore mentioned (*ante*, p. 89) the said accused person ought to be admitted to bail, he or they shall in such cases, and in all other cases of misdemeanors, certify (S. 3, *post*, p. 92) on the back of the warrant of commitment his or their consent to such accused party being bailed, stating also the amount of bail which ought to be required. It shall be lawful for any justice of the peace, attending or being at the gaol or prison where such accused party shall be in custody,

on production of such certificate to admit such accused person to bail in manner aforesaid; or if it shall be inconvenient for the surety or sureties in such a case to attend at such gaol or prison to join with such accused person in the recognizance of bail, then such committing justice or justices may make a duplicate of such certificate (S. 4, *infra*) as aforesaid, and upon the same being produced to any justice of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for such last-mentioned justice to take the recognizance of the surety or sureties in conformity with such certificate, and upon such recognizance being transmitted to the keeper of such gaol or prison, and produced, together with the certificate on the warrant of commitment as aforesaid, to any justice of the peace attending or being at such gaol or prison, it shall be lawful for such last-mentioned justice thereupon to take the recognizance of such accused party, and to order him to be discharged out of custody as to that commitment as hereinafter mentioned." 11 & 12 Vict. c. 42, s. 23. When the justice has consented to bail under this section, the recognizances can now be taken before the clerk to the justices or the governor of the prison in which the accused is. 42 & 43 Vict. c. 49, s. 42; Summary Jurisdiction Rules, 1886, rr. 13, 13A. As to cases where the indictment is removed for trial at the Central Criminal Court, under 19 & 20 Vict. c. 16, see the 9th section of that Act.

(S. 3.)

Certificate of consent to bail by the committing justice indorsed on the commitment.]—*I hereby certify that I consent to the within-named* A. B. *being bailed by recognizance, himself in —— and* [two] *sureties in —— each.*

(S. 4.)

The like, on a separate paper.]—Whereas A. B. *was on the —— committed by me to the* [house of correction] *at —— charged with* [etc., naming the offence shortly] : *I hereby certify that I consent to the said* A. B. *being bailed by recognizance, himself in —— and* [two] *sureties in —— each. Dated the —— day of ——*, 19—.

NOTE.—In cases where the justice acts under the *Bail Act*, 1898 (*ante*, p. 90) the words as to sureties can be omitted.

Recognizance to be transmitted to committing justices.]—" And in all cases where such accused person in custody shall be admitted to bail by a justice of the peace other than the committing justice or justices as aforesaid, such justice of the peace so admitting him to bail shall forthwith transmit the recognizance or recognizances of bail to the committing justice or justices, or one of them, to be by him or them transmitted, with the examinations, to the proper officer." 11 & 12 Vict. c. 42, s. 23.

Warrant of deliverance where a person in prison is bailed.]—" Where a justice or justices of the peace shall admit to bail any person who shall then be in prison, charged with the offence for which he shall be so admitted to bail, such justice or justices shall send or cause to be lodged with the keeper of such

prison a warrant of deliverance (S. 5, *infra*) under his or their hand and seal, or hands and seals, requiring the said keeper to discharge the person so admitted to bail, if he be detained for no other offence, and upon such warrant of deliverance being delivered or lodged with such keeper he shall forthwith obey the same." 11 & 12 Vict. c. 42, s. 24.

(S. 5.)

Form of warrant of deliverance on bail being given for a prisoner already committed.]—*To the keeper of the* [house of correction] *at* ——, *in the said* [county] *of* ——. *Whereas* A. B., *late of* —— [labourer], *hath before* [us, two] *of his Majesty's justices of the peace in and for the said county, entered into his own recognizances* [*and found sufficient sureties*] *for his appearance at the next court of oyer and terminer and general gaol delivery* [*or court of general quarter sessions of the peace*], *to be holden in and for the county of* ——, *to answer our sovereign lord the King, for that* [etc., as in the commitment], *for which he was taken and committed to your said* [house of correction] : *These are therefore to command you, in his said Majesty's name, that if the said A. B. do remain in your custody in the said* [house of correction], *for the said cause, and for no other, you shall forthwith suffer him to go at large. Given under our hands and seals this —— day of ——, in the year of our Lord ——, at ——, in the* [county] *aforesaid.*

J. S. (L.S.)
J. N. (L.S.)

Bail by the court of trial.]—The court of trial has the power of granting bail, stated *ante*, p. 87, and is guided in its exercise by the considerations there stated. It is not, however, usual to grant bail after indictment found if the offence is of a serious nature. *R.* v. *Chapman*, 8 C. & P. 558 : *R.* v. *Guttridge*, 9 C. & P. 228 : *R.* v. *Owen*, *Id.* 83 : *R.* v. *Bowen*, *Id.* 509, where the effect of the *Habeas Corpus Act*, 1679 (31 Car. 2, c. 2), was discussed. *Cf. R.* v. *McCartie* [1859] 11 Ir. Rep. C. L. 188.

Bail by the High Court.]—The High Court of Justice exercises (in the King's Bench Division) the powers as to bail of the old Court of King's Bench; 36 & 37 Vict. c. 66, ss. 16, 34; and the practice, except as below indicated, is not altered by the *Judicature Acts* (*see* 38 & 39 Vict. c. 77, s. 19), or the Cr. Off. Rules, 1906. The extent of the discretion of the court has been stated *ante*, pp. 87 *et seq.*

The court may in its discretion direct a prisoner to be admitted to bail before a justice of the peace, where it would be inconvenient to bring the prisoner and his bail before the court or judge in town; or, on just cause being shown, to order that a party not in custody shall be admitted to bail on surrendering to a warrant. At common law the powers of the court were exercised by means of a writ of *habeas corpus*. Hale's Sum. 104; 1 Chit. Cr. L. 98; Burn's J., *tit. Bail* (30th ed.) 369. Under the present practice of the Court, " applications for bail in felony or misdemeanor where the party is in custody, shall be *in the first instance* by summons before a judge at chambers for a writ

of *habeas corpus*, or to show cause why the defendant should not be admitted to bail either before a judge at chambers or before a justice of the peace, in such an amount as the judge may direct." Cr. Off. Rules, 1906, r. 111. No summons to show cause before a judge at chambers for bail in felony shall be issued without the leave of a judge upon an *ex parte* application. Rule 266. For the requisite forms on application for bail, *see* Appendix to Cr. Off. Rules, 1906, Nos. 69 to 75. Affidavits must be intituled "In the High Court of Justice, King's Bench Division." Cr. Off. Rules, 1906, r. 6.

If the judge at chambers refuses bail, a further application may be made to a divisional court, or any other branch of the High Court or the Lord Chancellor, not by way of appeal, but *de novo*; Short and Mellor Cr. Pr. (2nd ed.) 287; but there is no appeal to the Court of Appeal from the decision of a divisional court of the King's Bench Division upon an application for bail by a prisoner. *R.* v. *Foote*, 10 Q. B. D. 378; 52 L. J. (Q. B.) 528.

To avoid expense and inconvenience it is now the practice in almost all cases, instead of applying for a writ of *habeas corpus*, to apply for a summons before a judge in chambers, to show cause why the prisoner should not be admitted to bail before a justice of the peace. If the order be made, upon its being produced to a justice, he will admit the prisoner to bail.

Where there is no inconvenience in the appearance of the prisoner and his bail in the court, counsel applies for a writ of *habeas corpus ad subjiciendum*, and also for a writ of *certiorari*, directed to the magistrate or coroner, as the case may be, to bring before the court the depositions on which the prisoner has been committed. The affidavits are entitled as in the case of a bail summons, and should verify the depositions (*R.* v. *Barthelemy*, 1 E. & B. 8; Dears. 60), and should be accompanied by a certified copy of the commitment, to which the accused is entitled as of right, under 31 Car. 2, c. 2, s. 4 (*see* Cr. Off. Rules, 1906, r. 22, Forms 172, 173), and by a copy of the depositions. If these are not obtained, a *certiorari* to bring them up is necessary.

Twenty-four hours' notice of bail, in cases of murder or manslaughter, must be served on the widow, if any there be, or next of kin of the deceased, and in other cases upon the prosecutor, and also on the coroner, or committing magistrate—*personal* service is not requisite. Returns having been duly made to the writs, when the prisoner is brought into court counsel moves that he be admitted to bail, and if there be no opposition the court will in its discretion admit the prsoner to bail, and the officer of the court will take the recognizance. In cases of felony the court sometimes requires *four* sureties; but for the inferior offences *two* are sufficient. *R.* v. *Shaw*, 6 Dow. & Ry. 154; Short and Mellor Cr. Pr. (2nd ed.) 285. The application to admit the prisoner to bail may be opposed by counsel, and affidavits may be used in answer to the application. When a prisoner is brought up to be bailed at chambers, the proceedings are nearly the same as those in court. Short and Mellor Cr. Pr. (2nd ed.) 287.

Bail in case of removed indictments.]—*See post*, *Certiorari*, p. 115.

Bail on coroner's inquisition.]—*See post*, p. 147.

Estreat of recognizance.]—If the condition of a recognizance entered into either by a party or by his sureties be broken, the recognizances may be forfeited, and on forfeiture the obligees become debtors to the Crown for the sums in which they are respectively bound.

Former practice.]—The ancient mode of enforcing a forfeited recognizance was to order its *estreat* into the Exchequer. The word "estreat" (*extractum*) means a true note of entries in the rolls of a court containing orders in favour of the revenues of the Crown : Termes de la Ley. It was the duty of the clerks of all the King's courts to make up an accurate estreat roll showing the nature and details of all fines, forfeitures, etc., enforced by the court, and to return it to the Exchequer. The roll had to be verified by oath (4 W. & M. c. 24, s. 4); wilful mis-statements were punishable (22 & 23 Car. 2, c. 22, s. 5); and failure to make the returns was ground for amercement (3 G. 1, c. 15, s. 12) : Encycl. Laws of England (2nd. ed.), vol. 5, p. 361.

The sums not received before the return of the roll were levied by the sheriff under the orders of the Court of Exchequer until 1822 (3 G. 4, c. 46). The Court of Exchequer had jurisdiction over recognizances forfeited before justices of the peace in or out of sessions. The jurisdiction was abolished by 3 G. 4, c. 46, s. 2. *R.* v. *Yorkshire, West Riding JJ.*, 7 A. & E. 583, 590; 7 L. J. (M. C.) 9 : *R.* v. *Thompson*, 3 Tyr. 53 : *R.* v. *Hankins*, M'Cl. & Y. 27. But this change in the law did not affect the power of the court to bring up the recognizance by *certiorari* from sessions : *Ex parte Pellow*, M'Cl. 111, 683 : *R.* v. *Brooke*, 59 J. P. 6, and did not affect the assizes : *R.* v. *Hankins*, *supra*.

The powers of the Court of Exchequer passed in 1875 to the H. C. J. (Exchequer Division), and in 1880 to the K. B. D. (36 & 37 Vict. c. 66, ss. 16. 32; Order in Council, 16 Dec., 1880; Statutory Rules and Orders Revised (ed. 1904) vol. 12, p. 1, *tit. Supreme Court, England*).

Present practice—Superior Courts.]—The practice of Parliament, the Supreme Court, and courts of assize, respecting the estreat of recognizances, is governed by the *Fines Act*, 1833 (3 & 4 W. 4, c. 99), which repealed 22 & 23 Car. 2, c. 22. By ss. 26, 27, 28, provision is made for the rendering of an account to the Treasury, by the King's coroner and attorney, and the King's Remembrancer, of fines, amerciaments, penalties, and recognizances set, imposed or forfeited in the High Court, and for the estreat by those officers under order of the court or a judge of such fines, etc., levied and not received, and for their payment over of the fines, etc., as directed by the Treasury. By s. 29 it is provided, that an account in writing of all recognizances forfeited to or for the use of the crown, by or before any judge or judges of assize throughout England, shall within fourteen days next after such recognizances are forfeited be made out by the clerk of assize, with the names and residences of the parties liable to make payment thereof, and he shall make out *two* copies, one to be sent to the Treasury, and such recognizances shall, within the time last aforesaid, be duly certified and *estreated* by the clerk of assize into the Court of Exchequer. Under 22 & 23 Vict. c. 21, s. 32, clerks of assize ceased to estreat fines, etc., into the Court of Exchequer, and now enrol the fines and send a copy to the

sheriff unless under s. 38 the Treasury requires return of the estreat to the King's Remembrancer. The Court of Exchequer, under a writ of privy seal, had power over penalties and forfeitures occurring *at assizes*, and could compound, or, in its discretion, discharge, any recognizances. 33 H. 8, c. 39, ss. 40-42 : *R.* v. *Hankins*, M'Cl. & Y. 27, and n., p. 31. The Treasury has a concurrent power under 3 & 4 W. 4, c. 99, ss. 33, 38.

The court has a discretion as to whether to order the estreat of a recognizance. In *R.* v. *Doyen*, Lewes assizes, 1899, 34 L. J. Newsp. 645, a Frenchman was admitted to bail, his father being taken as surety, and went to France, where he became dangerously insane, so that, through no fault of the surety, he could not be produced at the trial. Wills, J., refused an application to estreat the recognizance, and said he could not make any order on the justices' clerk as to the amount, which was deposited with him.

In *R.* v. *Sangiovanni* [1904] 68 J. P. 54, an estreat of the recognizances of sureties for a person committed for trial had been ordered on his failure to surrender. Fulton, Recorder, directed that the estreat should not issue, on being satisfied that the sureties had taken all reasonable steps to secure the attendance of the defendant. On finding that he had left for the United States, they had informed the police, and had telegraphed at their own expense to have the defendant detained on arrival. In consequence of their action he was not allowed to land, and was forced to return in the ship; but this being a Belgian vessel, it took him to a Belgian port.

The estreat of recognizances on the Crown side of the King's Bench Division is regulated by the Crown Office Rules, 1906.

"Every recognizance acknowledged on the removal of an indictment, order, or other proceeding, or to prosecute any information granted by the King's Bench Division, or for the appearing or answering of any party in the said Division, or for good behaviour, *or for any other purpose*, shall after the acknowledgment thereof, be transmitted to the crown office and filed there." *R.* 112. *See* Short and Mellor Cr. Pr. (2nd ed.) 289.

"No recognizance shall henceforth be forfeited, estreated, or put upon the estreat roll without the order of the court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof, and no default shall be considered to be made in performing the conditions of a recognizance by reason of the trial of any indictment or presentment or the argument of any order or conviction or other proceeding having stood over where such indictment has been made a remanet, or such indictment or order has stood over by order of the court, or by consent in writing of the parties." *R.* 113.

By r. 115, "Whenever it has been made to appear to the court or judge that a party has made default in performing the conditions of any recognizance, into which he has entered, filed in the crown office, the court or a judge upon notice to the cognizor and his sureties, if any, may order such recognizance to be estreated into the Exchequer without issuing any writ of *scire facias:* provided that nothing herein contained shall be deemed to take away or prejudice the right of any party to have questions of fact tried by a jury in such

cases as he might before the Crown Office Rules of 1886 have so required." . . . *The rule goes on to provide for the trial of such questions of fact*, and concludes "nothing herein contained shall be deemed to take away the jurisdiction of the court or judge to order the estreat of any recognizance when the breach of its conditions has been committed in the face of the court or judge." *See* Short and Mellor Cr. Pr. (2nd ed.) 290.

"No proceedings shall be taken in the crown office by *scire facias* upon recognizance." *R.* 116.

Where the conditions of a recognizance entered into before a court of assize or quarter sessions have been broken the recognizance can be enforced by the King's Bench Division, which issues a *certiorari* to bring up the recognizance. *See* Short and Mellor Cr. Pr. (2nd ed.) 289: *R.* v. *Mul Luchman* [1909] 44 L. J. Newsp. 60.

Practice at general or quarter sessions.]—The practice for courts of quarter sessions as to the estreat of recognizances other than those of the defendant and his sureties is governed by s. 31 of the *Criminal Law Act*, 1826 (7 G. 4, c. 64), which provides that "in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy (*this form of recognizance was abolished by* 4 & 5 W. 4, c. 76, s. 70), shall therein make default, the officer of the court by whom the estreats are made out shall prepare a list in writing, specifying the name of every person so making default and the nature of the offence in respect of which every such person, or his or her surety, was so bound, together with the residence, trade, profession or calling of every such person or surety, and shall in such list distinguish the principals from the sureties, and shall state the cause, if known, why each such person has not appeared, and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed: and every such officer shall and is hereby required before any such recognizance shall be estreated to lay such list, if at a court of oyer and terminer or gaol delivery in any county besides Middlesex and London" (*i.e.*, City) . . . "before one of the justices of these courts respectively; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court; who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, corporate officer, chairman, or justice of the peace before whom respectively such list shall have been laid."

Subject to the special provisions of the Act above quoted, the general practice of courts of quarter sessions is governed by the *Levy of Fines Act*, 1822 (3 G. 4), c. 46, which directs (s. 2) that the clerk of the peace or town

clerk shall copy on a roll such forfeited recognizances, and shall within such time as shall be fixed by the court of quarter sessions, not exceeding twenty-one days from the adjournment of such court, send a copy of such roll, with a writ of *distringas* and *capias* [*see forms scheduled to* 22 & 23 *Vict. c.* 21], or a writ of *fieri facias* and *capias*, to the sheriff of such county, which shall be the authority to him for proceeding to the immediate levying and recovering of such forfeited recognizances. Section 8 of the same Act requires the sheriff to return the writ and roll on the first day of the quarter sessions with a return of what has been done under it, and s. 5 of the *Levy of Fines Act*, 1823 (4 G. 4, c. 37), requires the clerk of the peace or town clerk to send to the Treasury within twenty days after the holding of quarter sessions a copy or extract of all rolls returned by the sheriff, with an account of the causes of the discharge by the court of any forfeiture, and the reason of the sheriff for any failure to levy a forfeited recognizance. In municipal boroughs in which the town clerk and clerk of the peace are not the same person, the latter is to discharge the duties imposed on the town clerk by the Act of 1822 : *see* 45 & 46 Vict. c. 50, s. 222. By s. 17 of the *Quarter Sessions Act*, 1849 (12 & 13 Vict. c. 45), the provisions of the Acts of 1822 and 1823 as to the procedure with respect to forfeited recognizances are applied also to fines and amercements : as to which see *Re Nottingham Corporation* [1897] 2 Q. B. 502 : *R.* v. *Dover*, 1 Cr. M. & R. 726 ; 1 Chit. Cr. L. 726 ; 4 Chit. Cr. L. 487.

In the case of a recognizance by the defendant the order to forfeit is made after he is called, and on his failure to appear during the sessions, without any further notice or summons. In the case of sureties, ss. 5, 6, of 3 G. 4, c. 46, gives a right of appeal to the sessions to all persons whose recognizances have been forfeited if they give proper security : and on the appeal the court may discharge the whole or part of the forfeiture, and discharge the obligee if in custody, and by s. 2 of the *Criminal Procedure Act*, 1853 (16 & 17 Vict. c. 30) courts of quarter sessions are empowered to forfeit recognizances by principals or sureties to keep the peace or be of good behaviour, on proof of the conviction of the principal of any offence which is by law a breach of the conditions of the recognizance. The procedure of the Acts of 1822 (3 G. 4, c. 46) is applied to recognizances so forfeited.

SECT. 9

INDICTMENT, IN WHAT CASES QUASHED.

In what cases.]—It was the rule of the common law that if an indictment or inquisition was bad on the face of it, or if there was any such insufficiency, either in the caption or in the body of an indictment or inquisition, as would make erroneous any judgment whatsoever given on any part thereof, the court might in its discretion quash the indictment. 2 Hawk. c. 25, ss. 146-149 ; 1 Chit. Cr. L. (2nd ed.) 298 : *R.* v. *Taylor*, 9 Dowl. 600. An indictment against six for exercising a trade was quashed because it was a distinct offence in each, and could not be made the subject of a joint prosecution. *R.* v.

Tucker, 4 Burr. 2046 : *R.* v. *Weston*, 1 Str. 623. In *R.* v. *Philips*, 2 Str. 921, judgment was arrested on an indictment of six for perjury (to which four pleaded and were convicted), on the ground that the offence was in its nature several, and two could not be indicted together for it. And in several instances indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law : *see R.* v. *Burkett*, Andr. 230 : *R.* v. *Sarmon*, 1 Burr. 516 : *R.* v. *Wright*, 1 Burr. 543 : *R.* v. *Philpotts*, 1 C. & K. 112; for instance, an indictment against an overseer for misconduct in preparing electoral registers was quashed on the ground that the offence, if any, was not punishable on indictment. *R.* v. *Hall* [1891] 1 Q. B. 747; 60 L. J. (M. C.) 129. An indictment under 46 & 47 Vict. c. 51, which charged the defendant with "corrupt practices," at a parliamentary election, without setting out the nature of such corrupt practices as "bribery," etc., was quashed as being too general. *R.* v. *Norton*, 16 Cox, 59, Pollock, B., approved by the majority of the judges in *R.* v. *Stroulger*, 17 Q. B. D. 327; 55 L. J. (M. C.) 137. An indictment for obtaining money by false pretences was quashed by the judge at the trial, *after the case for the prosecution had closed*, on the judge discovering that the indictment did not contain the words "with intent to defraud." *R.* v. *James*, 12 Cox, 127, Lush, J. An indictment for libel was quashed, the expressions used in the alleged libel not being *primâ facie* libellous, and the indictment containing no averments or innuendoes showing that those expressions were intended to impute improper conduct to the prosecutor. *R.* v. *Yates*, 12 Cox, 233, Quain, J. But now, under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 5 (1), wide powers of amendment are given, and defects which would formerly have been fatal will ordinarily be met by the application of those powers. *See ante*, p. 54.

If the application is made on the part of the prosecution, the court will quash the indictment in all cases where it appears to be so defective that the defendant cannot be convicted on it, and where the prosecution appears to be *bonâ fide*, and not instituted from malicious motives, or for the purposes of oppression. If the prosecution is instituted by the attorney-general, an application to quash the indictment is never made upon the part of the prosecutor, because the attorney-general may himself enter a *nolle prosequi*, which will have the same effect (*see post*, p. 122). *R.* v. *Stratton*, 1 Doug. 239; *cf. R.* v. *Colling*, 2 Cox, 184, as to the procedure where the indictment has been removed by *certiorari*.

An application to quash may, it would seem, be made upon the part of the prosecution at any time before the defendant has been actually tried upon the indictment. *See R.* v. *Webb*, 3 Burr. 1468; 1 W. Bl. 460. But after judgment for the prisoner on demurrer, the indictment cannot be quashed at the instance of the prosecutor. *R.* v. *W. Smith*, 2 M. & Rob. 109. Where the application is made to the High Court, the rule is absolute in the first instance, if the defendant has not appeared and pleaded. *R.* v. *Stowell*, 1 Dowl. (N. S.) 320.

Before an application of this kind is made on the part of the prosecution, a new bill for the same offence must have been preferred against the defendant and found. *R.* v. *Wynn*, 2 East, 226. And when the court, upon such an applica-

tion, orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of the former indictment. *R.* v. *Webb*, 3 Burr. 1468; 1 W. Bl. 460. *R.* v. *Dunn*, 1 C. & K. 730; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it were not quashed: *R.* v. *Glenn*, 3 B. & Ald. 373: *R.* v. *Webb*, *supra;* and (particularly where there has been any vexatious delay upon the part of the prosecutor, *Id.*) that the name of the prosecutor be disclosed. *R.* v. *Glenn*, *supra*.

Where the application is made upon the part of the defendant, the courts have almost uniformly refused to quash an indictment, where it appeared to be for some grave crime, such as treason or felony; Com. Dig. Indictment (H.); 2 Hawk. c. 25, s. 146; 1 East, P. C. 110: *R.* v. *Sheares*, 27 St. Tr. 255, 266; 1 Chit. Cr. L. 298: *R.* v. *Lynch* [1903] 1 K. B. 744: *R.* v. *Johnson*, 1 Wils. 325; or for forgery, perjury, subornation, or nuisance to highways. *R.* v. *Belton*, 1 Salk. 372: *Anon.*, 1 Vent. 369; *cf.* 1 Sid. 54: *R.* v. *Thomas*, 3 D. & R. 621; *R.* v. *Burnby*, 5 Q. B. 348; 13 L. J. (M. C.) 29: *R.* v. *Withers*, 4 Cox, 17. They have also refused to quash indictments for cheating: *R.* v. *Orbell*, 6 Mod. 42; for selling flour by false weights: *R.* v. *Crookes*, 3 Burr. 1841; for extortion or oppression: *R.* v. *Wadsworth*, 5 Mod. 13; for not executing a magistrate's warrant: *R.* v. *Bailey*, 2 Str. 1211; against overseers for not paying money over to their successors: *R.* v. *King*, 2 Str. 1268; and the like. They have also refused to quash indictments for not repairing highways or bridges, or for other public nuisances, *R.* v. *Belton*, 1 Salk. 372: *Anon.*, 1 Vent. 369: *R.* v. *Bishop*, Andr. 220: *R.* v. *Sutton*, 4 Burr. 2116, unless there is a certificate that the nuisance is removed; *R.* v. *Leyton*, Cro. Car. 584; *R.* v. *Wigg*, 2 Salk. 460; 1 Ld. Raym. 1165; nor will they quash an indictment for forcible entry, *R.* v. *Dyer*, 6 Mod. 96, unless perhaps, when the possession has been afterwards given up.

But when it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion by the defendant after plea pleaded; although in a doubtful case they will leave him to test its validity by demurrer (*R.* v. *Brownlow*, 11 A. & E. 119, 127, 128) or motion in arrest of judgment (*R.* v. *Lynch* [1903] 1 K. B. 444: *R.* v. *Sheares*, 27 St. Tr. 359) or by appeal. It is said that a motion to quash will not be granted upon a trial of an indictment, at *nisi prius*, if the objections taken appear on the record. *R.* v. *Souter*, 2 Stark. (N. P.) 423; Short and Mellor, Cr. Pr. (2nd ed.) 140. It is no ground for quashing an indictment for non-compliance with the provisions of the *Vexatious Indictments Act* (22 & 23 Vict. c. 17, s. 1, *ante*, p. 67) that the charge arising in one petty sessional division of a county, the committal is by justices sitting in and acting for another petty sessional division of the same county, such a committal being good in point of law. *R.* v. *Beckley*, 20 Q. B. D. 187; 57 L. J. (M. C.) 22.

How.]—The application to quash an indictment is made to the court where the bill is found; except in cases of indictments at sessions or in other inferior

courts, in which cases the application may be made to the High Court of Justice (King's Bench Division) after removing the record by *certiorari*. But a court of quarter sessions has itself authority to quash an indictment found there, before plea pleaded. *R.* v. *Wilson*, 6 Q. B. 620; 14 L. J. (M. C.) 3.

It was formerly held that the application, if made upon the part of the defendant, must in all cases be made before plea pleaded; Fost. 231: *R.* v. *Rookwood*, cas. temp. Holt, 684; 13 St. Tr. 139; and *see R.* v. *Thompson* [1914] 2 K. B. 99; 83 L. J. (K. B.) 643; 110 L. T. 272; 78 J. P. 212; 30 T. L. R. 223; 9 Cr. App. R. 252; but this, while just and convenient, is not essential: *R.* v. *Chapple*, 17 Cox, 455; and where it is clear that an indictment has been found without jurisdiction, or has a substantial and apparent defect, the court will quash it on motion by the defendant *after* plea pleaded: *R.* v. *Heane*, 4 B. & S. 947; 33 L. J. (M. C.) 115; and even after the case for the prosecution had closed. *R.* v. *James*, 12 Cox, 127. As to appeal, *see R.* v. *Thompson*, *supra*. Where an indictment had already, upon the application of the defendant, been removed into the Court of King's Bench by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognizance by not having carried the record down for trial; *Anon*, 1 Salk. 380; and a motion to quash after *certiorari*, trial and conviction has been refused. *R.* v. *Marsh*, 6 A. & E. 236.

By sub-s. 1 of s. 5 of the *Indictments Act*, 1915 (*ante*, p. 54) the court may before trial or at any stage of a trial amend a defective indictment unless, having regard to the *merits* of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

By sub-s. 2, where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been found by the grand jury in the amended form.

SECT. 10.

INDICTMENT, WHEN AND WHERE TRIED.

When.]—Indictments for high treason or felony are usually tried at the same assizes or sessions at which they are preferred to and found by the grand jury. This practice accords with the requirements of s. 6 of the *Habeas Corpus Act*, 1679 (31 Car. 2, c. 2).

The same course is now pursued as to misdemeanors. By 14 & 15 Vict. c. 100, s. 27, "no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always,

that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, and upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose." This enactment abolished the old practice which entitled the defendant in cases of misdemeanor to postpone his trial till the next assizes or sessions. 4 Bl. Com. 351.

Postponement of trial.]—The trial may, however, be postponed to the next assizes or sessions at the instance of the prosecutor or the defendant, on showing to the court a sufficient cause for the delay, such as the sudden illness of the prisoner, or the unavoidable absence or illness of a necessary and material witness, the existence of prejudice in the jury, and the like. *See* 31 Car. 2, c. 2, s. 6 : *R.* v. *D'Eon*, 3 Burr. 1513 : *R.* v. *Jolliffe*, 4 T. R. 285 : *R.* v. *Morphew*, 2 M. & Sel. 602 : *R.* v. *Hunter*, 3 C. & P. 591 : *R.* v. *Streek*, 2 C. & P. 413 : *R.* v. *Stevenson*, 2 Leach, 546 : *R.* v. *Chapman*, 8 C. & P. 558 : *R.* v. *Owen*, 9 C. & P. 83 : *R.* v. *Macarthy*, C. & Mar. 625 : *R.* v. *Mobbs*, 2 F. & F. 18 : *R.* v. *Langhurst*, 10 Cox, 353 : *R.* v. *Taylor*, 11 Cox, 340 : *R.* v. *Dripps*, 13 Cox, 25 (Ir.). In *R.* v. *Palmer*, 6 C. & P. 652, the Central Criminal Court postponed until the next session the presentment of a bill for arson to the grand jury, upon the ground of the illness of a witness sworn to be material, and refused to examine her deposition to ascertain whether she deposed to material facts. In *R.* v. *Heesom*, 14 Cox, 40, it was held by Lush, J., that the presentment of a bill to the grand jury cannot be postponed to the next assizes, on the ground that other and like charges may before that time be brought against the prisoner, and that if no bill was presented the prisoner would be entitled to her discharge on bail. His lordship said that the case of *R.* v. *Palmer*, *supra*, was an application founded on the absence of a material witness for the Crown, which was provided for by s. 6 of the *Habeas Corpus Act*, 1679 (31 Car. 2, c. 2). *But see R.* v. *Doran*, 10 Cr. App. R. 67. Where a witness for the Crown, on the ground of whose illness it is sought to postpone the trial, was not examined before the committing magistrate, the court will require an affidavit as to what the witness is expected to prove. *R.* v. *Savage*, 1 C. & K. 75 : *R.* v. *Lawrence*, 4 F. & F. 901. In *R.* v. *Taylor*, 15 Cox, 8, Baggallay, L.J., postponed the presentment of a bill to the next assizes, on the ground that all the witnesses resided at a workhouse in which small-pox had broken out, and that their attendance at the assizes would be dangerous to the public, as they might carry infection, and admitted the prisoner to bail on his own recognizances to appear at the next assizes. The production by the prosecution at the trial of evidence not produced before the magistrate, and not communicated to the prisoner previously to the trial, may be ground for a postponement of the trial in the interests of the defendant. *R.* v. *Flannagan*, 15 Cox, 403. Where the defendant was

indicted for having carnal knowledge of a girl under ten years old, an application by the prosecution for the postponement of the trial, with a view to the instruction of the girl, was refused. *R.* v. *Nicholas*, 2 C. & K. 246; *and see R.* v. *Cox*, 62 J. P. 89, and 2 Russ. Cr. (7th ed.) 2267, 2268. It seems that the trial may be postponed, on the defendant's application, after the jury have been charged with the indictment, and before any evidence has been given in the case. *R.* v. *Fitzgerald*, 1 C. & K. 201. *See R.* v. *Downey*, 3 Cr. & Dix. (Ir.) 314. Where the application is made by the defendant, he will be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either to detain the defendant in custody or admit him to bail, or to discharge him on his own recognizances. *R.* v. *Beardmore*, 7 C. & P. 497 : *R.* v. *Parish*, *Id.* 782 : *R.* v. *Osborne*, *Id.* 799 : *R.* v. *Bridgman*, C. & Mar. 271. After a bill has been found, if the offence is of a serious nature, or an absent witness has been kept out of the way by the defence, the court will not admit the prisoner to bail. *R.* v. *Chapman*, 8 C. & P. 558 : *R.* v. *Guttridge*, 9 C. & P. 228 : *R.* v. *Owen*, *Id.* 83 : *R.* v. *Bowen*, *Id.* 509. *See Bail*, *ante*, p. 87.

By sub-s. 4 of s. 5 of the *Indictments Act*, 1915 (*ante*, p. 54), where before trial or at any stage of a trial the court is of opinion that a postponement is expedient as a consequence of the indictment having been amended or a separate trial of a count ordered under the Act, the court shall make such order as to postponement as appears necessary.

By sub-s 5, where an order of the court is made under this section for a separate trial or for the postponement of a trial—(*a*) if such order is made during a trial the court may discharge the jury from giving a verdict on the count or counts of which the trial is postponed or on the indictment, as the case may be; (*b*) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; (*c*) the court may make such order as it thinks fit as to costs, bail, enlargement of recognizances and otherwise.

By sub-s. 6, any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

Under the *Assizes Relief Act*, 1889 (52 & 53 Vict. c. 12), if a person committed for trial at sessions is not tried at the next sessions, the next court of assize may on his application try or discharge him or release him on bail, unless the delay is due to special reasons, such as the removal of the indictment by *certiorari*, or the impossibility of producing the witnesses for the crown. S. 3 (1) (3). If the next court of quarter sessions has not tried him before the next subsequent assizes, the judge of assize must try or discharge him. S. 3 (2).

Section 6 of the *Habeas Corpus Act*, 1679 (31 Car. 2, c. 2), provides for the release of persons committed for trial for high treason or felony if they are not indicted at the latest in the second term, assizes, or sessions after their committal.

Where.]—Indictments for felonies and misdemeanors are tried within the jurisdiction in which the offence is committed, or in which by some statute it may lawfully be tried (*ante*, pp. 29 *et seq.*), and before the court in which the indictment is preferred, or into which it has been removed by *certiorari* or order of removal.

The following statement will show the courts competent to try any indictable offence, subject to the rules as to venue and national jurisdiction stated *ante*, pp. 29 *et seq.*

High Court.]—The High Court of Justice (K. B. D.), as the successor of the Court of King's Bench, has jurisdiction to try all indictable offences against the law of England. This jurisdiction is concurrent with that of the courts of oyer and terminer, or gaol delivery, or courts of quarter sessions. *See* Short and Mellor Cr. Pr. (2nd ed.) 86. The jurisdiction is not exercised except (1) Where the indictment is removed into the court by *certiorari;* (2) Where the indictment is found in the counties of London or Middlesex by a grand jury summoned under 35 & 36 Vict. c. 52, and R. S. C., Jan. 15, 1903, made under s. 89 (3) of the *Local Government Act*, 1888; (3) In the case of criminal informations filed in the court (*see post*, pp. 127 *et seq.*). The court has special jurisdiction to try the following offences :—Treason and misprision of treason committed out of the realm (35 H. 8, c. 2 : *R.* v. *Lynch* [1903] 1 K. B. 444); wilful neglect or delay to deliver or transmit writs for the election of members of parliament (53 G. 3, c. 89, s. 6); oppressions and crimes by governors, etc., of colonies, or persons in public employment out of Great Britain (11 W. 3, c. 12; 42 G. 3, c. 85; 1 & 2 Geo. 5, c. 28, s. 10; offences by officials of the crown in India (10 G. 3, c. 47, s. 4; 13 G. 3, c. 63, s. 39; 21 G. 3, c. 70, s. 7). As to offences in India, *see* Ilbert, Government of India (2nd ed.) 255 *et seq.* None of the above Acts, except 35 H. 8, c. 2, appears to extend to treason or felony. *R.* v. *Shawe*, 5 M. & Sel. 403. Prosecutions under them have been rare. *See R.* v. *Jones*, 8 East, 31; *Picton's case*, 30 St. Tr. 225 : *R.* v. *Eyre*, L. R. 3 Q. B. 487 : *R.* v. *Turner* [1889] 24 L. J. Newsp. 466, 469, 479; Short and Mellor Cr. Pr. (2nd ed.) 85.

Courts of Assize, etc.]—Courts acting under a commission of assize only try such criminal offences as are sent to them for trial on a transcript of a record of the King's Bench Division of the High Court of Justice. *See* Short and Mellor Cr. Pr. (2nd ed.) 110; *post*, *tit. Certiorari*, p. 110). The ordinary circuit courts of oyer and terminer and gaol delivery have jurisdiction to try any offence triable at common law, or by statute, in the county or other district for which they are commissioned, and not specifically excluded from their jurisdiction. Courts of assize, oyer and terminer, and gaol delivery, were made part of the High Court by ss. 16, 29 of the *Judicature Act*, 1873 : *R.* v. *Dudley*, 14 Q. B. D. 273, 560 : *R.* v. *Parke* [1903] 2 K. B. 432, 436 : *R.* v. *Davies* [1906] 1 K. B. 32. Special commissions of oyer and terminer, etc., can be issued, but are now rare. The jurisdiction of these courts is concurrent with that of quarter sessions as to cases wherein the latter have jurisdiction.

The sittings of courts of assize are regulated by Orders in Council. As to

the dispensing with the holding of the court when there is no business, *see* 8 Edw. 7, c. 41, ss. 1, 2, *ante*, p. 72.

Central Criminal Court.]—The Central Criminal Court is created by a commission of oyer and terminer and gaol delivery for the district allotted to it, and for the prisons appointed as its prisons (4 & 5 W. 4, c. 36, ss. 2-4; 44 & 45 Vict. c. 64, s. 2: *R.* v. *Boaler*, 17 Cox, 569; *R.* v. *Marshall*, 34 L. J. Newsp. 48). It has also a special admiralty jurisdiction (4 & 5 W. 4, c. 36, s. 22). The history of the court is to be found in 6 St. Tr. (N. S.) 1135; and *see Leverson* v. *R.*, L. R. 4 Q. B. 394. Under the *Judicature Act*, 1873 (36 & 37 Vict. c. 66), ss. 16, 29, it has become a branch of the High Court. *R.* v. *Parke* [1903] 2 K. B. 432, 439, 442.

The court must hold sessions at least twelve times a year (4 & 5 W. 4, c. 36, s. 15). The sessions are fixed annually by four or more judges of the High Court in October of each year (44 & 45 Vict. c. 68, s. 18).

Courts of Quarter Sessions: (*a*) *Relation to courts of assize.*]—Where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county, after the grand jury have been discharged, it has been considered proper that the quarter sessions should not proceed with the trial of prisoners, but after disposing of their other business, should adjourn to a future day. *See* 9 C. & P. 790. But as the authority of a county or borough court of quarter sessions is not in law determined or suspended by the commission of assize, a trial at the sessions, during the continuance of the assizes in the same county, is valid in law. *Smith* v. *R.*, 13 Q. B. 738; 18 L. J. (M. C.) 207. As regards quarter sessions within the Central Criminal Court district, this rule is expressly recognized by 4 & 5 W. 4, c. 36, s. 21.

It was the duty of the sheriff under 3 H. 7, c. 3, and is the duty of the governor of the prison, to lay before the court of assize or quarter sessions a calendar of prisoners in the prison for trial before it: 5 & 6 W. 4, c. 38, s. 3; 14 & 15 Vict. c. 55, s. 19; and 28 & 29 Vict. c. 126, s. 62.

(*b*) *Sittings.*]—County quarter sessions must be held in the first week after 31st March, 24th June, 11th October and 28th December respectively (11 G. 4, and 1 W. 4, c. 70, s. 35), unless the justices at special meeting alter the date so that the sessions may be held not earlier than fourteen days before nor later than fourteen days after the week in which they would otherwise be held (8 Edw. 7, c. 41, s. 3). These provisions do not preclude the justices from holding other general sessions or from holding quarter sessions by adjournment at other dates. *See* 1 & 2 Vict. c. 4; Archbold Q. S. (6th ed.) 64. As to forming a second court, *see* 21 & 22 Vict. c. 73, ss. 9-11.

The dates of borough quarter sessions are fixed by the recorder subject to the directions of the Home Secretary (45 & 46 Vict. c. 50, s. 165): *see* Archbold Q. S. (6th ed.) 20. For table of boroughs which have separate courts of quarter sessions, *see* Archbold Q. S. (6th ed.) 614. As to forming a second court, *see* 45 & 46 Vict. c. 50, s. 168.

When not more than five days before the time fixed for holding quarter sessions, it appears that there is no business to be transacted, the court need not be held, and a notice may be sent dispensing with the attendance of jurors, 8 Edw. 7, c. 41, ss. 1, 2.

Some judges of assize have considered it their duty to deliver the gaols of the prisoners whom they found there, although the offences for which such prisoners had been committed were within the jurisdiction of quarter sessions, and although the prosecutor and his witnesses had been bound over to prosecute and give evidence at quarter sessions. The English decisions on this question are collected in *R.* v. *Clifford* [1895] 16 New South Wales Rep. (Law) 12.

The *Assizes Relief Act*, 1889 (52 & 53 Vict. c. 12), provides (s. 1) that whenever any person has been committed to gaol or admitted to bail by a justice or justices under s. 22 or s. 25 of 11 & 12 Vict. c. 42, charged with an indictable offence triable at quarter sessions, the persons bound over to prosecute and give evidence shall be bound over to attend for that purpose at the next practicable court of quarter sessions having jurisdiction to try such person for such offence, unless such justice or justices for special reasons think fit otherwise to direct; and where the persons are so bound over, the person charged shall be tried at the said court of quarter sessions, and a court of oyer and terminer or general gaol delivery shall not be required to deliver such person from gaol, unless the High Court of Justice shall by order direct that such person shall be indicted and tried at a court of oyer and terminer or general gaol delivery having jurisdiction to try him for such offence. Sub-s. 2 of s. 1 prescribes the procedure where the High Court has made the order mentioned in sub-s. 1. Section 3 prescribes the course of procedure where a prisoner having been committed to gaol on a charge for an indictable offence, and persons having been bound over to prosecute and give evidence at quarter sessions, the prisoner is not tried at those sessions.

(*c*) *Jurisdiction.*]—The present form of the Commission of the Peace (prescribed by Order in Council of Feb. 22, 1878, and printed in Statutory Rules and Orders Revised (ed. 1904) vol. 1, *tit. Clerk of the Crown*), authorizes the justices to inquire "of all and in manner of crimes and trespasses, and all and singular other offences of which the justices of our peace may or ought lawfully to inquire," . . . except in cases of difficulty, which are to be transmitted to the assizes, "and to hear and determine all and singular the crimes, trespasses, and offences aforesaid according to the laws and statutes of our realm, as in the like case it has been accustomed or ought to be done." As to the jurisdiction of courts of quarter sessions under the commission of the peace, *see* Archbold Q. S. (6th ed.): *Keen* v. *R.*, 10 Q. B. 928; 2 Cox, 341.

A court of county or borough quarter sessions has jurisdiction to try any indictable offence except those in the annexed list. The justices of the Soke of Peterborough are said to have a wider jurisdiction; *see* Gaches, Soke of Peterborough, p. 52, 40 L. J. Newsp., 8 July, 1905. But this has been questioned. *See R.* v. *Holdich*, 15 Cr. App. R. 122. The jurisdiction of quarter sessions rests

on the *Quarter Sessions Act*, 1842 (5 & 6 Vict. c. 38, s. 1), except in the cases in italics, which depend on the particular statutes specified :—

1. Treason, or misprision of treason;

2. Murder;

3. Capital felony, or any felony, which when committed by a person not previously convicted of felony, is punishable by *penal servitude for life* (20 & 21 Vict. c. 3, ss. 2, 6);

4. Offences against the King's title, prerogative, person, or government, or against either House of Parliament;

5. Offences subject to the penalties of *præmunire;*

6. Blasphemy, and offences against religion;

7. Administering or taking unlawful oaths;

8. *Any offence against the Perjury Act*, 1911, *or any offence which under any enactment for the time being in force is declared to be perjury or to be punishable as perjury or as subornation of perjury* (1 & 2 Geo. 5, c. 6, s. 10);

9. *Any offence against the Forgery Act*, 1913, *or any offence which under any enactment for the time being in force is declared to be forgery or to be punishable as forgery* (3 & 4 Geo. 5, c. 27, s. 13);

10. *Offences against the False Personation Act*, 1874 (37 & 38 Vict. c. 36, s. 3);

11. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern;

12. *Offences against* s. 9 *of the Night Poaching Act*, 1828 (9 G. 4, c. 69);

13. Bigamy and offences against the laws relating to marriage;

14. Abduction of women and girls, *and indictable offences against the Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69, s. 17); *and incest* (8 Edw. 7, c. 45, s. 4 (2));

15. Endeavouring to conceal the birth of a child;

16. Composing, printing, or publishing blasphemous, seditious, or defamatory libels;

17. Bribery [except bribery of and by members, etc., of corporations, within 52 & 53 Vict. c. 69, s. 6]; *and undue influence* (17 & 18 Vict. c. 102, s. 10);

18. *Corrupt practices at parliamentary or municipal elections, including elections of county, district, and parish councils, and of boards of guardians* (17 & 18 Vict. c. 102, s. 10; 46 & 47 Vict. c. 51, s. 53; 47 & 48 Vict. c. 70, ss. 30, 35, & 36, sch.; 51 & 52 Vict. c. 41, s. 75; 56 & 57 Vict. c. 73, s. 48), *or elections in the City of London* (47 & 48 Vict. c. 70, s. 35; 50 & 51 Vict. c. xiii.); *or of metropolitan borough councils* (62 & 63 Vict. c. 14);

19. *Misdemeanors against the Prevention of Corruption Act*, 1906 (6 Edw. 7, c. 34, s. 2 (5)). (*a*)

20. Unlawful combinations and conspiracies, except conspiracies and com-

(*a*) Under this Act the sessions have no jurisdiction to inquire of such offences which seems to preclude the grand jury from finding a bill for an offence under the Act. Quarter sessions have jurisdiction to try offences under the *Public Bodies Corrupt Practices Act* [1889] (52 & 53 Vict. c. 69). *See* s. 6 of that Act.

binations to commit any offence which the justices or recorder respectively have or has jurisdiction to try when committed by one person;

21. Stealing or fraudulently taking, or injuring or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein;

22. Stealing, or fraudulently destroying or concealing, wills or testamentary papers or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments;

23. *Misdemeanors against ss.* 20, 21, *and* 22 *of the Larceny Act*, 1916 (which relate to fraudulent conversion, fraudulent conversion by trustee, factors obtaining advances on the property of their principals), 6 & 7 Geo. 5, c. 50, s. 38;

24. *Offences against the Official Secrets Acts*, 1911 and 1920 (1 & 2 Geo. 5, c. 28, s. 10 (3); 10 & 11 Geo. 5, c. 74).

By the *Burglary Act*, 1896 (59 & 60 Vict. c. 57), quarter sessions were given jurisdiction to try a person charged with burglary; but the Act directed that a justice of the peace when committing for trial a person charged with that offence should commit him for trial before a court of assize unless owing to the absence of any circumstances which make the case a grave or difficult one he thinks it expedient in the interests of justice to commit him for trial before a court of quarter sessions; and the *Assizes Relief Act*, 1889, shall then apply. These provisions are now repealed, but re-enacted, by the *Larceny Act*, 1916, s. 38.

Offences against the bankruptcy laws are triable at quarter sessions: *see* 32 & 33 Vict. c. 62, s. 20, and 37 & 38 Vict. c. 96 (Stat. Law Rev.), which repealed the provision to the contrary in 5 & 6 Vict. c. 38, s. 1.

The jurisdiction of quarter sessions to try a person for the common law misdemeanor of attempting to commit suicide is not taken away by 24 & 25 Vict. c. 100, ss. 11-16, which render an attempt to commit murder a felony, punishable by penal servitude for life; for attempting to kill one's self is not an attempt to commit murder within the meaning of that statute. *R.* v. *Burgess*, L. & C. 258; 32 L. J. (M. C.) 55. Where an indictment charged that the defendants conspired by divers false pretences to defraud the prosecutor of his money; and it was objected that the facts ought to have been set out, so as to show that the false pretences were within the jurisdiction of the sessions, by which the indictment had been tried, the court of Queen's Bench held that, after verdict it must be taken that the jury had found the defendants guilty on facts, proving a conspiracy to defraud by such false pretences as were cognizable by the sessions. *Latham* v. *R.*, 5 B. & S. 635; 33 L J (M. C.) 197.

A court of quarter sessions cannot try an indictment against a corporation. *See ante*, p. 10, *post*, p. 111.

Courts of quarter sessions have power to transmit to the assizes for trial indictments found before them which they have no jurisdiction to try (*ante*, p 107, or which from the nature of the charge should more properly be tried at assizes. The power arises under the commission of the peace, and is preserved by s. 5 of the *Assizes Relief Act*, 1889 (52 & 53 Vict. c. 12). It is

specifically given as to quarter sessions within the Central Criminal Court district by 4 & 5 W. 4, c. 36, s. 19. These powers are distinct from the procedure by *certiorari*, *infra*.

Indictments found at the sessions and transmitted by the justices to the assizes must be tried at the assizes, although they have not been removed by *certiorari*. *R.* v. *Wetherell*, R. & R. 381. An indictment was found at quarter sessions against the defendant, who was, upon a certificate of such finding, taken before a justice under 11 & 12 Vict. c. 42, s. 3, and bound by recognizances to appear and plead at the *assizes*. The indictment was not transmitted to the assizes, but remained in the custody of the clerk of the peace. It was held that the transmission of the indictment to the assizes was in the discretion of the justices, and that the judge of assize had no power to order such transmission, and that the indictment having been found at sessions and not transmitted for trial at the assizes, it could not be tried at the assizes. Another indictment against the defendant for the same offence having however been found by the grand jury at the assizes, it was held, that the defendant being bound by the above-mentioned recognizance, must be called upon it to plead to such second indictment. *R.* v. *Wildman*, 12 Cox, 354, Keating, J.

Change of place of trial.]—The King's Bench Division of the High Court of Justice has jurisdiction to change the place of trial of any felony or misdemeanor, whenever it is necessary for the purpose of securing, so far as possible, a fair and impartial trial. *R.* v. *Holden*, 5 B. & Ad. 347, 354, Denman, C.J.: and *see R.* v. *Boughton* [1895] 2 Ir. Rep. 386; *ex parte Gyde*, 72 J. P. 504. For this purpose a writ of *certiorari* must issue to remove the indictment into the King's Bench Division, unless the court or a judge think fit to direct the trial to be held at the Central Criminal Court, under 19 & 20 Vict. c. 16, *post*, p. 118. Indictments may be removed from the Crown Court of Assize without a *certiorari*, because the court is made part of the High Court by the *Judicature Act*, 1873 (36 & 37 Vict. c. 66), ss. 16, 29. *R.* v. *Dudley*, 14 Q. B. D. 273, 560; 64 L. J. (M. C.) 32. An *order*, however, for their removal is requisite, which is obtained in the same way, and is subject to the same conditions as *certiorari*. *See* Cr. Off. Rules, 1906, rr. 12-19, *post*, pp. 115, 119. Short and Mellor, Cr. Pr. (2nd ed.) 106, 543.

SECT. 11.

CERTIORARI.

THE writ of *certiorari* is an original writ, usually issuing out of the King's Bench Division, when the crown would be *certified* of any record in any other court of record. Fitz. N. B. 245 a; 36 & 37 Vict. c. 66, s. 34. It may also, under 4 & 5 W. 4, c. 36, s. 16, be issued by the judges of the High Court who are in the commission of the Central Criminal Court, and by the recorder of the city of London, to remove from courts of quarter sessions having jurisdiction within the Central Criminal Court district, indictments found in such courts for offences cognizable by the Central Criminal Court under the Act; and under 5 & 6 Vict. c. 38, s. 2, may be issued by a judge of assize in respect of indictments found or taken before courts of quarter sessions (for any county or borough within his commission) in respect of offences which they have no jurisdiction to try (*ante*, p. 106). There seems, however, to be no power to remove by *certiorari* the order of a justice committing a person for trial for an indictable offence. *See R.* v. *Roscommon Justices* [1894] 2 Ir. Rep. 158. The power to remove by *certiorari* an indictment found at quarter sessions is not affected by 52 & 53 Vict. c. 12 (*Assizes Relief Act*, 1889). *See* s. 5. The writ is directed in the King's name to the judges or officers of inferior courts, requiring them to return the records of a certain indictment or inquisition depending before them, in order that the party may have the benefit of a trial in the King's Bench Division, or before such justices as his Majesty shall assign to hear and determine the cause. For the removal of indictments into the King's Bench Division the writ is sued out of the King's Bench Division and issued from the crown office: that division of the High Court, as successor to the old Court of King's Bench, having a general superintendence over all other courts of criminal jurisdiction, whether ancient or newly created (2 Hawk. c. 27, s. 22), and being the sovereign ordinary court of justice in criminal causes. 4 Bl. Com. 320: 36 & 37 Vict. c. 66, s. 34. This writ is frequently used in order the better to consider and determine the validity of indictments and the proceedings thereon, and to prevent a partial and insufficient trial, which it is apprehended would take place in the original jurisdiction. 1 Chit. Cr. L. 371; 2 Hale, 210. The effect of the writ is to remove all proceedings such as are described therein, which have taken place between the *teste* and return, although they may have been commenced after the *teste*. *R.* v. *Battams*, 1 East, 298; 2 Hawk. c. 27, s. 73. It may be applied for before or after the finding of any indictment for misdemeanor; 60 G. 3 and 1 G. 4, c. 4, s. 4. The writ is of no effect unless it is delivered to the court below before the time for its return has expired.

Form of the writ.]—The following is the form of the writ of *certiorari* to remove an indictment into the King's Bench Division, addressed to the justices of quarter sessions:—

George the Fifth, by the grace of God of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas King defender of the faith, to the keepers of our peace and our justices assigned to hear and determine divers crimes, trespasses, and other offences committed within our county of D., *and to every of them, greeting: We, being willing for certain reasons that all and singular indictments of whatsoever felonies* [*or misdemeanors*] *whereof* A. B. *is* [if indictment not yet preferred, add, *or may be*] *before you indicted (as it said) be determined before us in the King's Bench Division of our High Court of Justice, and not elsewhere, do command you and every of you that you or one of you do forthwith send under your seals, or the seal of one of you, before us in our said court at the Royal Courts of Justice, London, all and singular the said indictments, with all things touching the same, by whatsoever name the said* A. B. *may be called therein, together with this our writ, that we may cause further to be done thereon what right of and according to the law and custom of England we shall see fit to be done. Witness, Alfred Tristram, Baron Trevethin, at the Royal Courts of Justice, London, the* day of , in the year of our Lord, 19—.

The writ must bear the following indorsements :—

By order of court [or *of Mr. Justice , as the case may be.*]
At the instance of the prosecutor [*or* defendant].
Recognizance by the prosecutor [*or* defendant] *in the sum of £ , with* [*two*] *sureties in the sum of £ each.*

This writ was issued by E. F., of , agent for C. D., of , solicitor for the prosecutor [*or* defendant].

[For other forms of the writ, *see* Appendix to Cr. Off. Rules, 1906, Forms 7, 8, and 9.]

In what cases granted.]—The writ of *certiorari* is demandable as of right by the crown (Short and Mellor Cr. Pr. (2nd ed.) 15 : *R.* v. *Eaton*, 2 T. R. 89 : *R.* v. *Thomas*, 4 M. & S. 442); and issues as of course where the attorney-general or other officer of the crown applies for it, either as prosecutor or as conducting the defence on behalf of the crown; *Id.: R.* v. *Lewis*, 4 Burr. 2456, 2458; and this, even though the *certiorari* be expressly taken away by statute; for, as a general rule, the crown is not bound by statute unless expressly named therein : Maxwell on Statutes (5th ed.) p. 220 : Craies on Statute Law (4th ed.) 349 *et seq.* (For form of attorney-general's fiat for application for *certiorari*, *see* Appendix to Cr. Off. Rules, 1906, Form 23.) By analogy to this rule, the *certiorari* was formerly granted almost of course to private prosecutors, who were said to represent the crown, at whose suit all indictments are preferred. But now, "no indictment, except indictments against bodies corporate not authorized to appear by solicitor in the court in which the indictment is preferred, shall be removed into the King's Bench Division, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court or a

judge, by the party applying, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for a satisfactory trial of the same." Cr. Off. Rules, 1906, r. 13, which supersedes 16 & 17 Vict. c. 30, s. 4 (*rep.*), as to which *see R.* v. *Gate Fulford*, 6 Cox, 510. The reason for the provision as to bodies corporate is that they cannot appear by attorney in courts of oyer and terminer or gaol delivery, or at sessions of the peace. *R.* v. *Birmingham and Gloucester Rail. Co.*, 9 C. & P. 469, Parke, B. In *R.* v. *Puck & Co., Ltd.*, 28 T. L. R. 197, some doubt was expressed as to whether a limited company could not now plead to an indictment at the Central Criminal Court, but the point was not decided.

The difficult points of law likely to arise must be specifically pointed out in order to induce the court to grant a *certiorari*, and must be stated in the rule. *R.* v. *Joule*, 5 A. & E. 539 : *R.* v. *Josephs*, 8 Dowl. 178. If it is clearly made out that there is a fair and reasonable probability of partiality and prejudice in the jurisdiction within which the indictment would otherwise be tried, the *certiorari* will be granted. *R.* v. *Lewis*, 2 Str. 704 : *R.* v. *Fawle*, 2 Ld. Raym. 1452 : *R.* v. *Waddington*, 1 East, 167 : *R.* v. *Penprase*, 4 B. & Ad. 573; 1 Nev. & M. 312 : *R.* v. *Hunt*, 3 B. & Ald. 444 : *R.* v. *Holden*, 5 B. & Ad. 347; 2 Nev. & M. 167 : *R.* v. *Lever*, 1 Wil., Wol. & Hod. 35 : *R.* v. *Palmer*, 5 E. & B. 1024 : as where a member of the court of magistrates was interested in the result of the trial : *R.* v. *Jones*, 2 Har. & Wol. 293 : but *see R.* v. *Fellows*, 1 Har. & Wol. 648; 4 Dowl. 607, *contra:* or where a magistrate, in the commission for the county, was indicted at the quarter sessions and circulated among the other magistrates a printed account of the charges. *R.* v. *Grover*, 8 Dowl. 325. So where the prosecutor or his solicitor is sheriff or under-sheriff, and could attend the grand jury when they considered the bill (*R.* v. *Webb*, 2 Str. 1068), the writ will be granted. Under some circumstances the court will grant a *certiorari* for the removal of an indictment for conspiracy : *R.* v. *Wilks*, 5 E. & B. 690; 25 L. J. (Q. B.) 47 : *R.* v. *Rowlands*, 17 Q. B. 671; 2 Den. 364; 21 L. J. (M. C.) 81, even where one of several defendants makes the application without the consent of the others. *R.* v. *Foulkes*, 1 L. M. & P. 720; 20 L. J. (M. C.) 196 : *R.* v. *Boxall*, 4 A. & E. 513 : *R.* v. *Probert*, Dears. 30 : *R.* v. *Jewell*, 7 E. & B. 140; 26 L. J. (Q. B.) 177. In those cases the writ was allowed on the application of one of several defendants, who was a responsible person, he entering into a recognizance to pay costs in case of the conviction of himself or of any of the other defendants. *See* Cr. Off. Rules, 1906, r. 14, *post*, p. 115, and Short and Mellor, Cr. Pr. (2nd ed.) 19.

In what cases refused.]—An indictment for not repairing bridges and the highways at the end thereof, where the inhabitants of the county are chargeable with the repair of the same, is not removable by *certiorari*, out of the county where such bridges or highways lie. 1 Anne, st. 1, c. 18, s. 5 : *R.* v *Hamworth*, 2 Str. 900 : *R.* v. *Cumberland*, 6 T. R. 194; 3 B. & P. 354 (H. L.).

But this Act cannot apply where the indictment is of the inhabitants of the county from which the petty jury comes. *See* Short and Mellor, Cr. Pr. (2nd ed.) 16. An indictment against any person for keeping a bawdy-house, gaming-house, or other disorderly house is not removable by *certiorari* at the instance of the defendant. 25 G. 2, c. 36, s. 10. But where an indictment for keeping a disorderly house had been removed from the Middlesex Sessions to the Central Criminal Court, under 4 & 5 W. 4, c. 36, s. 16, the court granted a *certiorari* to remove the indictment into the Queen's Bench at the instance of the defendant, holding that where the indictment has been once removed by the prosecutor, 25 G. 2, c. 36, s. 10, which takes away the writ of *certiorari*, does not apply. *R.* v. *Brier*, 14 Q. B. 568; 19 L. J. (M. C.) 121. If an indictment charging an offence in which the *certiorari* is taken away by statute contains counts charging an offence where it is not taken away, the writs may still issue. *R.* v. *Saunders*, 5 D. & R. 611.

The writ is rarely if ever issued to remove an indictment after judgment in the court below except for the purpose of carrying the judgment into execution: Short and Mellor, Cr. Pl. (2nd ed.) 16; 2 Hawk. 288: *R.* v. *Gwynne*, 2 Burr. 749: *R.* v. *Nicholls*, 2 Str. 1227: *R.* v. *Nichols*, 13 East, 412 n, 417 n.: *R.* v. *Pennegoes*, 1 B. & C. 142: *R.* v. *Lucas*, 2 Fox & Sm. (K. B., Ir.) 30: *Ex parte Collins*, Q. B. D., Dec. 19, 1899; 34 L. J. Newsp. 132.

In Short and Mellor, Cr. Pr. (2nd ed.) 17 n., reference is made to a suggestion in an unreported case of *R.* v. *Boaler* [1888] that the writ might lie where *error* would not. But in *R.* v. *Boaler* [1892] 17 Cox, 569; 56 J. P. 792, it was held that *certiorari* will not go to the Central Criminal Court to bring up an indictment after judgment. In *R.* v. *Seton*, 7 T. R. 373, the court quashed a *certiorari* granted before, but not lodged till after judgment in an indictment for misdemeanor, and in *R.* v. *Unwin*, 7 Dowl. 578, a *certiorari* was refused in a case where the defendant had surreptitiously secured an acquittal by failing to give the notice of trial usual at the sessions where he was indicted.

The court could grant, but usually refused to issue, the writ for removal of an indictment for felony or misdemeanor after verdict and before judgment. 2 Hawk. c. 27, s. 28; 1 Chit. Cr. L. 380: *R.* v. *Oxfordshire*, 13 East, 411: *R.* v. *Garside*, 2 A. & E. 266: *R.* v. *Nichols*, *supra*: *R.* v. *Boaler*, 17 Cox, 569. It is doubtful whether this jurisdiction can or should be exercised since the creation of the Court of Criminal Appeal.

The court will not, ordinarily, on the application of the defendant, grant a *certiorari* for the removal of an indictment for perjury, forgery, or other heinous misdemeanor where the delay would tend to defeat the prosecution, 2 Hawk. c. 27, s. 28: *R.* v. *Pusey*, 2 Str. 717; or for murder, *R.* v. *Mead*, 3 D. & R. 301: *R.* v. *Thomas*, 4 M. & Sel. 442; unnatural crime, *R.* v. *Holden*, 5 B. & Ad. 347; 2 Nev. & M. 167, or the like. *See R.* v. *Penprase*, 4 B. & Ad. 573; 1 Nev. & M. 312. The creation of the Court for Crown Cases Reserved rendered the High Court unwilling to grant the writ on the ground of questions of law arising on an indictment; and the passing of the *Criminal Appeal Act*, 1907, will no doubt increase that unwillingness, especially in the case of the Central Criminal Court or Courts at which a judge of the High Court will sit. *See R.* v. *Kingston (Duchess)*, 1 Cowp. 283; 20 St. Tr. 355: *R.* v. *Templar*,

1 Nev. & P. 91 : *R.* v. *Wartnaby*, 2 A. & E. 435; and Short and Mellor, Cr. Pr. (2nd ed.) 19.

Time when granted.]—The writ may be sued out in cases of misdemeanor, though at the time the indictment is not *in esse;* and it is sufficient if the indictment be found at any period before the writ is returnable. 60 G. 3, & 1 G. 4, c. 4, s. 4. The proper time for either party to apply for a *certiorari* is before issue joined on the indictment : 1 Chit. Cr. L. 380; but the *certiorari* is not too late, if delivered before the jury are sworn to try the case. 60 G. 3, c. 4, s. 3 (*rep.*) : *see R.* v. *Passman*, 2 Dowl. 529; 1 A. & E. 603; Short and Mellor, Cr. Pr. (2nd ed.) 16.

Mode of obtaining the writ.]—In all cases (except where the attorney-general applies for the writ on behalf of the crown) the application must be founded upon affidavit, suggesting some adequate ground for removal. *See ante*, p. 111.

The following form of an affidavit in support of an application for a *certiorari* to remove an indictment into the King's Bench Division, is given in Appendix to Cr. Off. Rules, 1906, Form 2.

In the High Court of Justice,
King's Bench Division.

I, A. B., *of, etc.* *make oath and say as follows:*

1. *That at the general quarter sessions of the peace holden at in and for the county of , on or about the day of , a bill of indictment was preferred to the grand jury who returned a true bill* [or that it is intended to prefer a bill of indictment, as the case may be].

2. *That in my judgment and belief, nice and intricate questions or points of law will arise on the trial of the said indictment, which will render it important that the same should be tried before one of the learned judges of the High Court of Justice, and particularly, that a question will, as I am advised, be raised as to whether* [state the particular question that will arise, or that a question will arise upon the construction of an Act of Parliament].

3. *That, in my judgment and belief, it will be material and necessary that the said indictment should be tried by a special jury, which cannot be had, unless the said indictment be removed into this honourable court. And that I* [or as the case may be] *will cause a special jury to be had if the said indictment shall be so removed.*

4. *That I verily believe that it will be important and necessary that a view of the place and premises in question should be had by some of the jurymen to be impanelled, to try the issue joined upon the said indictment, which I am informed and believe can only be had by the said indictment being removed into this honourable court.*

[NOTE.—Where the view is to be had in the county where the bill is preferred *certiorari is unnecessary. See R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M. C.) 113.]

5. *That, by reason of* [here state what has occurred to create prejudice], *I verily believe that strong prejudices have been created in the minds of some of the justices who may preside at the sessions upon the trial of the said indictment. And also among that class of persons in the said place, from whom the common jurors are selected for the trials at the said sessions, and some of whom are likely to be called upon the jury for the trial of the said indictment, unless the same be removed into this honourable court. And therefore, that a fair and impartial trial of the same cannot be had at the said sessions.*

6. *That* [add any other allegation which may be likely to induce the court or a judge to grant the writ of *certiorari*, consistent with the facts and circumstances of the case required to be removed.]

[Omit any of the foregoing allegations which may not be applicable to the case.]

The affidavits, if sworn in England, must be sworn before a judge, district registrar, commissioner to administer oaths (*see* 52 & 53 Vict. c. 10, *Commissioners for Oaths Act*, 1889), first or second class clerk in the Crown Office Department, or officer empowered under the Rules of the Supreme Court to administer oaths. Cr. Off. Rules, 1906, r. 7. As to the persons before whom affidavits may be sworn out of England, *see* r. 5, and R. S. C. O. 38, r. 6. The affidavits must be intituled "In the High Court of Justice, King's Bench Division." Cr. Off. Rules, 1906, r. 6. "Every application for a writ of *certiorari*, or for an order to remove an indictment into the King's Bench Division, at the instance of any person other than the attorney-general on behalf of the crown, shall, during the sittings, be made to a divisional court of the said division by motion for an order *nisi* to show cause, and in the vacation or when there is no sitting of a divisional court to a judge at chambers for a summons to show cause: Provided that where, from special circumstances, the court or a judge may be of opinion that the writ should issue forthwith, the order may be made absolute, or an order be made in the first instance, either *ex parte* or otherwise, as the court or judge may direct." *Id.*, r. 12. No summons to show cause before a judge at chambers shall be issued for a writ of *certiorari* without the leave of a judge upon an *ex parte* application. *Id.* r. 266 (*b*). For forms of summonses at chambers, *see* Appendix to Cr. Off. Rules, 1886, Forms 3 & 5, and for form of judge's order for *certiorari* to remove indictment into the King's Bench Division, *see Id.* Form 4; and for form of judge's order to remove indictment from assizes or Central Criminal Court into the King's Bench Division, *see Id.* Form 6.

Allowance.]—"No writ of *certiorari* for the removal of an indictment into the King's Bench Division at the instance of a defendant or defendants before trial had, shall be allowed by the Court to whom it may be directed, unless the defendant or defendants, at whose instance the writ of *certiorari* shall have been awarded, shall have entered into a recognizance before a judge of the High Court, or before the court before whom such defendant or defendants shall stand indicted, or before one or more justices of the peace of the county or place in which such indictment may be found, or in which such defendant or defendants reside, in such sum and with such sufficient sureties

as the court or judge awarding the writ shall, by endorsement on the writ, order or direct, conditioned to appear and plead (and in cases of felony in open court) to the said indictment, and give notice of trial, and proceed to trial of the indictment at the next assizes to be held for the county wherein the indictment was found, or if in London or Middlesex forthwith at the sittings of the High Court of Justice, and personally to appear from day to day at the trial of such indictment, and if necessary in the King's Bench Division of the High Court of Justice, and not depart till he or they shall be discharged by the court, and to pay the costs of the prosecution subsequent to the removal of the indictment, if he or they be convicted." Cr. Off. Rules, 1906, r. 14.

A certiorari *obtained by one of several co-defendants removes the indictment as to all.* *R.* v. *Boxall*, 4 A. & E. 513.

"No writ of *certiorari* for the removal of an indictment into the King's Bench Division at the instance of any prosecutor (other than the attorney-general acting on behalf of the Crown or the prosecutor of an indictment against a body corporate) shall be allowed by the court to whom it may be directed unless the prosecutor at whose instance the writ of *certiorari* shall have been awarded, shall before the allowance of such writ by the court to whom it may be directed, enter into a recognizance in the manner and for such sum as in the preceding rule, provided and directed, conditioned on the return of such writ, to make up the record, and give notice of trial and proceed to trial of the indictment at the next assizes to be held for the county wherein the indictment was found, or if in London or Middlesex forthwith at the sittings of the High Court of Justice, and to pay the costs of the defendant subsequent to the removal of the indictment, if he be acquitted." R. 15.

Rules 14, 15 generalize a provision made as to certain misdemeanors by 21 Jac. 1, c. 8, s. 4, and as to appeals from judgments and orders of quarter sessions by 5 G. 2, c. 19, ss. 2, 3.

On removing an indictment containing seven counts into the High Court, the prosecutors bound themselves to pay the defendant's costs if she were acquitted on the indictment. Defendant having been acquitted on five out of the seven counts, it was held that this was not an acquittal upon the indictment within the meaning of the recognizance, and that she could not claim her costs of the counts on which she had been acquitted. *R.* v. *Bayard* [1892] 2 Q. B. 181; 17 Cox, 502.

"If the person at whose instance any writ of *certiorari* for the removal of an indictment shall have been awarded, shall not before the allowance thereof enter into a properly conditioned recognizance, the court to which such writ or order may be directed shall proceed to the trial of the indictment, as if such writ had not been awarded." R. 16.

The "allowance" of the writ mentioned in this rule means by the court or person to whom it is directed. *R.* v. *Abergele*, 5 A. & E. 795 : *R.* v. *Dunn*, 8 T. R. 217 : *R.* v. *Jones*, 9 Dowl. 504.

The provisions of rules 12, 13, 14, 15 and 16 shall in like manner apply in the case of a removal of an indictment into the King's Bench Division before trial had by order without writ of *certiorari* when such writ may not be required or used. R. 17.

When a *certiorari*, or an order to remove from the assizes, is granted, the divisional court or judge at chambers on granting it fixes the amount of the recognizances (to be entered into before a judge, or a justice of the county or place in which the party resides), and the amount of the recognizances is indorsed on the writ. By r. 15, *supra*, the prosecutor of an indictment against a body corporate is not bound to enter into recognizances on the removal of an indictment by *certiorari*, because the corporation can plead only in the High Court. *R.* v. *Birmingham & Gloucester Rail. Co.*, 9 C. & P. 469. The rule in this respect follows the construction put upon 16 & 17 Vict. c. 30, s. 5 (*rep.*), in *R.* v. *Mayor, etc., of Manchester*, 7 E. & B. 453; 26 L. J. (M. C.) 65. As to the mode of entering into recognizances when they are required from a parish, etc., or other such large *quasi* corporate body, *see* *R.* v. *Abergele*, 5 A. & E. 795. When they are required from a corporation, it is the practice to allow one of the members of the corporation, on behalf of himself and the rest of the corporation, to enter into the recognizance, with such sureties as may be required. Short and Mellor, Cr. Pr. (2nd ed.) 26.

For the forms of recognizances by prosecutor and defendant on *certiorari* to remove indictment into the King's Bench Division, *see* Cr. Off. Rules, 1906, Forms 10, 11, 12.

The following is the form of the rule to compel the defendant to put in better bail :—

The King against *A. B.* — *Unless the defendant shall put in better bail within four days next after notice of this rule given to him or to his solicitor, let a* procedendo *issue.*

TREVETHIN.

The recognizance must be lodged, together with the writ, with the clerk of the peace or clerk of assize, as the case may be; and after they are lodged all proceedings upon the indictment in the court below are stayed.

"Every recognizance acknowledged on the removal of an indictment, order, or other proceeding, or to prosecute any information granted by the King's Bench Division, or for the appearing or answering of any party in the said Division, or for good behaviour, or for any other purpose, shall after the acknowledgment thereof be transmitted to the Crown Office and filed there." Cr. Off. Rules, 1906, r. 112.

Where a defendant has entered into insufficient recognizances, the court will discharge them, and compel him to give better security. *R.* v. *Hooper*, 1 Chit. Rep. (K. B.) 491.

Return to writ.]—The return is made by indorsing on the writ of *certiorari* the following memorandum :—*The execution of this writ appears by the schedules hereunto annexed. The answer of* A. B., *Esquire, one of the keepers of the peace and justices within mentioned.* This memorandum must be signed and sealed by A. B. The schedules mentioned in it as thereunto annexed are the indictment and other documents to be returned in pursuance of the *certiorari*. *See* Appendix to Cr. Off. Rules, 1906, Form 21.

Sending back the record.]—If the writ of *certiorari* has been improvidently issued, *e.g.*, if it appears to have been obtained by misrepresentation of the facts, the court (or a judge at chambers, *R.* v. *Scaife*, 18 Q. B. 773; 2 Den. 513; 3 C. & K. 211; 21 L. J. (M. C.) 221) may award a writ of *supersedeas* to the *certiorari* and a *procedendo* to carry back the indictment, and so send back the record to the original jurisdiction, there to be dealt with as if no *certiorari* had issued. *See* 1 Burn's J. 648 (30th ed.); 4 Co. Inst. 67. The same course may be taken if the defendant neglects to perform the condition of the recognizance, or if bad or insufficient bail be put in. *R.* v. *Jones*, 9 Dowl. 504: *R.* v. *Dunn*, 8 T. R. 217: *R.* v. *Abergele*, 5 A. & E. 795: Com. Dig. Certiorari (G.): 1 Chitty Cr. L. 397. And where the defendants in a case originally removed from quarter sessions by *certiorari*, having obtained a rule in the Queen's Bench for a new trial, neglected to bring down the record and proceed to trial at the assizes, a writ of *procedendo* was awarded, and the record was sent back to sessions, where the parties were tried and sentenced to transportation. *R.* v. *Scaife*, *supra*.

For the form of writ of *supersedeas* to *certiorari* and *procedendo* to carry back indictment, see Appendix to Cr. Off. Rules, 1906, Form 169.

Trial at Central Criminal Court of indictments removed by certiorari.]—By 19 & 20 Vict. c. 16, s. 1 ("*The Palmer Act*"), the Court of King's Bench in term time, or any judge thereof in vacation, is authorized, whenever any indictment or inquisition for any felony or misdemeanor committed or supposed to have been committed at any place out of the jurisdiction of the Central Criminal Court shall have been removed by *certiorari* in the King's Bench to order, if it appear to be expedient to the ends of justice, that such indictment or inquisition shall be tried at the Central Criminal Court. Or such court or judge may, in any such case of felony or misdemeanor, order a *certiorari* to issue to the court before which the indictment or inquisition shall be pending, or shall thereafter be found, or to the coroner before whom such inquisition shall have been or shall thereafter be taken, to remove the indictment or inquisition directly into the Central Criminal Court (s. 3). Under this section the Court has power to order the removal into the Central Criminal Court of an indictment, notwithstanding that abortive trials have already taken place at the court to which the order is addressed. The court has a very wide discretion, the only condition being that the court deems it expedient to the ends of justice. *R.* v. *Barnett* [1919] 1 K. B. 640; 83 J. P. 134; 35 T. L. R. 344. Provisions are made for the transmission of the indictment or inquisition, and for the return of the recognizances, depositions, etc., into that court (ss. 2, 4); for the removal of the offender to the prison appointed for the Central Criminal Court (s. 5); for his arraignment, pleading and trial at the Central Criminal Court (19 & 20 Vict. c. 16, ss. 6, 7); for the allowance of the expenses of prosecutions (s. 13); and otherwise in relation to the objects of the Act. The powers of the Court of King's Bench were transferred to the High Court of Justice (King's Bench Division) by 36 & 37 Vict. c. 66, s. 34. The court has refused to make it a condition, under 19 & 20 Vict. c. 16, s. 24 (*rep.* and superseded by Cr. Off. Rules, 1906, rr. 14, 15, *ante*, p. 116),

that the prosecutor should furnish the defendant with evidence which it was suggested had been obtained by the prosecutor since the depositions were taken. *R.* v. *Palmer*, 5 E. & B. 1024.

"An application for an order that an indictment or inquisition removed into the King's Bench Division shall be tried at the Central Criminal Court, or a motion to remove an indictment or inquisition by *certiorari* into the Central Criminal Court for trial under 19 [& 20] Vict. c. 16, shall, during the sittings, be made to the King's Bench Division by motion for an order *nisi*: and in the vacation, [? or] when there is no sitting of a divisional court, to a judge at chambers for a summons; and the order may be made absolute or granted upon such terms as to recognizance or otherwise as the court or judge may consider reasonable." Cr. Off. Rules, 1906, r. 19. No appeal lies from the refusal of the King's Bench Division to grant a *certiorari* to remove an indictment to the Central Criminal Court under 19 & 20 Vict. c. 16. *R.* v. *Rudge*, 16 Q. B. D. 459; 55 L. J. (M. C.) 112.

Costs.]—The liability of the parties to costs on the removal of an indictment by *certiorari* was first imposed by 21 Jac. 1, c. 8, s. 4, and 5 & 6 W. & M. c. 11, s. 3 (*rep.*), and was extended by 16 & 17 Vict. c. 30, s. 5 (*rep.*). It is now regulated by Cr. Off. Rules, 1906, rr. 14, 15 (*ante*, p. 116), and by 8 Edw. 7, c. 15, s. 6, *post*, pp. 116 *et seq.* Under 16 & 17 Vict. c. 30, s. 5, it was held that the prosecutor was entitled to costs in the case of an indictment removed by the defendant by *certiorari*, where the defendant was convicted, though the prosecutor was not the party aggrieved or injured. *R.* v. *Oastler*, L. R. 9 Q. B. 132; 43 L. J. (Q. B.) 42; and as s. 5 is embodied in Cr. Off. Rules, 1906, rr. 14, 15 (*ante*, p. 116), *R.* v. *Oastler* would be an authority on the construction of those rules. If a defendant dies after verdict and before judgment, his bail will be liable for the costs to the extent of their recognizances; *R.* v. *Turner*, 3 B. & C. 160; *R.* v. *Finmore*, 8 T. R. 409; but under ordinary circumstances the prosecutor is not entitled to costs till the court has pronounced judgment, for it may be that judgment will be arrested. *R.* v. *Turner*, 15 East, 570. If an indictment against several defendants is removed into the King's Bench Division without the consent of all of them, those who did not consent to the application for the *certiorari* are not liable for the costs, even though they have pleaded to the indictment and have been convicted upon it. *R.* v. *Hassell*, 5 Dowl. 531. But under 16 & 17 Vict. c. 30, s. 5 (*rep.*), where the *certiorari* was applied for at the instance of one of two defendants, the judge might in his discretion make it a condition of the recognizance that the defendant applying for the writ should pay the prosecutor's costs, in case either he or the other defendant should be convicted, *R.* v. *Jewell*, 7 E. & B. 140; 26 L. J. (Q. B.) 177; and an express provision to that effect is contained in Cr. Off. Rules, 1906, r. 14, *ante*, p. 115. The prosecutor is not entitled under the recognizance to the costs of any counts of the indictment on which the defendant has been acquitted. *R.* v. *Hawdon*, 11 A. & E. 143, nor to costs incurred prior to the *certiorari*. *R.* v. *Passman*, 1 A. & E. 603, 606, n.: *R.* v. *Higgins*, 5 Dowl. 375; 6 L. J. (M. C.) 9. The defendant is to pay all reasonable costs occasioned by the removal of the indictment by the

certiorari, or incurred in consequence of it, in order to carry the prosecution to its legal conclusion : *R.* v. *Gilbie*, 5 M. & Sel. 520; and the amount of costs is not limited by the recognizance. *R.* v. *Teal*, 13 East, 4. If a prosecutor, being entitled to costs, dies after taxation of costs, his personal representatives are entitled to them. As to the effect on the defendant's liability of 8 Edw. 7, c. 15, s. 6 (1), *vide post*, pp. 284, *et seq.*

The prosecutor's liability to pay costs to the defendant, if acquitted, only arises where the prosecutor has entered into the recognizance with the condition mentioned in Cr. Off. Rules, 1906, r. 15, *ante*, p. 116, or in cases falling within 8 Edw. 7, c. 15, s. 6 (2), which is not limited to trials in courts of assize or quarter sessions. To entitle the defendant to costs he must be acquitted on all counts of the indictment. *R.* v. *Bayard* [1892] 2 Q. B. 181; 17 Cox, 572. If the prosecutor has merely entered into a recognizance conditioned to prosecute with effect, and to do and perform such orders and things as the court shall direct, he is not liable to costs. *R.* v. *East Stoke*, 6 B. & S. 536; 34 L. J. (M. C.) 190.

The costs are taxed in the Supreme Court Taxing Office, and payment is enforced by estreat of the recognizances under Cr. Off. Rules, 1906, rr. 112—115, which is effected by order of the court made after calling upon the party liable to perform the conditions. 16 & 17 Vict. c. 30, s. 6, which permitted attachment, was repealed in 1892. As to costs of a special jury, *see R.* v. *Moate*, 3 B. & Ad. 237; 1 L. J. (K. B.) 78.

As to the cases in which the defendant may, by reason of poverty or bankruptcy, have relief from the payment of the costs, *see R.* v. *Thornton*, 4 Ex. 820; 19 L. J. (M. C.) 113 : *R.* v. *Hills*, 2 E. & B. 176; 22 L. J. (Q. B.) 322.

As to the general law with respect to the payment of the costs of indictments, and as to the costs in cases where the indictment, after its removal by *certiorari*, is tried at the Central Criminal Court, under 19 & 20 Vict. c. 16, ss. 25, 26, *see post*, pp. 267 *et seq.*

Change of venue.]—The removal of an indictment by *certiorari* at common law does no more than change the court of trial, and does not affect the venue. The original practice was to try the indictment at bar in the Court of King's Bench, unless after issue joined a writ of *nisi prius* were issued with the attorney-general's consent to try in the proper county. 2 Co. Inst. 424. The court was by 6 H. 8, c. 6 empowered thus to remit indictments for felonies. In the case of an offence committed outside the Central Criminal Court District, if it is desired to change the venue, this can be effected by obtaining an order under 19 & 20 Vict. c. 16, s. 3, for the trial of the offence in that court. On the removal of a case *from* that court the venue is determined by the court on issuing the *certiorari* and stated in the writ. Cr. Off. Rules, 1906, r. 18, which provides that "every writ of *certiorari* for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried; and a jury shall be summoned, and the trial proceed, in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." The true construction of this rule is, that the King's Bench Division has discretion to name in the

certiorari the county or jurisdiction in which the trial is to take place, and that by the jurors summoned from that jurisdiction the same issues shall be tried that would have been tried in the Central Criminal Court had the indictment not been removed. *R.* v. *Castro*, L. R. 9 Q. B. 350, 355; 43 L. J. (Q. B.) 105, 107.

In cases not dealt with as above it is necessary to obtain an order to change the venue, which may be made by a judge of assize without *certiorari*, or by the King's Bench Division after the grant of a *certiorari* and joinder of issue. Short and Mellor Cr. Pr. (2nd ed.) 106. The right to make such an order appears to be established as to felonies. *See R.* v. *Penprase*, 4 B. & Ald. 573: *R.* v. *Holden*, 5 B. & Ad. 347: *and R.* v. *Barrett*, Ir. Rep. 4 C. L. 285; 18 W. R. 671: *R.* v. *Fay*, Ir. Rep. 6 C. L. 436: *R.* v. *M'Eneany* [1878] 2 L. R. Ir. 236: *R.* v. *Phelan*, 14 Cox, 579 (Ir.). And it is certainly established as to misdemeanors. But it is not exercised unless (1) demanded as of right by the attorney-general acting on behalf of the crown; (2) the inhabitants of a county are indicted and all are interested in the verdict: *R.* v. *Southampton (Inhabitants)* 17 Q. B. D. 424; (3) a view in another county is necessary: *Clerk* v. *R.*, 9 H. L. C. 184; 31 L. J. (Q. B.) 175: *R.* v. *Sheldon*, 32 L. T. (N. S.) 27; or (4) a fair trial cannot be had in the original venue. *R.* v. *Simpson*, 5 Jur. 462: *R.* v. *Dunn*, 11 Jur. 287: *R.* v. *Patent Eurika Co.*, 13 L. T. (N. S.) 365: *R.* v. *Hunt*, 3 B. & Ald. 444; 2 Chit. Rep. (K. B.) 130: *R.* v. *Harris*, 3 Burr. 1330: *R.* v. *Duggan*, Ir. Rep. 7 C. L. 94: *R.* v. *Boughton* [1895] 2 Ir. Rep. 386. Mere possibility of prejudice is not a sufficient reason for change of venue. *R.* v. *King*, 2 Chit. Rep. (K. B.) 217: *R.* v. *Stephenson*, 5 Jur. 341: *and see R.* v. *Casey*, 13 Cox, 614: *R.* v. *Walter*, 14 Cox, 579: *Ex parte Gyde*, 72 J. P. 504. Any extra expense caused by the change falls on the person who applies for it. *R.* v. *Newton*, 1 Cox, 195. It is usual, but not necessary, to change the venue to the nearest county on the same circuit in which a fair trial can be had. *Anon.*, 6 Jur. 131: *R.* v. *Browne*, 6 Jur. 168: *R.* v. *Palmer*, 5 E. & B. 1024, 1028, Campbell, C.J. *See* Short and Mellor Cr. Pr. (2nd ed.) 106. As to the trial in a county at large of offences committed in counties of cities, *see ante*, p. 38. An application change the venue is made during the sittings to a Divisional Court of the King's Bench Division, in vacation to a judge. Short and Mellor Cr. Pr. (2nd ed.) 107.

Trial at bar.]—A trial at bar can be obtained only by order of the Court, Cr. Off. Rules, 1906, r. 150. Where an indictment has been removed by *certiorari* into the King's Bench Division the attorney-general, if prosecuting on behalf of the crown, has the right to demand a trial at bar as a matter of course; r. 151. *R.* v. *Hales*, 2 Str. 816: *R.* v. *Castro*, L. R. 9 Q. B. 350. In other cases the procedure is by motion for a rule *nisi*, and the court may impose terms on making the rule absolute (rr. 151, 152); *and see* rr. 153-155: *Anderson* v. *Gorrie*, 10 T. L. R. 383: *Dixon* v. *Farrer*, 17 Q. B. D. 661: Short and Mellor Cr. Pr. (2nd ed.) 297. The most recent instances of trials at bar are *R.* v. *Jameson* [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218: and *West Rand Co., Ltd.* v. *R.* [1905] 2 K. B. 391; 74 L. J. (K. B.) 753. In

R. v. *Lynch* [1903] 1 K. B. 444, no demand was made by the attorney-general for a trial at bar, as treason committed abroad is triable before the King's Bench Division under 35 H. 8, c. 2, s. 1.

Removal without certiorari.]—Where a defendant has been convicted at the assizes and has entered into a recognizance to keep the peace, the King's Bench Division can, on breach of the recognizance being committed, by order, and without issuing a writ of *certiorari*, direct that the indictment and record of the trial be filed in the crown office in order that the defendant may be further dealt with. *R.* v. *Chambers, Ex parte Klitz* [1919] 1 K. B. 638.

SECT. 12.

POWERS OF THE ATTORNEY-GENERAL OVER PROSECUTIONS.

When sanction of attorney-general necessary.]—In the following cases a prosecution may not be instituted without the sanction of the attorney-general. Offences under the *Explosives Act*, 1883 (46 & 47 Vict. c. 3, s. 7); the *Public Bodies Corrupt Practices Act*, 1889 (52 & 53 Vict. c. 69, s. 4); the *Prevention of Corruption Act*, 1906 (6 Edw. 7, c. 34, s. 2); the *Official Secrets Act*, 1911 (1 & 2 Geo. 5, c. 28, s. 8); under s. 327 of the *Lunacy Act*, 1890 (53 & 54 Vict. c. 5) and s. 2 (1) (*a*) of the *Moneylenders Act*, 1900 (63 & 64 Vict. c. 51, s 2 (3)); fraudulent concealment of documents of title (22 & 23 Vict. c. 35, s. 24); frauds by a trustee under an express trust in writing (6 & 7 Geo. 5, c. 50, ss. 21 (a), 46); incest unless the director of public prosecutions commences the prosecution (8 Edw. 7, c. 45, s. 6). In the case of offences by aliens within the *Territorial Waters Jurisdiction Act*, 1878 (41 & 42 Vict. c. 73), the consent of a secretary of state is necessary (s. 3).

Where a prosecution is instituted on the fiat of the attorney-general it is sufficient to lodge the fiat with the clerk of the court of trial and it need not be proved at the trial. *R.* v. *Dexter*, 19 Cox, 360. *See also R.* v. *Metz*, 84 L. J. (K. B.) 1462; 79 J. P. 384; 11 Cr. App. R. 164.

Intervention of attorney-general.]—The attorney-general or the director of public prosecutions under the special or general directions of the attorney-general is always entitled to take over and continue a private prosecution. *See* 2 Russ. Cr. (7th ed.) 1923 *et seq.* As to the position of the attorney-general with reference to cases within the *Vexatious Indictments Act*, 1859, *see ante*, pp. 67 *et seq.*

Nolle prosequi.]—A *nolle prosequi* to stay proceedings upon an indictment or information pending in any court may be entered, by leave of the attorney-

general, at the instance of either the prosecutor or the defendant, at any time after the bill of indictment is found, and before judgment. *R.* v. *Dunn*, 1 C. & K. 730 : *R.* v. *Colling*, 2 Cox, 184; but not before the indictment has been presented : *R.* v. *Wylie*, 83 J. P. 295. "This power of the attorney-general is not subject to any control by the courts; but does not interfere with the right of a judge to allow a case to be withdrawn on the application of a private prosecutor." *R.* v. *Comptroller of Patents* [1899] 1 Q. B. 909, 914, *per* Smith, L.J. If the office of attorney-general is vacant, *semble* that the solicitor-general may give leave to enter a *nolle prosequi; Id., and see* 42 & 43 Vict. c. 22, s. 9. Leave is never given except upon good cause shown, and is never refused when the interests of justice require it. A *nolle prosequi* is distinct from, and has not the same effect as, offering no evidence and submitting to acquittal. *Elworthy* v. *Bird*, 2 Bing. 258; 9 Moore (C. P.) 430. It appears to be preferable to an applicant to discharge the recognizances of the prosecutor and witnesses. *See R.* v. *Freakley*, 6 Cox, 75. The following is the form of the attorney-general's *fiat* or warrant to the King's coroner and attorney in the King's Bench Division to enter a *nolle prosequi*, in order to admit a prisoner, indicted for a conspiracy, as a witness for the crown :—

Whereas at the general quarter sessions of the peace holden for the West Riding of the county of York, etc., an indictment was found by the grand jury of the said Riding against H. S., T. S., G. E. *and* S. C., *for a conspiracy falsely to charge* J. H. *to be the father of a bastard child, whereof the said* H. S. *was pregnant, which indictment has since been removed into the King's Bench Division of his Majesty's High Court of Justice; and whereas it is represented to me on the part of the prosecutor of the said indictment, that he considering that the said* H. S. *was rather an object of the conspiracy of the other defendants than a willing actress in it, and from recent information that she is comparatively innocent; and considering that the ends of justice would be best answered were she in a situation to undergo examination as a witness upon the subject-matter of the indictment, is desirous, with the advice of his counsel, to have a* nolle prosequi *entered as against the said* H. S., *and that he prays the same accordingly; these are therefore to authorize and require you to enter or cause to be entered a* nolle prosequi *upon the said indictment as to the said* H. S. *And for so doing this shall be your warrant. Dated, etc.*

To Sir L. W. K., *Knight, coroner and attorney of our lord the King, in the King's Bench Division, of his Majesty's High Court of Justice.*

Where the application is made at the instance of the prosecutor, the opinion of counsel as to the desirability of having the defendant examined as a witness is laid before the attorney-general, who will order the *nolle prosequi* to be entered without issuing any summons to the defendant : but where the application proceeds from the defendant, the attorney-general will direct his clerk to summon the prosecutor to show cause before him at his chambers why proceedings should not be stayed, and on hearing the parties will grant his warrant, if he thinks the circumstances of the case demand it.

The attorney-general may, however, on an *ex parte* application by the defendant, and without calling the prosecutor before him, enter a *nolle prosequi* to an indictment. *R.* v. *Allen*, 1 B. & S. 850; 31 L. J. (M. C.) 129.

The usual occasion of granting a *nolle prosequi* is either where in cases of misdemeanor a civil action is depending for the same cause: *R.* v. *Fielding*, 2 Burr. 719: *Jones* v. *Clay*, 1 B. & P. 191; or where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence: *R.* v. *Guerchy*, 1 W. Bl. 545; or if it is clear that an indictment is not sustainable against the defendant. *R.* v. *Pond*, 1 Comyns Rep. 312; 1 Chitty Cr. L. 479. Where an indictment is preferred against a defendant for an assault, and at the same time an action of trespass is commenced in one of the civil courts for identically the same assault, upon affidavit of the facts, and hearing the parties, the attorney-general may, if he sees fit, order a *nolle prosequi* to be entered to the indictment, or compel the prosecutor to elect whether he will pursue the criminal or civil remedy. *R.* v. *Fielding*, 2 Burr. 719; 1 Chitty Cr. L. 479.

The following may be the form of the affidavit in such a case:—

I, A. B., *of the parish of* ——, *in the county of* ——, *etc., make oath and say, that I, this deponent, did see the clerk of the peace of the county of* —— *sign a certificate hereto annexed, on the* —— *day of* ——, *at* ——, *and that since* [*or before*] *the time of preferring the indictment, in the said certificate mentioned, I was served with a copy of a writ of summons, issuing out of the King's Bench Division of his Majesty's High Court of Justice, at the suit of* C. D., *the prosecutor of the said indictment, requiring me within eight days to cause an appearance to be entered for me in the said King's Bench Division, in an action of trespass at the suit of the said* C. D.; *and that on the* —— *day of* —— *I, this deponent, did receive a notice of a declaration being filed against me at the suit of the said* C. D., *the prosecutor of the said indictment, in the master's office of the said King's Bench Division, for assaulting him, the said* C. D., *which said declaration and indictment, I say, are for the same assault and not for different offences.*

A certificate from the clerk of assize or clerk of the peace, stating the substance of the indictment, and the time when it was preferred, must be annexed to this affidavit. Cro. Circ. Comp. 25 (10th ed.) *For form of certificate, see ante*, p. 123. And if the attorney-general thinks the case a proper one for his interference, he will sign a warrant under his hand and seal, directed to the clerk of the peace, if the indictment has been found at sessions, directing him to enter a *stet processus*. *R.* v. *Fielding*, 2 Burr. 719: *Jones* v. *Clay*, 1 B. & P. 191. If the cause of the application is the vexatious conduct of the prosecutor, the attorney-general may direct the proceedings to be removed into the King's Bench Division, where counsel will be heard in support of the *nolle prosequi*. *R.* v. *Guerchy*, 1 W. Bl. 545. A *nolle prosequi* may be entered as to one of several defendants at any time before trial. *R.* v. *Teal*, 11 East, 307. And on motion for a new trial in the King's Bench on an indictment for a conspiracy against several defendants, counsel for the crown, at the

suggestion of the court, and having received the assent of the attorney-general (the attorney-general appearing as counsel for one of the defendants) entered a *nolle prosequi* as to two defendants, when the rule for a new trial was refused as to the rest; *R.* v. *Rowlands*, 17 Q. B. 671, 685; 2 Den. 364; 21 L. J. (M. C.) 81: *and see R.* v. *Hempstead*, R. & R. 344: and *R.* v. *Butterworth*, R. & R. 520. In *R.* v. *Leatham*, 30 L. J. (Q. B.) 205; 8 Cox, 498; 3 E. & E. 658, when the defendant had been found guilty on several counts of an information for bribery, the solicitor-general entered a *nolle prosequi* on one of them after a rule *nisi* for a new trial: and in *R.* v. *Rowlands*, *supra*, on application for a rule *nisi* to arrest the judgment on an indictment for a conspiracy, a *nolle prosequi* was entered on three counts of an indictment, as to the sufficiency of which some doubts were entertained, and the court pronounced judgment on the remaining good counts, a verdict having been taken on each count

The following is the form of entering a *nolle prosequi* on record, given in Cr. Off. Rules, 1906, Form 120:—

Afterwards on the —— day of ——, before our said lord the King at the Royal Courts of Justice, London, come as well the said coroner and attorney of our said lord the King, in the King's Bench Division of his Majesty's High Court of Justice, who for our said lord the King in this behalf prosecutes in his proper person, as the said A. B. *by his solicitor. And the said coroner and attorney for our said lord the King says that he will not further prosecute (ait se nolle ulterius prosequi) the said* A. B. *upon the indictment* [or *information*] *aforesaid. Whereupon all and singular the premises being seen and fully understood by the court now here, it is considered and adjudged, by the said court here, that all proceedings upon the said indictment* [or *information*] *against the said* A. B. *be altogether stayed, and that the said* A. B. *be discharged of and from the said indictment* [or *information*].

[NOTE.—*In the case of an information filed by the attorney-general his name must be used instead of that of the King's coroner and attorney.*]

A *nolle prosequi* puts an end to the prosecution (*see Gilchrist* v. *Gardner*, 12 N. S. W. Rep. (Law) 184, and English authorities there cited); but does not operate as a bar or discharge or an acquittal on the merits. *Goddard* v. *Smith*, 6 Mod. 261; 3 Salk. 245: *R.* v. *Ridpath*, 10 Mod. 152; and the party remains liable to be re-indicted. It has been said that fresh process may be awarded on the same indictment. *Goddard* v. *Smith*, *supra;* Com. Dig. Indict. (K.): but this *dictum* appears not to be law. See the judgment in *R.* v. *Allen*, 1 B. & S. 850; 31 L. J. (M. C.) 129: *R.* v. *Mitchel*, 3 Cox, 93; 6 St. Tr. (N. S.) 545; and Short and Mellor, Cr. Pr. (2nd ed.) 142.

CHAPTER II.

CRIMINAL INFORMATION.

SECT. 1.

PRELIMINARY.

PROSECUTIONS by information in respect of indictable misdemeanors or upon penal statutes, are not now in use before courts of oyer and terminer, or gaol delivery, or before courts of quarter sessions (Archbold, Quarter Sessions (6th ed.) 482, 483). Informations on penal statutes are subject to the provisions of 18 Eliz. c. 5 and 31 Eliz. c. 5, except where the proceedings are of a civil nature, or are taken under the *Summary Jurisdiction Acts*. Informations for misdemeanor are still occasionally filed in the King's Bench Division of the High Court. These are dealt with in sects. 2 and 3, *post*. Informations in that court in customs and revenue cases are treated as civil proceedings for purposes of evidence and appeal : *see The Crown Suits Act*, 1865 (28 & 29 Vict. c. 104), ss. 31, 32, 34 (which got rid of doubts expressed in *Att.-Gen.* v. *Radloff*, 10 Ex. 84; 23 L. J. (Ex.) 240), and s. 259 of the *Customs Consolidation Act*, 1876 (39 & 40 Vict. c. 36); and judgments thereon for the Crown are not convictions within the *Criminal Appeal Act*, 1907. *R.* v. *Hausmann* [1909] 73 J. P. 516; 3 Cr. App. R. 3 : *see Att.-Gen.* v. *Bradlaugh*, 14 Q. B. D. 667; 54 L. J. (Q. B.) 205. *R.* v. *Hausmann* was a proceeding under 39 & 40 Vict. c. 36, s. 186, to recover penalties for smuggling. Informations in *quo warranto* are now civil proceedings : 47 & 48 Vict. c. 61, s. 15.

SECT. 2.

INFORMATION EX OFFICIO.

What and in what cases.]—The information *ex officio* is a formal written suggestion on behalf of the King of a misdemeanor committed, filed by the King's attorney-general (or, in the vacancy of that office, by the solicitor-general, *R.* v. *Wilkes*, 4 Burr. 2527; 19 St. Tr. 1075; 2 Eng. Rep. 244; 4 Bro. Parl. Cas. 360) in the King's Bench Division of the High Court of Justice, without the intervention of a grand jury. The attorney-general for the Duchy of Lancaster cannot file an *ex officio* information in the High Court. *Att.-Gen. of Duchy of Lancaster* v. *Duke of Devonshire*, 14 Q. B. D. 195; 54 L. J. (Q. B.) 271.

It lies at common law for misdemeanors only, and not for treason or felony; Com. Dig. Information (A. 1): *R.* v. *Prynn*, 5 Mod. 459; *R.* v. *Berchet*, 1 Show. 106: *R.* v. *Magee*, Rowe (Ir. K. B.) 416; nor for misprision of treason: for wherever any capital offence is charged, or an offence so highly penal as misprision of treason, the law of England requires that the accusation should be warranted by the oath of twelve men, before the defendant can be put to answer it; 2 Hawk. c. 26, s. 3. The usual objects of an information *ex officio* are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the King's government, or to molest or affront him in the regular discharge of his royal functions; 4 Bl. Com. 308; such, for instance, as seditious or blasphemous writings or speeches (*R.* v. *Horne*, 2 Cowp. 672; 20 St. Tr. 651: *R.* v. *Wilkes*, *supra*: *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1: *R.* v. *Waddington*, 1 St. Tr. (N. S.) 1339; 1 B. & C. 26: *R.* v. *Mary Ann Carlile*, 1 St. Tr. (N. S.) 1033); seditious riots not amounting to high treason; libels upon the King or his ministers, the judges, or other high officers, reflecting upon their conduct in the execution of their official duties (*R.* v. *Harvey*, 2 St. Tr. (N. S.) 1: *R.* v. *Hunt*, 31 St. Tr. 367, 408: *R.* v. *Lord George Gordon*, 22 *Id.* 177); libels on foreign sovereigns or ambassadors (*R.* v. *Peltier*, 28 St. Tr. 529: *R.* v. *Vint*, 27 *Id.* 627); obstructing public officers in the execution of their duties; obstructing the King's officers in the collection, etc., of the revenues; bribery at parliamentary elections (*R.* v. *Leatham*, 8 Cox, 425, 498: *R.* v. *Charlesworth*, 1 B. & S. 460); bribery, corrupt or oppressive conduct or neglect of duty by magistrates and public officials (*R.* v. *Pinney*, 3 St. Tr. (N. S.) 11); or misconduct by public officials outside Great Britain. *See* 11 W. 3, c. 12; 42 G. 3, c. 85: *R.* v. *Shawe*, 5 M. & Sel. 403; Short and Mellor, Cr. Pr. (2nd ed.) 85. In *R.* v. *Brown*, Q. B. Feb. 1858; 7 Cox, 442; *sub nom. R.* v. *Esdaile*, 1 F. & F. 213, informations *ex officio* were filed against directors of a banking company, for a conspiracy to defraud the shareholders by false reports of the pecuniary condition of the bank and otherwise. In *R.* v. *Parnell*, 14 Cox, 505, an *ex officio* information was laid in Ireland for conspiracy to commit an offence against the State. *Ex officio* informations are now rarely filed in England. The latest was *R.* v. *Cate & Tarry*, 9 July,

1887, for a libel imputing corruptibility to the Middlesex Justices. *See* Short and Mellor, Cr. Pr. (2nd ed.) 151, 169.

Form.]—Under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 8 (3), the provisions of that Act applying to indictments apply to criminal informations in the High Court with such modifications as may be made by rules under the Act. By rules dated 23rd May, 1916, rule 1 (5) of the Rules in the Schedule to the *Indictments Act* (*ante*, p. 28) does not apply to criminal informations; but rule 2 and the other rules in the schedule do apply.

The form is now therefore assimilated to that of an indictment, except that the heading is as follows :—

The King *v.* A. B.
In the High Court of Justice, King's Bench Division.
Criminal Information filed by the King's Attorney-General.
A. B. is charged with the following offence.

Statement of offence.

As in the case of an indictment. *See passim.*

Filing.]—This information is filed in the crown office, without any leave previously obtained of the court for that purpose; and the court will not entertain a motion by the attorney-general for a criminal information at the suit of the crown : *R.* v. *Philipps*, 3 Burr. 1564 : *R.* v. *Phillips*, 4 Burr. 2089; 1 Deacon Cr. Law, 672 n. : *R.* v. *Magee*, Rowe (Ir. K. B.) 416; nor will the court, upon the application of the defendant, restrain the attorney-general from filing an *ex officio* information upon the ground that a criminal information has already been granted for the same cause. *R.* v. *Alexander*, MS., E. T. 1830. But in that case, after both informations had been filed, the court stayed the criminal information until further order. *See post*, p. 134.

Copy to be filed.]—By rule 2 of the *Indictments Rules*, dated May 23, 1916, the attorney-general or any person procuring any criminal information to be exhibited, received, or filed at the crown office shall deliver to the master of the crown office a true copy thereof for each accused person, who shall on request be supplied therewith free of charge.

Quashing.]—The court will not quash an *ex officio* information at the instance of the prosecutor, because the attorney-general may, if he will, enter a *nolle prosequi; R.* v. *Stratton*, 1 Doug. 239; 21 St. Tr. 1046; and even upon the motion of the defendant, they will seldom quash it, but will generally put the defendant to demur, etc., *see* Com. Dig. Information (D. 4) : *R.* v. *Gregory*, 1 Salk. 372. After demurrer the information may be amended. *R.* v. *Holland*, 4 T. R. 457. The attorney-general is also entitled as of right to amend the information on paying costs. *Att.-Gen.* v. *Ray*, 11 M. & W. 464; and the provisions of the *Indictments Act*, 1915, with regard to amending indictments (*ante*, p. 54) apply to criminal informations. 5 & 6 Geo. 5, c. 90, ss. 5, 8 (3).

Procedure.]—When the information has been filed, the defendant, after appearance, upon application to the court, is entitled to a copy of it free of expense. 60 G. 3 and 1 G. 4, c. 4, s. 8; 5 & 6 Geo. 5, c. 90, r. 13. *See also* rule 2 of the *Indictments Rules*, 1916, *ante*, p. 128. This provision applies also to indictments for misdemeanor prosecuted by the attorney-general (or solicitor-general) in the King's Bench Division. *Id.* If the attorney-general delays bringing the information to trial, the defendant cannot take it down by proviso; *R.* v. *M'Leod*, 2 East, 202; but if it is not brought to trial within twelve calendar months next after the plea of not guilty has been pleaded, the defendant may, after twenty days' notice to the attorney-general or solicitor-general, apply to the court, which may authorize the defendant to bring on the trial, and he may bring it on accordingly, unless a *nolle prosequi* is entered. 60 G. 3 and 1 G. 4, c. 4, s. 9. *See also* Cr. Off. Rules, 1906, as to pleading (rr. 117—122) and procedure (rr. 32—39), for securing the speedy trial of the defendant, and his being speedily brought up for judgment, when he is in custody. The attorney-general is entitled, if he wishes, to a trial at bar; *R.* v. *Johnson*, 1 Str. 644: *Paddock* v. *Forrester*, 4 St. Tr. (N. S.) 557; 1 Man. & G. 583: *R.* v. *Pinney*, 3 St. Tr. (N. S.) 17 n.; and to bring on the case out of its turn. Short and Mellor, Cr. Pr. (2nd ed.) 171. As to the venue and procedure on a trial at bar, *vide ante*, pp. 120, 121. At the trial the attorney-general has the right of reply, even though the defendant calls no witnesses. *R.* v. *Marsden*, M. & M. 439

Costs.]—On the trial of an *ex officio* information in the High Court there is no jurisdiction to give costs for or against the crown, nor to direct their payment out of local funds; 8 Edw. 7, c. 15, ss. 1, 6. As to the position of the crown with respect to costs, *see* Hullock, 557: *R.* v. *Beadle*, 26 L. J. (M. C.) 111: *Thomas* v. *Pritchard* [1903] 1 K. B. 209; 72 L. J. (K. B.) 23: *R.* v. *Archbishop of Canterbury* [1902] 2 K. B. 503, 572; 71 L. J. (K. B.) 932: *Johnson* v. *R.* [1904] A. C. 817, 824; Short and Mellor, Cr. Pr. (2nd ed.) 389.

SECT. 3.

INFORMATION BY THE MASTER OF THE CROWN OFFICE.

What and in what cases.]—An information by the master of the crown office is a formal written suggestion of a misdemeanor committed, filed in the King's Bench Division of the High Court of Justice at the instance of an individual, with the leave of the court, by the master of the crown office (King's coroner and attorney) without the intervention of a grand jury. The right of private prosecutors to file informations for trespass, battery, or other misdemeanors without the leave of the court was taken away by 4 W. and M. c. 18, ss. 1, 5. *See R.* v. *Robinson*, 1 W. Bl. 541.

Like the information *ex officio* (*ante*, p. 127) this kind of information lies for misdemeanor only (2 Hale, 151; 2 Hawk. c. 26, ss. 7-12), and not for treason, felony, or misprision of treason. The court has power to give leave to file a criminal information of this description for any misdemeanor whatever, but usually grants leave only in the case of gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not specially concerning the state: *Ex parte Crawshay*, 8 Cox, 356; nor peculiarly tending to disturb the government, for those are left to the care of the attorney-general (*R.* v. *Harvey*, 2 St. Tr. (N. S.) 1; 2 B. & C. 257; 3 D. & R. 464), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. 4 Bl. Com. 309. In substance informations are granted only in cases which before the abolition of the Star Chamber went to that court as too serious for the ordinary courts, or because justice could not be obtained in them. *See R.* v. *Sedley*, 1 Sid. 168; 17 St. Tr. 155 n.; Baildon, Star Chamber Reports. In a few cases informations have been granted for non-repair of roads or bridges where the grand jury has ignored a bill of indictment. *R.* v. *Upton St. Leonards*, 10 Q. B. 827: and *see* Short and Mellor, Cr. Pr. (2nd ed.) 151 *et seq.* The cases in which they have been granted fall under the following heads:—

Blasphemy.]—Publishing a blasphemous libel: *R.* v. *Richard Carlile*, 4 St. Tr. (N. S.) 1423; 3 B. & Ald. 161; or an invective upon the established religion of the country. *R.* v. *Waddington*, 1 Str. Tr. (N. S.) 1339; 1 B. & C. 26: *R.* v. *Curl*, 2 Str. 788; 17 St. Tr. 153.

Bribery and corruption.]—An attempt to bribe a privy councillor to obtain a patent of an offence under government: *R.* v. *Vaughan*, 4 Burr. 2494; an attempt to bribe at an election for members to serve in parliament: *R.* v. *Robinson*, 1 W. Bl. 541: *R.* v. *Isherwood*, 2 Ld. Ken. 202: *R.* v. *Pitt*, 1 W. Bl. 380; 3 Burr. 1335; bribing persons, either by money or promises, to vote at elections of officers of corporations: *R.* v. *Plympton*, 2 Ld. Raym. 1377: *R.* v. *Mayor of Tiverton* [1723] 8 Mod. 186; bribery in the election of an alderman, who, by virtue of his office, is a justice of the peace; *R.* v. *Steward*, 2 B. & Ad. 12; attempting to bribe jurymen: *R.* v. *Young*, 2 East, 14, cit.; or clerks in public offices: *R.* v. *Beale*, 1 East, 183, cit.; endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R.* v. *Jolliffe*, 1 East, 154 n.; 4 T. R. 285.

Immorality.]—Where a music-master, in consideration of a sum of money, assigned over his female apprentice to a gentleman under pretence of her receiving lessons from him in music, but really for the purposes of prostitution, the court upon application granted a criminal information against the gentleman, the music-teacher, and the attorney who drew up the assignment. *R.* v. *Delaval*, 3 Burr. 1434; 1 W. Bl. 410, 439: and *see R.* v. *Sedley*, 1 Sid. 168; 17 St. Tr. 155 n.

Libel.]—The court at one time used to grant criminal informations for libels reflecting on the conduct of private individuals, if attended with circumstances of aggravation. *R.* v. *Benfield*, 2 Burr. 980 : *R.* v. *Miles*, 1 Doug. 284 : *R.* v. *Haswell*, *Id.* 387 : *R.* v. *Staples*, Andr. 228. With the repeal of the Acts *de scandalis magnatum* and change in opinion and circumstances the rule established by modern decisions is that a criminal information for libel will not be granted at the suit of private persons, but only on the application of persons in a public office or position; *R.* v. *Labouchere*, 12 Q. B. D. 330; 53 L. J. (Q. B.) 362 : *Ex parte Freeman Mitford*, 30 T. L. R. 693; for instance, for libels reflecting on the conduct of magistrates in the execution of their duties : *R.* v. *Waite*, 1 Wils. (K. B.) 22; of conduct of the mayor of a city during his term of office; *R.* v. *O'Brien, Cooke & Alcock* (Ir. K. B.) 128; of members of parliament in the execution of their duties in parliament; *R.* v. *Haswell*, 1 Doug. 387; of persons high in office under government in the execution of their several duties; of a public body; *R.* v. *Williams*, 5 B. & Ald. 595; 1 St. Tr. (N. S.) 1291; and the like. *See R.* v. *Jenour*, 7 Mod. 400 : *R.* v. *Dennison*, Lofft, 148 : *R.* v. *Kinnersley*, 1 W. Bl. 294, and n. : *R.* v. *Russell*, 93 L. T. 407; 21 T. L. R. 749; 69 J. P. 450.

Offences against the administration of justice.]—Informations have been granted for prejudging a criminal case by representing in a theatrical exhibition a man in the act of committing the offence. *R.* v. *Williams*, 2 L. J. (O. S.) K. B. 30 : and *cf. Monson* v. *Tussauds, Ltd.* [1894] 1 Q. B. 671. And in *R.* v. *Tibbits & Windust* [1902] 1 K. B. 77 (C. C. R.) it was held to be an indictable offence to attempt to pervert the course of justice by publishing articles affecting the conduct and character of persons about to be tried. The court followed *R.* v. *Williams*, *supra*, and *R.* v. *Fisher*, 2 Camp. 563. So, where a defendant to an information immediately before the trial distributed handbills in the assize town, vindicating his own conduct, and reflecting on that of the prosecutor, the court, considering the handbills to have been distributed by the defendant for the purpose of influencing the jury in his favour at the trial, granted a criminal information against him. *R.* v. *Jolliffe*, 4 T. R. 285. So, the court granted a criminal information against a person for publishing the proceedings before a coroner, with comments prior to the trial, although the statement was correct, and no malicious motive shown: for such publications have a tendency improperly to influence the public mind, and particularly the jury by whom the cause is afterwards to be tried. *R.* v. *Fleet*, 1 B. & Ald. 379. *See R.* v. *Wright*, 8 T. R. 293. It is now found more expeditious in such a case to proceed for contempt of court where the proceedings affected is in one of the branches of the High Court : *R.* v. *Parke* [1903] 2 K. B. 432 : *R.* v. *Freeman's Journal* [1902] 2 Ir. Rep. 82 : *R.* v. *Davies* [1906] 1 K. B. 32. But the existence of the summary remedy is no bar to proceedings by indictment or information : *R.* v. *Tibbits*, *supra*. Informations have also been granted for procuring a grand jury to throw out bills : *Anon.*, Rowe (Ir. K. B.) 644, 727; for attempting to suborn witnesses in a civil suit : *R.* v. *Phillips*, *Cas.* (K. B.) temp. Hardw. 241; and for attempting to induce witnesses to keep out of the way : *R.* v. *Lawley*, 2 Str.

904; and also for a conspiracy to obtain a false verdict by unlawful means, viz., by getting two of the conspirators on to the jury. *R.* v. *Opie*, 1 Wms. Saund. 300 *k*.

An information has been granted for publishing an invective against judges and juries, with a view to bring into suspicion and contempt the administration of justice. *R.* v. *White*, 1 Camp. 359; 30 St. Tr. 1131. And where an order was made by a corporation, and entered on their books, stating that J. S. (against whom a jury had given a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in the Court of Common Pleas) was actuated by motives of public justice, etc., in preferring the indictment, the court, deeming the order to be a libel reflecting upon the administration of justice, upon application granted a criminal information against the parties concerned in making it. *R.* v. *Watson*, 2 T. R. 199. *See also R.* v. *Gray* [1900] 2 Q. B. 36.

A criminal information will not be granted for *words* imputing misconduct to a justice of the peace in his office, unless tending to a breach of the peace, or spoken to the magistrate when sitting as such. *Ex parte Duke of Marlborough*, 5 Q. B. 955; *Ex parte Chapman*, 4 A. & E. 773.

Misconduct by judicial officers.]—There are no modern precedents of indictments or informations against judges of a superior court of record for oppression or extortion under colour of office. *See Anderson* v. *Gorrie* [1895] 1 Q. B. 668; Mayne, Ind. Cr. L. [1896] 342. For an early precedent, *see* Y. B. 14 & 15 Edw. 3 (ed. Pike), Preface. An information will lie against a judge of an inferior court of record for misconduct in office. A rule for a criminal information against a county court judge, for misconduct in his office, was discharged on the ground that the applicant had made the same misconduct the subject of a memorial to the Lord Chancellor, praying for inquiry, and so had elected his remedy. *R.* v. *Marshall*, 4 E. & B. 475; 24 L. J. (Q. B.) 242; *see Anon.*, 4 A. & E. 576 n.

The court can grant a criminal information against a justice of the peace for any illegal act committed by him from fraudulent, corrupt or vindictive motives, or for manifest illegality and oppression, or gross abuse of power, or partiality and wilful abuse of discretion, or wilful disobedience of the orders of a superior court. *R.* v. *Wykes*, Andr. 238 : *R.* v. *Soane*, *Id.* 272 : *R.* v. *Cozens*, 2 Doug. 426 : *R.* v. *Jones*, 1 Wils. (K. B.) 7 : *cf. R.* v. *Newton*, 1 Str. 413 : *R.* v. *Staffordshire JJ.*, 1 Chit. (K. B.) 217. The following cases illustrate the occasions on which the power has been exercised :—

1. A justice acting where he had direct interest. *R.* v. *Davis*, Lofft, 62 : *R.* v. *Whateley*, 4 Man. & Ry. 431 : *R.* v. *Hoseason*, 14 East, 605, or failing without lawful excuse to return to the assizes examinations taken by him. *R.* v. *Going*, Rowe (Ir. K. B.) 563.

2. Grant or refusal of alehouse licences, from corrupt motives or resentment. *R.* v. *Young*, 1 Burr. 556, 560, 561 : *R.* v. *Nottingham JJ.*, Say, 216 : *R.* v. *Holland*, 1 T. R. 692 : *R.* v. *Davis*, *R.* v. *Williams*, 3 Burr. 1317 : *R.* v. *Hann*, 3 Burr. 1716. In *Boulter* v. *Kent Justices* [1897] A. C. 556, it was held that justices sitting for the grant or renewal of liquor licences do

not sit as a court: *cf. R.* v. *Howard* [1902] 2 K. B. 363 (C. A.); so that it may be doubted whether the old cases as to information are now of authority. But *see R.* v. *Manchester JJ.* [1899] 1 Q. B. 571: *R.* v. *Nicholson* [1899] 2 Q. B. 455.

3. Illegal appointment of overseers from corrupt and improper motives. *R.* v. *Somersetshire JJ.*, 1 D. & R. 443: *cf. R.* v. *Jolliffe*, 1 East, 154, cit.

4. Corruptly making a false return to a *mandamus*. *R.* v. *Lancashire JJ.*, 1 D. & R. 485.

5. Abuse of authority by an obviously improper conviction: *R.* v. *Webster*, 3 T. R. 388: *R.* v. *Martin*, Rowe (Ir. K. B.) 726: or an obviously illegal sentence: *R.* v. *Mather*, 2 Barnard (K. B.) 249; or by interfering with order of another justice: *R.* v. *Brooke*, 2 T. R. 190; or by refusing bail from improper motives: *R.* v. *Badger*, 4 Q. B. 468; 4 St. Tr. (N. S.) 1387; or by destroying a house on not finding the men he was searching for: *Anon.*, Rowe (Ir. K. B.) 645; or by abusing the prosecutor in a case before him. *R.* v. *Manley* (*Id.*) 646.

But to induce the court to act there must be *primâ facie* evidence that the justice acted from corrupt motives (C. O. R. 1906, r. 37, *post*, p. 135), and not from mistake or ignorance of law or in *bonâ fide* exercise of discretion. *R.* v. *Palmer*, 2 Burr. 1162: *R.* v. *Davie*, 2 Doug. 588: *R.* v. *Brooke*, 2 T. R. 190: *R.* v. *Jackson*, 1 T. R. 653: *R.* v. *Seton*, 7 T. R. 373: *R.* v. *Barker*, 1 East, 186: *R.* v. *Baylis*, 3 Burr. 1318: *R.* v. *Fielding*, 2 *Id.* 719: *R.* v. *Borron*, 3 B. & Ald. 432; 1 St. Tr. (N. S.) 1347: *Ex parte Fentiman*, 2 A. & E. 127. If the act complained of was done at general or quarter sessions the evidence of deliberate misconduct or corruption must be very strong. *R.* v. *Seaford JJ.*, 1 W. Bl. 432: *R.* v. *Shrewsbury JJ.*, 2 Barnard (K. B.) 272: *R.* v. *Phelps*, 2 Ld. Kenyon, 570: *R.* v. *Eyres*, 2 Barnard (K. B.) 250.

Misconduct by ministerial officers.]—The court will grant an information against ministerial officers, for any act of oppression, or for any illegal act committed by them in the execution of their duties, from corrupt, vindictive, or other improper motives; but not where they act from ignorance or mistake merely. *R.* v. *Friar*, 1 Chit. Rep. (K. B.) 702. Informations have been granted against overseers for forcing a pauper to marry another pauper then pregnant with a bastard; *R.* v. *Tarrant*, 4 Burr. 2106; for a conspiracy by parish officers to marry persons settled in different parishes; *R.* v. *Compton*, Cald. 246: *R.* v. *Herbert*, 2 Ld. Ken. 466; and for procuring one to marry an idiot chargeable to the parish; *R.* v. *Watson*, 1 Wils. (K. B.) 41; but it has long been settled practice to refuse informations in such cases, and to leave the applicant to seek his remedy by indictment: *see* Cald. 447 n. (a); 2 Nolan, 262.

The court has granted a criminal information against a person for refusing to take upon himself the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to trial. *R.* v. *Woodrow*, 2 T. R. 731. *See R.* v. *Grosvenor*, 2 Str. 1193; 1 Wils. (K. B.) 18: *R.* v. *Shacklington*, Andr. 201 n.

Discretion of the court.]—The grant of the information is in the discretion of the court, and is not of right nor *ex debito justitiæ*, as the remedy is extraordinary and is alternative to proceedings by indictment. In the exercise of this discretion the court has refused to grant a criminal information for an illegal act committed by a person under a *bonâ fide* conviction that he was merely exercising a legal right; *R.* v. *Parkyns*, 3 B. & Ald. 668; and where the application was made against a poor man residing at a distance, to whom it would be very inconvenient, if not impossible, to show cause against the rule, or to appear afterwards to receive judgment if convicted. *See R.* v. *Compton*, Cald. 246 : *Cf.* Lofft, 155. The court has refused it also against the members of a corporation, for a misapplication of the corporation funds, it being rather a subject for an application in the Chancery Division. *R.* v. *Watson*, 2 T. R. 199. The court has also refused to grant it where the applicant himself was not free from imputation; Lofft, 314; or had already taken civil proceedings; *Anon.*, 4 A. & E. 576 n.; or had, before applying for the rule, entered into a correspondence with the person sought to be made defendant. *Ex parte Haviland*, 44 J. P. 789. So, where an application was made for a criminal information on a charge of raising great sums by subscription for trading purposes, as being one of those schemes denounced by 6 G. 1, c. 18, s. 18 (*rep.*), the court refused to grant it, as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the court. *R.* v. *Dodd*, 9 East, 516. *See R.* v. *Webb*, 14 East, 406. Informations have been granted for sending a challenge to fight a duel. *R.* v. *Younghusband*, 4 N. & M. 850 : *R.* v. *Holmes*, Rowe (Ir. K. B.) 239 : *R.* v. *Rowe*, *Id.*, 288, 418 : *R.* v. *Harman*, *Id.*, 441 : *R.* v. *Staunton*, 1 Ir. Law Rec. (O. S.) 7 : *R.* v. *Maunsell* [1839] 1 Ir. Law Rec. 257 : *Armstrong* v. *Kiernan*, 7 Cox, 6 (Ir). But an information for a challenge has been refused, when it appeared that the party applying had previously written letters to the other, provoking him to fight; but the court said that, if both parties had applied for informations, they would have granted them. *R.* v. *Hankey*, 1 Burr. 316. And an information has been refused, where the application was made by notorious gamesters against other gamesters, for a conspiracy to cheat them at a race. *R.* v. *Peach*, 1 Burr. 548. Even in cases which would warrant an information, if the court think it will be sufficient punishment for the defendant to pay the costs already incurred by the prosecutor, they will discharge the rule *nisi* upon these terms, if acceded to by the defendant. *R.* v. *Morgan*, 1 Doug. 314 : *R.* v. *Cozens*, 2 Doug. 426.

When and how to be moved for, etc.]—"No application shall be made for a criminal information against a justice of the peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances, or acts of misconduct complained of, be served personally upon him, or left at his residence with some member of his household, six days before the time named in it for making the application." Crown Office Rules, 1906, r. 36. This rule perpetuates what had been the established practice

both in England and Ireland. *R.* v. *Heming*, 5 B. & Ad. 666; 3 L. J. (M. C.) 3: *R.* v. *Rae*, Ir. Rep. 8 C. L. 524.

"The application for a criminal information shall be made to a Divisional Court by a motion for an order *nisi*, within a reasonable time after the offence complained of, and if the application be made against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge." R. 37. The first part of this rule adopts the practice as laid down in *R.* v. *Harries*, 13 East, 270: *R.* v. *Marshall*, 13 East, 322: *R.* v. *Smith*, 7 T. R. 80: *R.* v. *Bishop*, 5 B. & Ald. 612: *R.* v. *Saunders*, 10 Q. B. 484. The motion must be founded upon an affidavit disclosing all the material facts of the case. It is a strong, although not a conclusive, reason for rejecting an application for leave to file a criminal application that the applicant does not reside in this country. *R.* v. *Labouchere*, 12 Q. B. D. 320; 53 L. J. (Q. B.) 362. If the court grants the order *nisi*, it is afterwards, upon showing cause, discharged or made absolute, as in ordinary cases. But the court cannot compel the prosecutor to proceed to make it absolute. *R.* v. *Sherwood*, 2 L. J. (O. S.) K. B. 78. The latter part of the rule embodies the practice as stated in *R.* v. *Saunders*, 2 Cox, 249.

The motion must be made by counsel, and is not entertained if made by a private individual. *R.* v. *Lancaster JJ.*, 1 Chit. Rep. (K. B.) 602: *Anon.*, 2 Ir. Law Rec. (O. S.) 479. The words "innocent of the charge" continue the practice as laid down in *R.* v. *Athay*, 2 Burr. 653: *R.* v. *Webster*, 3 T. R. 388, as to the necessity of removing or quashing the conviction before a rule will be granted: *see R.* v. *Heber*, 2 Str. 915. The abolition of the division of the legal year into terms so far as relates to the administration of justice by s. 26 of the *Judicature Act*, 1873 (36 & 37 Vict. c. 66), appears to render it unnecessary to refer (for the purposes of r. 37) to the old division into terms in computing the time within which an application may be made for a criminal information against a magistrate for anything done in execution of his office. On the construction of that section *see Re College of Christ, Brecknock, and Martin*, 3 Q. B. D. 16; 46 L. J. (Q. B.) 591.

The motion must in all cases be made upon affidavits disclosing all the material facts of the case; if a material fact is suppressed or misrepresented, the court will discharge the rule: *R.* v. *Wroughton*, 3 Burr. 1683, very probably with costs against the applicant: *R.* v. *Wroughton* (*supra*); or perhaps, in an extreme case, against his solicitor: *R.* v. *Anderson* [1840] 2 Ir. Law Rep. 262: *R.* v. *Thomas*, 7 A. & E. 608. And, as the court is in a manner substituted for a grand jury, it will in general expect that the fact so disclosed shall amount to such evidence as would satisfy a grand jury, if an indictment was preferred for the offence. *R.* v. *Willett*, 6 T. R. 294: *R.* v. *Williamson*, 3 B. & Ald. 582. The affidavit must connect the person complained of with the offence by legal evidence. *R.* v. *Stanger*, L. R. 6 Q. B. 352; 40 L. J. (Q. B.) 96. Therefore where a rule *nisi* had been granted calling upon S. to show cause why an information should not be exhibited against him for publishing a libel in a newspaper, and the affidavit simply showed that copies of the newspaper had

been purchased at the publishing office of the paper, that by a footnote printed at the end of the copies S. was stated to be the printer and publisher of them, and that the deponent believed that S. was the printer and publisher, the court discharged the rule on the ground that the affidavit was insufficient. *Id.* The question was raised, but not decided, whether, under such circumstances, recourse can be had to the affidavits used by the defendant in showing cause, to supply the defect in those for the prosecution. *Id.* An information may be granted upon the uncontradicted affidavit of one who was *particeps criminis*. *R.* v. *Steward*, 2 B. & Ad. 12. If the subject of the application is a libel upon an individual charging him with a particular offence, the court always requires the prosecutor to deny the charge upon oath, before they will grant the information; *R.* v. *Miles*, 1 Doug. 284 : *R.* v. *Haswell*, *Id.* 387. But it is otherwise if the charge is general or be against a public body of men; *R.* v. *Williams*, 5 B. & Ald. 595; 1 D. & R. 197; or if it relates to anything said, or supposed to have been said, by the prosecutor in parliament as a member : *R.* v. *Haswell*, 1 Doug. 387. As to the practice on such applications, *see* *R.* v. *The World*, 13 Cox, 305 : *R.* v. *Labouchere*, 12 Q. B. D. 320. Where a criminal information was applied for against a magistrate, for improperly convicting a person, the court refused to grant it, unless the party complaining would make an exculpatory affidavit denying the charge. *R.* v. *Webster*, 3 T. R. 388. The affidavit upon which the order *nisi* is moved for must not be intituled in any cause. *R.* v. *Harrison*, 6 T. R. 60 : *R.* v. *Robinson*, *Id.* 642, cit.; but must be intituled, " In the High Court of Justice, King's Bench Division : " and *see also* *R.* v. *Jones*, 2 Str. 704 : *King* (*qui tam*) v. *Cole*, 6 T. R. 642; Short and Mellor, Cr. Pr. (2nd ed.) 162.

If it is intended to file a joint information against several persons, the application should be joint against all in the first instance : for, where distinct rules were obtained against five persons severally, and one information thereupon filed against them jointly, the court, upon application, set aside the proceedings. *R.* v. *Heydon*, 3 Burr. 1270.

Proceedings for a criminal information once instituted cannot be withdrawn or compromised without the sanction of the Court. *R.* v. *Newton*, 67 J. P. 453.

A rule for a criminal information was granted, and discharged upon an affidavit of the truth of the charge; subsequently it was discovered that the affidavit in answer to the rule was false, and the court granted another rule, which was made absolute. *R.* v. *Eve*, 5 A. & E. 780.

The *Law of Libel Amendment Act*, 1888 (51 & 52 Vict. c. 64, s. 8), forbids prosecution by indictment of libels in registered newspapers without the leave of a judge of the High Court; *see Ex parte Pulbrook* [1892] 1 Q. B. 86; 61 L. J. (M. C.) 91. That Act repealed s. 3 of the *Newspaper Libel and Registration Act*, 1881 (44 & 45 Vict. c. 60), which did not prevent proceedings by criminal information. *R.* v. *Yates*, 11 Q. B. D. 750; 52 L. J. (Q. B.) 778 : *Yates* v. *R.*, 14 Q. B. D. 648; 54 L. J. (Q. B.) 258. It has been assumed, but has not been decided, that s. 8 of the Act of 1888 does not bar proceedings by criminal information. Odgers on Libel (4th ed.) 663.

Form.]—Under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90, s. 8 (3)), the

provisions of that Act shall apply to criminal information in the High Court and to any plea, replication or other criminal pleading, with such modifications as may be made by rules under the Act. By rules made May 23, 1916, rule 1 (5) in the first schedule to the Act is not to apply to criminal information in the High Court, but rule 2 is made to apply with the substitution of "Criminal Information filed by the King's Coroner and Attorney" for "Presentment of the Grand Jury." And by rule 5 of the rules dated May 23, 1916, the other rules relating to indictments are to apply to criminal informations and to any plea, replication, or other pleading relating thereto. The form, therefore, is now:

In the High Court of Justice, King's Bench Division.
Criminal information filed by the King's Coroner and Attorney.
A. B. is charged with the following offence.

Statement of offence.

As in the case of an indictment. *See passim.*

Filing, etc.]—After the court has made the rule absolute, the information may be filed at the crown office, upon the prosecutor's entering into the usual recognizances for costs. "With the exception of *ex officio* informations filed by the attorney-general on behalf of the crown no criminal information . . . shall be exhibited, received, or filed at the Crown Office Department without express order of the King's Bench Division in open court, nor shall any process be issued upon any information other than an *ex officio* information, until the person procuring such information to be exhibited shall have filed at the Crown Office Department a recognizance in the penalty of 50*l.* effectually to prosecute such information and to abide and observe such orders as the court shall direct, such recognizance to be entered into before the King's coroner and attorney or the master of the Crown Office, or a justice of the peace of the county, borough, or place in which the cause may have arisen." Cr. Off. Rules, 1906, r. 35. *See* form of recognizance, App. to Cr. Off. Rules, 1906, Form 27.

Appearance and pleading.]—When the information is filed, process issues to compel the appearance of the defendant, if an appearance be not already entered for him. He then either pleads to it, or applies to quash it; and on issue joined, the proceedings are brought on to trial. *See* Short and Mellor Cr. Pr. (2nd ed.) 167; Cr. Off. Rules, 1906, rr. 35-39, 79, 83, 84. "If the prosecutor on any information not *ex officio* does not proceed to trial within a year after issue joined, or if the prosecutor causes a *nolle prosequi* to be entered, or if the defendant be acquitted (unless the judge at the time of trial certifies that there was reasonable cause for the information), the court, on motion for the same, may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information." Cr. Off. Rules, 1906, r. 38. *See also* rr. 33, 34, for securing the speedy trial of the defendant, and his being speedily brought up for judgment, when in custody.

In what cases quashed or stayed.]—The court will very seldom quash an information filed by the master of the crown office; indeed, in some of the

books it is laid down that they will not quash it in any case. *See R.* v. *Nixon*, 1 Str. 185 : *R.* v. *Fountain*, 1 Sid. 152. They have, however, interfered in this manner in a very few cases, under peculiar circumstances. *See R.* v. *Roper*, 2 Str. 1072 : *R.* v. *Williams*, 1 Burr. 385. If quashed on the motion of the prosecutor, it must be upon payment by him of the defendant's costs, at least to the extent of the recognizance. (*See ante*, p. 99.) Where a criminal information had been granted, and the attorney-general afterwards, for the same cause, filed an information *ex officio*, the court stayed the former until further order. *R.* v. *Alexander*, MS., E. T. 1830. It seems to have been laid down as a rule of practice of the court, that a person who applies for a criminal information must waive his right of action in that court for the same cause, unless the court should, on hearing the whole matter, be of opinion that it was a proper subject to be tried in a civil action, and should specifically give him leave to do so; and it was said that, if an information was granted, it was of course to stay the proceedings in an action for the same cause. *R.* v. *Sparrow*, 2 T. R. 198. And in *R.* v. *Mahon* [1836] 4 A. & E. 575, the court refused to pass sentence in a conviction for assault by the O'Gorman Mahon while a civil action was pending for the assault. *See* Short and Mellor Cr. Pr. (2nd ed) 152. However, where a rule for a criminal information for a libel was discharged on cause shown, this was held not to preclude the applicant from bringing an action in another court for the publication of the same libel. *Wakley* v. *Cooke*, 16 M. & W. 822; 16 L. J. (Ex.) 225.

Appeal.]—On conviction on a criminal information for an indictable offence an appeal lies to the Court of Criminal Appeal; 7 Edw. 7, c. 23, s. 20 (2).

Costs.]—At common law the defendant upon acquittal is not entitled to any costs beyond the extent of the recognizance. *R.* v. *Filewood*, 2 T. R. 145 : *see R.* v. *Brooke*, 2 *Id.* 190. *See also R.* v. *Savile*, 18 Q. B. 703, and Cr. Off. Rules, 1906, r. 38, *ante*, p. 137. In cases of informations for libel a more extensive remedy for costs was given by the *Libel Act*, 1843 (6 & 7 Vict. c. 96, s. 8), which enacted, that in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried. Under this section it was held, that, on a criminal information for libel, the defendant, having recovered judgment, was entitled to costs, though the only plea on the record was not guilty, and though the judge had certified, under 4 W. & M. c. 18, s. 2 (*rep.*), that there was reasonable cause for exhibiting the information : *R.* v. *Latimer*, 15 Q. B. 1077; 20 L. J. (Q. B.) 129; and that where, on such an information, judgment was given for the defendant, he was entitled to costs incurred previously to

the filing of the information, as well as to costs incurred subsequently to the filing of the information. *R.* v. *Steel*, 1 Q. B. D. 482; 45 L. J. (Q. B.) 391. The provisions of s. 8 were embodied in Cr. Off. Rules, 1906, r. 39; but s. 8 was repealed as to England by s. 10 of the *Costs in Criminal Cases Act*, 1908 (8 Edw. 7, c. 15). The part as to acquittal is re-enacted by s. 6 (2) of that Act, but that as to conviction after plea of justification is replaced by a more general provision in s. 6 (1). Section 6 applies to prosecutions on criminal information as well as to prosecutions on indictment; *vide post*, pp. 284 *et seq.*

CHAPTER III.

CORONER'S INQUISITION.

CORONERS are ancient officers of the common law: so called because they deal principally with the pleas of The Crown, and were of old time the principal conservators of the peace within their county: 2 Hawk. c. 9, s. 1; Stephen, 1 Hist. Cr. L. 217; Seld. Soc. Publ. vol. 9.

Coroner's inquisition as a mode of criminal prosecutions.]—The finding of a coroner's inquest is equivalent to the finding of a grand jury; and a defendant may be prosecuted for murder or manslaughter upon such *inquisition*, which is the record of the finding of a jury sworn to inquire concerning the death of the deceased, *super visum corporis*. Such an inquisition amounts to an indictment (*R.* v. *Ingham*, 5 B. & S. 257; 33 L. J. (Q. B.) 183), and by Coke, and the older law-writers, is frequently designated by that name, and a defendant is arraigned upon it in the same way as upon an indictment, and may plead, or take exception to it precisely as if it had been found by a grand jury, and he may be tried and sentenced on such inquisition. *Re Ward*, 30 L. J. Ch. 775, 776, Lord Campbell. It is the practice at assizes, where a prisoner stands charged upon a coroner's inquisition with murder or manslaughter, in order to guard against any failure of justice, also to prefer a bill of indictment for the same offence before the grand jury. It is usual when a bill of indictment for the offence charged in the inquisition has been ignored, to offer no evidence on the coroner's inquisition, but it is occasionally found convenient to proceed on the inquisition, and cases have occurred when this was done and the defendant was convicted. If a true bill is found the defendant is arraigned on both the indictment and the inquisition at the same time; 1 East, P. C. 371. If the bill is ignored the defendant must still be arraigned on the inquisition. Where a defendant is arraigned and tried upon one only and acquitted he must afterwards be arraigned upon the other; to which, however, he may effectually plead *autrefois acquit*. 2 Hale, 246; 4 Bl. Com. 301; 1 Chitty Cr. L. (2nd ed.) 163: *R.* v. *Cole*, 3 Camp. 371; 2 Leach, 1095: *R.* v. *Maynard*, R. & R. 240.

Authority and duty of coroner in holding inquests in cases of murder and manslaughter.]—The duty of a coroner, in cases "where any be slain or suddenly dead," was pointed out with great particularity by the statute 4 Edw. 1 (*De Officio Coronatoris*), which is said to have been merely declaratory, and in affirmance of the common law. (*See* Seld. Soc. Publ. vol. 9, p. xiv. *et seq.*) That statute was repealed by s. 45 of the *Coroners Act*, 1887 (50 & 51 Vict.

c. 71), a consolidating Act. Section 3 of the latter statute provides that " where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death, or has died a sudden death of which the cause is unknown (*see Re Hull*, 9 Q. B. D. 689), or that such person has died in prison (*R.* v. *Robinson*, 19 Q. B. D. 322), or in such place or under such circumstances as to require an inquest in pursuance of any Act, the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men to appear before him at a specified time and place, there to inquire as jurors, touching the death of such person as aforesaid " (sub-s. 1).

Upon the statute 4 Edw. 1. (*De Officio Coronatoris*), it was held that a coroner was bound to take his inquest *upon view* of the dead body, and that an inquest otherwise taken is void; *R.* v. *Ferrand*, 3 B. & Ald. 260; and it is still the law that the coroner and jury shall, at the first sitting of the inquest, view the body. 50 & 51 Vict. c. 71, s. 4, sub-s. 1 (*post*, p. 143). It was also held under the old statute that a coroner might inquire as well respecting accessories *before* the fact to a murder or manslaughter, or respecting a principal in the second degree, aiding and abetting a murder or manslaughter, as concerning the actual murderer or slayer; but that he had no power to inquire concerning accessories after the fact; and the same rule appears to continue under 50 & 51 Vict. c. 71, s. 4, sub-s. 3 of which enacts that the inquisition shall in cases of murder or manslaughter set forth " the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories *before the fact* to such murder." It was held before the passing of the *Coroners Act*, 1887, that if the dead body, whereon an inquest ought to be held, be interred, or suffered to putrefy before the coroner viewed it, the township, or, if the death occurred in a prison, the gaoler should be amerced; and that it was a misdemeanor to burn or otherwise dispose of a dead body, upon which an inquest ought to be held, with intent to prevent the coroner from holding the inquest (*see R.* v. *Price*, 12 Q. B. D. 247; 53 L. J. (M. C.) 51 : *R.* v. *Stephenson*, 13 Q. B. D. 331; 53 L. J. (M. C.) 176; *Cremation Act*, 1902 (2 Edw. 7, c. 8), s. 10); or in any other way to obstruct the coroner or his jury in the view or inquiry; Jervis on Coroners (6th ed.) 6, 86. The *ratio decidendi* of these cases will apply to similar cases arising since the passing of the Act. The coroner himself may be indicted for misdemeanor if guilty of corruption or wilful neglect of duty or of misbehaviour in abstaining from holding an inquest where it is his duty to do so. *See* 50 & 51 Vict. c. 71, s. 8, sub-s. 2. On the other hand, the holding of inquests *unnecessarily* was most strongly censured by Lord Ellenborough in *R.* v. *Kent JJ.*, 11 East, 229. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress, and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death,—that it may have been due to other causes than common illness. In

such cases the coroner not only may, but ought to hold an inquest. *R.* v. *Price*, 12 Q. B. D. 247, 248, Stephen, J. And a coroner is justified in holding an inquest if he honestly believes in the truth of information given to him which, if true, would make it his duty to hold such inquest. *R.* v. *Stephenson*, 13 Q. B. D. 331. A coroner, also, may lawfully, within a reasonable time after the death, order a dead body to be disinterred in order to view it, not only for the purpose of taking an inquest where none has been held before, but of taking a good inquest where an insufficient one has been taken before. Jervis on Coroners (6th ed.) 27. For, where the first inquest was not held *super visum corporis*, or is afterwards quashed by the High Court (K. B. D.), the coroner may hold another. 2 Hawk. c. 9, s. 23; 2 Hale, 58 : *Anon.*, 1 Str. 533. But where an inquest has been held *super visum corporis*, and a verdict recorded, the coroner cannot, *mero motu*, hold a second inquest. 2 Hale, 59 : *R.* v. *White*, 3 E. & E. 137; 29 L. J. (Q. B.) 257 : *and see* *R.* v. *Coulson*, 55 J. P. 202. Where a coroner rejected evidence which he ought to have admitted and the jury returned an open verdict the inquisition was quashed by the Q. B. D., and a *melius inquirendum* awarded before the same coroner and another jury. *R.* v. *Carter*, 13 Cox, 220. By s. 6 of the *Coroners Act*, 1887 (50 & 51 Vict. c. 71), "where his Majesty's High Court of Justice, upon application made by or under the authority of the attorney-general, is satisfied either (*a*) that a coroner refuses or neglects to hold an inquest which ought to be held; or (*b*) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held touching the said death . . . and where an inquest has been already held may quash the inquisition on that inquest." That section also makes provisions as to the costs of the application, the coroner before whom the inquest provided for by it is to be held, and the proceedings at such inquest. *See* Jervis on Coroners (6th ed.) 54. *R.* v. *Wood*, 73 J. P. 40. Having regard to the terms of s. 6, it seems doubtful whether if a coroner neglects to take an inquisition, it can now be taken by the justices of gaol delivery, of oyer and terminer, or of the peace, as stated in Bac. Abr. Coroner; 2 Hark. c. 9, s. 23 (5) *et seq.*

In view of the powers given to the secretary of state to license exhumation (20 & 21 Vict. c. 81, s. 25), and the terms of s. 6 of the *Coroners Act*, 1887, it has been doubted whether a coroner has now the power, *proprio motu*, to order exhumation. *See* Brooke Little on Burials. The form of order in Jervis on Coroners (6th ed.) 247, is not a statutory form. The coroner has also a duty to hold inquests on all prisoners dying in a prison (50 & 51 Vict. c. 71, s. 3 : *R.* v. *Graham* [1905] 69 J. P. 324 : *R.* v. *Robinson*, 19 Q. B. D. 322); including persons executed under sentence of a court of justice (31 & 32 Vict. c. 24, s. 5; 42 & 43 Vict. c. 1, s. 3; 44 & 45 Vict. c. 64, s. 2); on lunatics dying in his district if he considers there is any reasonable ground of suspicion (53 & 54 Vict. c. 5, ss. 84, 319); and on the bodies of infants nursed for hire, unless a satisfactory medical certificate of the cause of death is available (8 Edw. 7, c. 67, s. 6).

Proceedings at the inquest.]—"When not less than twelve jurors are assembled they shall be sworn by or before the coroner diligently to inquire touching the death of the person on whose body the inquest is about to be held, and a true verdict to give according to the evidence." 50 & 51 Vict. c. 71, s. 3, sub-s. 3. Though the jury cannot consist of less than twelve persons, it may consist of any greater number not exceeding twenty-three. 50 & 51 Vict. c. 71, s. 3, sub-s. 1 (*ante*, p. 141). "The coroner and jury shall, at the first sitting of the inquest, view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine." 50 & 51 Vict. c. 71, s. 4, sub-s. 1. The coroner has power to require and compel the attendance of such witnesses as he deems necessary for the investigation of the truth of each case, and may fine them for non-attendance or for refusing to answer questions. 50 & 51 Vict. c. 71, s. 19, sub-s. 2. The Act of 1887, s. 4, sub-s. 1 (*supra*), requires that the evidence at the inquest shall be given upon oath. This leaves the law as it stood before 1887. *Wakley* v. *Cooke*, 4 Ex. 511; 19 L. J. (Ex.) 91: Jervis on Coroners (6th ed.). But the fact that evidence not upon oath was received by the coroner is no ground for a *certiorari* to bring up the inquisition. *R.* v. *Ingham*, 5 B. & S. 257; 9 Cox, 508. It might, however, furnish ground for an application to the High Court of Justice for an order for another inquest under 50 & 51 Vict. c. 71, s. 6, *supra*. "Where it appears to the coroner that the deceased was attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon such practitioner as witness; but if it appears to the coroner that the deceased person was not attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon any legally qualified medical practitioner who is at the time in actual practice in or near the place where the death happened, and any such medical witness as is summoned in pursuance of this section, may be asked to give evidence as to how, in his opinion, the deceased came to his death." 50 & 51 Vict. c. 71, s. 21, sub-s. 1. "The coroner may, either in his summons for the attendance of such medical witness or at any time between the issuing of that summons and the end of the inquest, direct such medical witness to make a *post-mortem* examination of the body of the deceased with or without an analysis of the contents of the stomach or intestines. Provided that where a person states upon oath before the coroner, that in his belief the death of the deceased was caused partly or entirely by the improper or negligent treatment of a medical practitioner or other person, such medical practitioner or other person shall not be allowed to perform or assist at the *post-mortem* examination of the deceased." *Id.* sub-s. 2. "If a majority of the jury sitting at an inquest are of opinion that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner or other witnesses brought before them, they may require the coroner in writing to summon as a witness some other legally qualified medical practitioner named by them, and further to direct a *post-mortem* examination of the deceased, with or without an analysis of the contents of the stomach or intestines, to be made by such last mentioned practitioner, and that whether

such examination has been previously made or not, and the coroner shall comply with such requisition, and in default shall be guilty of a misdemeanor." *Id.* sub-s. 3.

"It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner." 50 & 51 Vict. c. 71, s. 4, sub-s. 2. [As to the admissibility in evidence of depositions taken before coroners, *see post*, p. 148.]

As to summing up by the coroner, *see* Jervis on Coroners (6th ed.) 40.

"After viewing the body and hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder." 50 & 51 Vict. c. 71, s. 4, sub-s. 3. If twelve at least of the jury do not agree on a verdict, the coroner may adjourn the inquest to the next assizes for the county or place for which the inquest is held, and if after hearing the charge of the judge or commissioner of assize twelve of the jury fail to agree on a verdict they may be discharged without a verdict. 50 & 51 Vict. c. 71, s. 4, sub-s. 5 : Jervis on Coroners (6th ed.) 44.

Requisites and form of inquisition in cases of murder and manslaughter.]—The form of an inquisition is contained in the second schedule of 50 & 51 Vict. c. 71, and by sect. 37 of that Act :—"the schedules to this Act shall be construed and have effect as part of this Act, and the forms given in any of those schedules, or such other forms as the Lord Chancellor from time to time directs may be used in all matters to which they apply, and when so used shall be sufficient in law." "The inquisition shall be under the hands, *and in the case of murder or manslaughter also under the seals*, of the jurors who concur in the verdict, and of the coroner." 50 & 51 Vict. c. 71, s. 18, sub-s. 1.

By the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90, s. 8 (3)), the provisions of that Act shall apply to . . . inquisitions . . . with such modifications as may be made by rules under the Act. By rules dated May 23, 1916, rule 3 (1) : Rule 1 (5) and rule 2 in the First Schedule to the Act shall not apply to coroners' inquisitions. By rule 3 (2) : In coroners' inquisitions the form of inquisition provided by the *Coroners Act*, 1887, may be used with such alterations as may be made under that Act, but any offence charged thereon shall be stated in accordance with the form of indictment relating thereto prescribed by the *Indictments Rules*, 1915-1916. By rule 5 : Except as in these rules otherwise provided, the *Indictments Rules*, 1915-1916, relating to indictments shall apply to . . . inquisitions.

"An inquisition need not be on parchment, and may be written or printed, or partly written and partly printed, and may be in the form contained in the second schedule to this Act, or to the like effect, or in such other form as the Lord Chancellor from time to time prescribes, or to the like effect, and the state-

ments therein may be made in concise and ordinary language." 50 & 51 Vict. c. 71, s. 18 (2). Formerly an inquisition in the case of murder or manslaughter had to be on parchment, but this is now repealed by the *Indictments Act*, 1915. 5 & 6 Geo. 5, c. 90, s. 8 (3). An inquisition consists of three parts—the caption or *incipitur*, the verdict of the jury, and the attestation.

Venue.]—The venue should be in the county or jurisdiction within which the inquisition is holden. *See ante*, pp. 28 *et seq.* To avoid difficulty in cases where the cause of death arose within one county or jurisdiction, and the body was lying dead within another county or jurisdiction, the Act of 1887 provides that "the coroner only within whose jurisdiction the body of a person upon whose death an inquest ought to be holden is lying shall hold the inquest, and where a body is found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea where there is no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body is first brought to land;" s. 7, sub-s. 1; and "for the purpose of holding coroners' inquests, every detached part of a county shall be deemed to be within the county by which it is wholly surrounded, or, where it is partly surrounded by two or more counties within the county with which it has the longest common boundary." Sec. 40, sub-s. 1.

Verdict.]—The inquisition must show of what place the person who took it was coroner, and that he had competent jurisdiction. 2 Ld. Raym. 1305. It is essential that the inquest shall be taken *upon view* of the body (2 Hawk. c. 9, s. 23), for the coroner can take an inquisition *super visum corporis* only (excepting where the inquest is ordered by the High Court of Justice, *ante*, p 142), the view being absolutely necessary to give him jurisdiction. (*R.* v. *Ferrand*, *ante*, p. 141). If the body of the deceased is identified, and his christian name and surname is known, or the name by which he was usually known is ascertained, they ought to be correctly stated; but the provisions of the *Indictments Act*, 1915, relating to descriptions in indictments apply to inquisitions. 5 & 6 Geo. 5, c. 90, s. 8 (3); *see ante*, pp. 47 *et seq.* It is essential to every inquisition that it be found by twelve jurors at the least; 2 Hale, 161 n.; 50 & 51 Vict. c. 71, s. 4, sub-s. 5.

Attestation.]—The names of the jurors ought to be inserted in the body of the inquisition, and the inquisition ought to be subscribed by them with their names. *R.* v. *Evett*, 6 B. & C. 247. It was held in the last-mentioned case that the jurors ought to subscribe their names in full. 50 & 51 Vict. c. 71, s. 18, sub-s. 1 (*ante*, p. 144) merely directs that the inquisition shall be under their hands, and in the case of murder or manslaughter also under their seals. *See* 2 Co. Inst. 388. Where the inquisition is taken before a deputy coroner, the proper mode of signing the attestation is "R. D. (L.S.), coroner, by E. M. his deputy duly appointed," etc. *R.* v. *Perkins*, 7 Q. B. 165; 14 L. J. (M. C.) 87. As to the jurisdiction of deputy coroners, and the mode of proving it, *see* 55 & 56 Vict. c. 56, s. 1. When the inquest takes place in a county other than

that in which the offence is charged by the inquisition, the inquisition should be returned to the court of assize for the county in which the offence is charged. *R.* v. *Wight*, 59 J. P. 746.

Process upon a coroner's inquisition.]—"Where a coroner's inquisition charges a person with the offence of murder or manslaughter, or of being accessory before the fact to a murder (which latter offence is in this Act included in the expression 'murder'), the coroner shall issue his warrant for arresting or detaining such person (if such warrant has not previously been issued) and shall bind by recognizance all such persons examined before him as know or declare anything material touching the said offence, to appear at the next court of oyer and terminer or gaol delivery at which the trial is to be, then and there to prosecute or give evidence against the person so charged." 50 & 51 Vict. c. 71, s. 5, sub-s. 1. For form of recognizances to prosecute and give evidence, *Id.* Sched. 2. "The coroner shall deliver the inquisition, depositions, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court." *Id.* s. 5, sub-s. 3. By Home Office circular of May, 1891, coroners are requested to see that the depositions are legibly written and accompanied by all exhibits. If the coroner does not take them properly, and return them to the proper court or person, he is liable to fine under 50 & 51 Vict. c. 71, s. 9. When an inquisition is returned to the justices of oyer and terminer, or of gaol delivery, if the person against whom the coroner's jury have found their verdict of guilty has been taken, he is tried before them; but if he cannot be taken, the inquisition is to be certified by them into the King's Bench Division, and process may then be awarded as upon an indictment. *See ante*, p. 78; 2 Hale, 64; 1 Chitty Cr. L. 163; and for all the forms of proceeding upon inquests, *see* Jervis on Coroners (6th ed.) and Sched. 2 of 50 & 51 Vict. c. 71.

Person charged with murder or manslaughter entitled to copy of inquisition and of depositions.]—By the *Indictments Rules*, 1916, dated May 23, 1916, rule 4: It shall be the duty of the clerk of assize to supply on request free of charge to a person committed for trial on a coroner's inquisition a copy of so much of the inquisition as charges him with an offence, and the cost of such copy shall be treated as part of the costs of the prosecution for the purpose of section 1 of the *Costs in Criminal Cases Act*, 1908. The *Coroners Act*, 1887, s. 18 (5), provides for copies of the inquisition and depositions at a charge not exceeding three halfpence for every folio of ninety words.

This has not been repealed by the *Indictments Act*, 1915; but, so far as the inquisition is concerned, is practically superseded by rule 4 of the *Indictments Rules*, *supra*.

By the *Costs in Criminal Cases Act*, 1908, s. 1 (3), *post*, p. 268, where a prisoner has obtained a certificate for legal aid under the *Poor Prisoners Defence Act*, 1903, the costs which may be directed to be paid out of local funds include the costs of a copy of the depositions.

Depositions to be sent to Director of Public Prosecutions.]—Where a prosecution for murder or manslaughter is undertaken by the Director of Public Prosecutions, the coroner must send the inquisition and depositions to that officer. 42 & 43 Vict. c. 22, s. 5. By the Regulations of Jan. 25, 1886, under the *Prosecution of Offences Acts*, 1879, 1884 and 1908 (*see* Douglas Summ. Jur. Proc. (9th ed.); Stat. Rules and Orders Revised (ed. 1904), vol. 4, *tit. Criminal Procedure, England*, p. 7), it is the duty of the Director of Public Prosecutions to take up charges of murder, and it has been the practice, since the issue of a Home Office circular of September, 1884, for the coroner to send to that officer copies of depositions taken on inquisitions of murder or manslaughter. *See* Jervis on Coroners (6th ed.) 52.

Bail where the coroner has committed a person to prison.]—The provisions as to bail contained in the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), the *Summary Jurisdiction Act*, 1848 (11 & 12 Vict. c. 43), and the *Bail Act*, 1898 (61 & 62 Vict. c. 7), *ante*, pp. 87 *et seq.*, do not apply to cases of commitment upon an inquisition by the warrant of a coroner; but by 50 & 51 Vict. c. 71, s. 5, sub-s. 2, "Where the offence is manslaughter, the coroner may, if he thinks fit, accept bail by recognizance with sufficient sureties for the appearance of the person charged at the next court of oyer and terminer, or gaol delivery at which the trial is to be, and thereupon such person if in the custody of an officer of the coroner's court or under a warrant of commitment issued by such coroner, shall be discharged therefrom." As to the form of such recognizances, and the notices to be given to the persons bound thereby, *see Id.* s. 18, sub-s. 4, and Sched. 2. Where the jury find a verdict of *murder*, or where the coroner refuses bail, the High Court (K. B. D.) can grant bail. The procedure is the same as in other cases of bail. It is now usual to proceed by summons for bail, and not by writ of *habeas corpus* and *certiorari*. *See ante*, p. 93.

Trial of Inquisition.]—On the trial of an inquisition, the court has the same powers of amendment as in the case of the trial of an indictment. *See* 5 & 6 Geo. 5, c. 90, ss. 5, 8 (3), (*ante*, pp. 54, 144). And by s. 20 of 50 & 51 Vict. c. 71,—"If in the opinion of the court having cognizance of the case an inquisition find sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the court may order the proper officer of the court to amend any defect in the inquisition, and any variance occurring between the inquisition and the evidence offered in proof thereof, if the court are of opinion that such defect or variance is not material to the merits of the case, and that the defendant or person traversing the inquisition cannot be prejudiced by the amendment in his defence or traverse on the merits, and the court may order the amendment on such terms as to postponing the trial to be had before the same or another jury as to the court may seem reasonable, and after the amendment the trial shall proceed in like manner, and the inquisition, verdict, and judgment, shall be of the same effect, and the record shall be drawn up in the same form, in

all respects, as if the inquisition had originally been in the form in which it stands when so amended." The jurisdiction to amend belongs only to the court of trial, *R.* v. *Directors of G.W.R.*, 24 Q. B. D. 410; 16 Cox, 410. If the inquisition is defective it may be brought up with the depositions by *certiorari* to the King's Bench Division of the High Court and quashed; *R.* v. *Clerk of Assize of Oxford Circuit* [1897] 1 Q. B. 370; 18 Cox, 518: and *cf. Six-mile Bridge Case*, 6 Cox, 122 (Ir.). Where the defects are on the face of the inquisition the application is usually made to the court to which it is returned, and before plea pleaded. *See* Jervis on Coroners (6th ed.) 54, 55.

Admissibility of depositions at trial.]—Depositions taken before a coroner do not fall within 11 & 12 Vict. c. 42, s. 17, but are admissible at the trial if the deponent is dead, on proof that the person against whom they are tendered in evidence was present at the inquest and had opportunities afforded him for cross-examining the deponent. *R.* v. *Cowle*, 71 J. P. 172: *R.* v. *Black*, 74 J. P. 71; 2 Russ. Cr. (7th ed.) 2244. This rule applies only to statements in the deposition which would have been admissible on a *viva voce* examination of the deponent. *R.* v. *Black*, *supra*.

Costs.]—As to the costs of a trial on a coroner's inquisition, *see* 8 Edw. 7, c. 15, *post*, pp. 267 *et seq.*

CHAPTER IV.

PLEAS, REPLICATIONS, ETC.

SECT. 1.

ORDER AND TIME OF PLEADING.

CRIMINAL proceedings have been specially excepted from statutes changing the system of pleading (*e.g.*, 4 & 5 Anne, c. 3; 4 Anne, c. 16, Ruffhead), and are still to a great extent subject to the common law rules of pleading; 1 Chit. Cr. L. 434. At common law no more than one plea can be pleaded to any indictment or criminal information for misdemeanor. *R.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 26: *R.* v. *Strahan*, 7 Cox, 85. In felonies if the defendant pleads specially in bar, he may (*R.* v. *Charlesworth*, *supra*), and should in strictness, *at the same time*, plead over to the felony. *See post*, p. 160; and *R.* v. *Drury*, 3 C. & K. 196, 200; 18 L. J. (M. C.) 189.

When brought to the bar and arraigned, after any question raised as to his capacity to plead has been decided, the prisoner either confesses the charge in the indictment or some other charge of which he can lawfully be convicted on that indictment (*see* 4 & 5 Geo. 5, c. 58, s. 39 (1)), or stands mute, or does not answer directly to the charge (*see* 7 & 8 G. 4, c. 28, s. 2); or pleads to the jurisdiction—or demurs—or pleads specially in bar—or pleads the general issue, *i.e.*, that he is "not guilty." Except under the express provisions of a statute, it is not permissible to plead double or to join any other plea with the general issue. *R.* v. *Strahan*, 7 Cox, 85. *And see R.* v. *Banks*, [1911] 2 K. B. 1095; 81 L. J. (K. B.) 120; 22 Cox, 653; 6 Cr. App. R. 276. When the

defendant has pleaded "not guilty," he is not entitled afterwards, and while that plea is standing, to plead specially in bar. *Id.* When he has any special matter to plead in bar, or if the indictment be demurrable, he should plead, or demur at the time of arraignment, before the plea of not guilty. *See R.* v. *Binkes*, 2 Smith (K. B.) 620.

Where a defendant prosecuted in the King's Bench Division of the High Court in England or Ireland, by information or indictment, for any misdemeanor there found or removed into that court, appears in court in term time in person to answer the indictment or information, he cannot "imparle" to a following term, but must plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days, judgment may be entered against him for want of a plea. If he appears to the indictment by attorney, he cannot "imparle" to the following term, but may forthwith be ruled to plead; and a plea or demurrer may be enforced, or judgment by default entered thereupon, in the same manner as before the passing of the Act might have been done, had the defendant appeared by his attorney in the preceding term. 60 G. 3 and 1 G. 4, c. 4, s. 1. But the court or a judge may, for sufficient cause, allow further time to plead or demur. 60 G. 3 and 1 G. 4, c. 4, s. 2. These provisions do not apply to prosecutions for non-repair of a bridge or highway. 60 G. 3 and 1 G. 4, c. 4, s. 10; Short and Mellor, Cr. Pr. (2nd ed.) 105.

SECT. 2.

PLEA TO THE JURISDICTION.

When available.]—Where an indictment is taken before a court which has no cognizance of the offence, the defendant may plead to the jurisdiction without answering at all to the crime alleged; 2 Hale, 268; 1 Chit. Cr. L. 437; as if a man were indicted for treason at the quarter sessions, or for a rape at the sheriff's tourn, or the like; *Id.*; or if another court have exclusive jurisdiction of the offence. 4 Bl. Com. 333.

But it is seldom necessary to have recourse to this plea. For it is bad unless it shows a court or jurisdiction in which the defendant could lawfully be tried. If the offence were committed out of the jurisdiction of the English courts, the defendant may take advantage of this matter under the general issue; *R.* v. *Johnson*, 6 East, 583; or if the defect of jurisdiction appears upon the face of the record, he may demur, or (it would seem) move in arrest of judgment; *R.* v. *Hewitt*, R. & R. 158; and if convicted may appeal. If, on the other hand, the offence were committed within the local jurisdiction of the court, but the court has not cognizance of it (which can occur only in the case of indictments in inferior courts, such as a court of quarter sessions), the defendant may have advantage of it upon general demurrer; *R.* v. *Fearnley*, 1 T. R. 316; 1 Leach, 425; or the High Court, upon the indictment being

removed by *certiorari*, will quash it: *R.* v. *Bainton*, 2 Str. 1088. And the court before which the indictment is preferred will, in general, give the defendant advantage of the objection at the trial, under the general issue. In *R.* v. *Balfour*, Q. B. D. Oct. 15th, 1895, Bruce, J., it was proposed to put in a plea to the jurisdiction on the ground that the indictment contained counts for offences in respect of which the defendant had not been extradited from the Argentine Republic; but the doubtful counts were withdrawn, and the plea was not in fact pleaded. In *R.* v. *Jameson* [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218; objections on the ground of want of jurisdiction were taken (1) on motion to quash the indictment; and (2) when this failed, under the plea of not guilty.

Form.]—By s. 8 (3) of the *Indictments Act*, 1915, *ante*, p. 144, the provisions of that Act are applied to any plea, replication, or other criminal pleading. The form of a plea to the jurisdiction is as follows:—

The King *v.* A. B.

Central Criminal Court.

A. B. says that the court ought not to take cognizance of the indictment against him because [*state in ordinary language the matter of the plea*].

The form of the replication to this plea is:—

The King *v.* A. B.

Central Criminal Court.

H. A. (the Clerk of the Court) joins issue on behalf of the King.

If a plea to the jurisdiction is quashed on demurrer or otherwise fails the defendant may be ordered to plead over *instanter*. *R.* v. *Johnson*, *supra*.

SECT. 3.

DEMURRER.

BY a demurrer to an indictment or information the defendant refers it to the court to pronounce whether, admitting the matters of fact alleged against him to be true, they do, in point of law, constitute him guilty of an offence sufficiently charged against him. 1 Starkie Cr. Pl. 315 (2nd ed.). By a demurrer to a plea the prosecutor refers it to the court to determine whether the plea is good in law. Demurrers are of two kinds: 1. *Special*, usually called demurrers in abatement, based on some formal defect in the indictment: these, like pleas in abatement, are obsolete, on account of the wide powers of amendment given formerly by the *Criminal Procedure Act*, 1851 (14 & 15 Vict. c. 100), and now

by the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90); *see ante*, p. 54. 2. *General*, founded on some substantial defect in the indictment or last preceding pleading. And if the party pleads to the indictment, or replies to a plea in bar, it will then be too late to demur unless the court consents to withdrawal of the plea or replication.

General demurrers.]—Where there is a defect in substance apparent on the face of the indictment, the defendant may take advantage of it by general demurrer, but if he pleads over, instead of demurring or moving to quash the indictment (as to which *see ante*, p. 98), the defect will in numerous cases be cured by verdict; *e.g.*, in cases within 7 G. 4, c. 64, s. 21, *ante*, p. 44. Even independently of that enactment, it is a general rule of pleading at common law—in criminal as in civil cases—that, where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court *after verdict* that the verdict could not have been found on this issue without proof of this averment, the defective averment, which might have been bad on demurrer, is cured by the verdict. *Heymann* v. *R.*, L. R. 8 Q. B. 102, 105: *R.* v. *Goldsmith*, L. R. 2 C. C. R. 74; 42 L. J. (M. C.) 94: *Taylor* v. *R.* [1895] 1 Q. B. 25; 64 L. J. (M. C.) 11. In the cases of defects in substance apparent on the face of the indictment which do not fall within one of the classes mentioned either in 7 G. 4, c. 64, s. 21 (*ante*, p. 44) or in *Heymann* v. *R.* (*supra*), and are therefore not cured by verdict, the defendant may, instead of demurring, plead "not guilty;" and then if convicted, move in arrest of judgment, thus giving himself the same advantage which he could have had upon demurrer, after having had a chance of an acquittal on his plea of not guilty. The usual adoption of this course in practice appears to be one of the main causes of the infrequency of demurrers in criminal practice. An additional reason for its adoption lies in the fact that points of law raised at the trial may on conviction be made the subject of appeal or case stated. *R.* v. *Martin*, 1 Den. 398; 18 L. J. (M. C.) 137. For these reasons, coupled with the wide powers of amendment in all cases of defective indictments under sub-s. 1 of s. 5 of the *Indictments Act*, 1915, *ante*, p. 54, demurrers may in practice be regarded as obsolete.

Time.]—The proper time for the defendant to demur is when arraigned and called upon to plead. But the court has a discretion to allow a plea to be withdrawn in order that the defendant may demur. Thus, in *R.* v. *Purchase*, C. & Mar. 617, where a man indicted for felony had in the absence of his counsel pleaded to a demurrable indictment, the judge, on counsel's application, allowed him to demur, before the evidence was gone into. But this would not be permitted in order to take advantage of a merely verbal objection. *R.* v. *Odgers*, 2 M. & Rob. 479, *and see R.* v. *Brown*, 1 Den. 291, 293 n. It was in some cases held that a defendant might demur and plead to the indictment at the same time. *R.* v. *Phelps*, C. & Mar. 180: *R.* v. *Adams*, *Id.* 299. But this was denied to be law by Cresswell, J., in *R.* v. *Odgers* (*supra*), *and see R.* v. *Duffy*, 7 St. Tr. (N. S.) 795, 853; 2 Cox, 45; Bullen & Leake Pleading (3rd ed.) 692.

Form.]—A demurrer in the High Court must be written or printed on paper and filed at the Crown Office, and a copy delivered to the opposite party, and, if settled by counsel, must be signed by him. Cr. Off. Rules, 1906, rr. 117, 119. A demurrer in other courts must also be written or printed on durable paper or parchment and filed. As to demurring *ore tenus*, *see* *R.* v. *Swan*, Fost. 105; 1 Chit. Cr. L. (2nd ed.) 440. The following are forms of demurrers and joinders :—

Demurrer to an Indictment.

The King *v.* A. B.

Central Criminal Court.

A. B. says that the indictment is not sufficient in law and that he is not bound by law to answer it.

Joinder.

The King *v.* A. B.

Central Criminal Court.

H. A. (the Clerk of the Court) joins issue on behalf of the King.

Effect.]—A demurrer, on the part either of the crown or of the defendant, has the effect of laying open to the court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; Hob. 56; 1 Saund. 284, n. 5; and if two or more of the pleadings are bad in substance the court will give judgment against the party who committed the first fault. Thus, for instance, if the indictment is bad, there shall be judgment for the defendant, although the plea in bar is also insufficient : *Piggot's case*, 5 Co. Rep. 29 *a*. Even if it appears upon the face of the record that the court have no jurisdiction of the offence charged in the indictment, the defendant may take advantage of this matter upon the demurrer. *R.* v. *Fearnley*, 1 T. R. 316; 1 Leach, 425.

Judgment.]—The judgment for the defendant upon demurrer is, that he be dismissed and discharged from the premises. The judgment against the defendant in misdemeanors is final as on demurrer in civil cases : *R.* v. *Taylor*, 3 B. & C. 502; 5 D. & R. 422; but the court has the power to permit the defendant afterwards to plead over. *R.* v. *Birmingham and Gloucester Rail. Co.*, 3 Q. B. 224; 10 L. J. (M. C.) 136 : *R.* v. *Mitchel*, 6 St. Tr. (N. S.) 545. Demurrers in felonies have been so rare, that it has been doubted what judgment ought to be pronounced against the defendant. The older authorities went to show it to be final; 2 Hawk. c. 31, s. 5; but by some this was questioned, and it was said that, *in favorem vitæ*, the defendant should plead over to the felony. *Id.* s. 6; 2 Hale, 255, 257; 4 Bl. Com. 334 : *R.* v. *Taylor*, 5 D. & R. 422; 3 B. & C. 502 : *R.* v. *Gibson*, 8 East, 107 : *see* *R.* v. *Purchase*, C. & Mar. 617 : *R.* v. *Bowen*,

1 C. & K. 501, 504. In *R.* v. *Duffy*, 7 St. Tr. (N. S.) 795; 4 Cox, 24, which was an indictment for a felony not capital, the judges sitting on the commission of oyer and terminer in Dublin, agreed that the defendant was entitled to plead over to the felony, after judgment against him on demurrer to the indictment. But in *R.* v. *Fadermann*, 1 Den. 569; 3 C. & K. 353, it was held that on *general* demurrer to an indictment for felony, the judgment for the crown was final; *and see Mulcahy*, v. *R.*, L. R. 3 H. L. 306, 323 n.

SECT. 4.

SPECIAL PLEAS IN BAR.

When used.]—As all matters of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice. In fact, the only instance (with the exception of the pleas of *autrefois acquit*, etc., *post*, pp. 155 *et seq.*) in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, etc., and wishes to throw the *onus* of repairing upon some person or persons not bound of common right to repair it; in which case they must plead specially the liability of the party to repair, and the reason of his liability, so as to take the case out of the common law presumptions, that every highway is repairable by the parish, and every bridge by the county in which it is situate.

Form.]—The following are forms of special pleas in bar, replications, and rejoinders :—

Special Plea.

The King *v.* A. B.

Central Criminal Court.

A. B. says that the King ought not further to prosecute the said indictment against him because [*state the matter of the plea in ordinary language*].

Replication.

The King *v.* A. B.

Central Criminal Court.

H.A. (the Clerk of the Court) joins issue on behalf of the King.

When the plea is to an indictment in the King's Bench Division, the replication is similar, substituting the High Court of Justice, King's Bench Division,

and the Master of the Crown Office, King's Coroner and Attorney for the Central Criminal Court and the Clerk of the Court.

In making up the record it is usual to add what is known as the *similiter*: "*And the said* A. B. *doth the like. Therefore, let a jury come.*" *See* Stephen, Pleading (5th ed.), 271. No judgment after verdict upon any indictment can be stayed or reversed for want of a *similiter*. 7 G. 4, c. 64, s. 21; (*ante*, p. 44).

Having thus given the forms of special pleas, etc., generally, it remains to treat of those which usually occur in practice, in this order:—

1. *Autrefois acquit*, *infra*.
2. *Autrefois convict*, p. 160.
3. *Autrefois attaint*, p. 163.
4. *Pardon*, p. 164.

1. *Autrefois acquit.*

"It is an established rule of the common law that a man may not be put twice in peril for the same offence." 2 Hawk. c. 35.

The principle on which the right to plead *autrefois acquit* or *autrefois convict* depends, is that a man should not be put twice in jeopardy for the same matter, and it does not rest on any doctrine of estoppel. But it seems always to have been held that a previous acquittal can only be pleaded in bar to a subsequent indictment (1) where the acquittal is for the exact offence charged in the subsequent indictment; or (2) where the subsequent indictment is based on the same acts and omissions in respect of which the previous acquittal was made, and some statute directs that the defendant shall not be tried or punished twice in respect of the same acts or omissions. The statutory provisions on the subject are as follows: The *Piracy Act*, 1744 (18 G. 2, c. 30), directs that persons tried and acquitted or convicted for piracy, felony, and robbery under the Act shall not be liable to be tried again "for the same fact" as high treason. The *Incitement to Mutiny Act*, 1797 (37 G. 3, c. 70), contains a similar provision (s. 2), as do the *Unlawful Oaths Acts*, 1797 (37 G. 3, c. 123, s. 7) and 1812 (52 G. 3, c. 104, s. 8), and the *Treason Felony Act*, 1848 (11 & 12 Vict. c. 12, s. 7). The *Criminal Procedure Act*, 1851 (14 & 15 Vict. c. 100), provides (s. 12) that a person tried for misdemeanor shall not be entitled to acquittal because the evidence proves a felony, and shall not be tried again on the same facts for felony unless the court so directs, and s. 9, while permitting conviction of an attempt on a charge for the full offence, forbids a second trial for the attempt. By s. 33 of the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), it is provided that "where an act or omission constitutes an offence under two or more Acts or under an Act and at common law (whether any such Act was passed before or after the commencement of this Act (January 1, 1890)) the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be *punished* twice for the same offence." Perhaps this enactment would have been clearer if for the word "offence" at the end had been substituted the words "act or omission." But it does no more than extend to statutory offences the common-law rule as laid down in *R.* v. *Miles*, 24 Q. B. D. 423; 59 L. J. (M. C.) 56.

If, therefore, a man has been tried and found to be not guilty of an offence by a court competent to try him, the acquittal is a bar to a second indictment for the same offence. And the rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter: 2 Hale, 246; but is not a bar to an indictment for arson arising out of the same facts: *R.* v. *Serné*, 107 Cent. Crim. Ct. Sess. Pap. 418, Charles, J. It is immaterial whether the first acquittal were in a summary proceeding or on indictment: *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; 44 L. J. (M. C.) 101. If the crimes were so distinct that the evidence necessary to prove one will not prove the other, it cannot properly be said that they were so far the same that an acquittal of one is a bar to a prosecution for the other. *R.* v. *Vandercomb*, 2 East, P. C. 519, 520; 2 Leach, 708; *R.* v. *Barron* [1914] 2 K. B. 570; 83 L. J. (K. B.) 786; 10 Cr. App. R. 81. *See also R.* v. *Bird*, 2 Den. 94; 20 L. J. (M. C.) 70 (C. C. R.): *R.* v. *Emden*, 9 East, 437: *R.* v. *Sheen*, 2 C. & P. 634: *R.* v. *Drury*, 3 C. & K. 193; 18 L. J. (M. C.) 189: *R.* v. *Miles*, 24 Q. B. D. 423; 59 L. J. (M. C.) 56; and 2 Russ. Cr. (7th ed.) 1982 *et seq.* Whether the facts are the same in both trials is not a true test: the test is rather whether the acquittal on the first charge necessarily involves an acquittal on the second charge. *R.* v. *Barron*, *supra*. An acquittal of the whole of an offence does not necessarily involve an acquittal of every part of it. *R.* v. *Salvi*, 10 Cox, 481.

In *R.* v. *Miles*, 3 Cr. App. R. 13, the defendant after acquittal on an indictment for larceny was again tried on exactly the same evidence for an offence against s. 7 of the *Prevention of Crimes Act*, 1871 (34 & 35 Vict. c. 112,) for being found in a public place with intent to commit a felony, and it was held that the first acquittal was no bar to the second trial.

An acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for larceny of the same goods: because, upon the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; 2 Hale, 246: *R.* v. *Vandercomb*, *supra*; because the defendant could not have been convicted of the larceny on the first indictment. But in *R.* v. *O'Brien*, 15 Cox, 29 (C. C. R.) an acquittal for larceny at common law and feloniously receiving the goods so stolen was held no bar to a subsequent indictment for stealing a fixture, framed on 24 & 25 Vict. c. 96, s. 31, now repealed and replaced by the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50, s. 8). An acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder on the same facts: *Holcroft's case*, 2 Hale, 246; 3 Co. Rep. 46 *b*, cit.: *R.* v. *Tancock*, 13 Cox, 217. Whether a person accused of a minor offence is acquitted or convicted he may not be charged again on the same facts in a more aggravated form. *R.* v. *Elrington*, 1 B. & S. 688; 31 L. J. (M. C.) 14, Cockburn, C.J.: *R.* v. *Miles*, 24 Q. B. D. 423; 59 L. J. (M. C.) 56. But this rule does not apply when the subsequent charge is of murder or manslaughter. *R.* v. *Morris*, L. R. 1 C. C. R. 90;

36 L. J. (M. C.) 84; 10 Cox, 480: *R.* v. *Salvi*, 10 Cox, 481 n. A person cannot, after acquittal on an indictment for felony or misdemeanor, be indicted for an attempt to commit it, for he might have been convicted for the attempt on the indictment for the felony. 14 & 15 Vict. c. 100, s. 9. Nor can a person indicted and acquitted for robbery, afterwards be indicted for an assault with intent to rob: 6 & 7 Geo. 5, c. 50, s. 44 (1); a person indicted and acquitted for a misdemeanor, which upon the trial appears to be a felony, cannot afterwards be indicted for the felony: 14 & 15 Vict. c. 100, s. 12. A person indicted and acquitted for embezzlement cannot afterwards be indicted for larceny; or if tried and acquitted for larceny, cannot afterwards be indicted for embezzlement, upon the same facts: 6 & 7 Geo. 5, c. 50, s. 44 (2). *R.* v. *Gorbutt*, Dears. & B. 166; 26 L. J. (M. C.) 47. A person indicted for stealing and acquitted cannot be afterwards indicted on the same facts for obtaining the same thing by false pretences: 6 & 7 Geo. 5, c. 50, s. 44 (3). The rules are equally applicable, though the first indictment is against the defendant jointly with others, and the second against him alone; for upon the second indictment he may be convicted of an offence committed by him separately or jointly with others; and the plea avers the identity of the offence charged in both the indictments. *R.* v. *Dann*, 1 Mood. 424. An acquittal on an indictment under 24 & 25 Vict. c. 97, s. 35, for the felony of unlawfully and maliciously putting across any railway anything with intent to obstruct any engine using such railway, is no bar to a subsequent indictment upon the same facts, under 24 & 25 Vict. c. 97, s. 36, for the misdemeanor of unlawfully obstructing an engine using a railway. *R.* v. *Gilmore*, 15 Cox, 85, Huddleston, B. And where a conviction for unlawful carnal knowledge of a girl was quashed in a case where serious injuries were also inflicted upon her, a plea of *autrefois acquit* to a subsequent charge of felonious wounding was held to be bad as the facts were entirely distinct. *R.* v. *Norton*, 5 Cr. App. R. 97. So also an acquittal of sodomy is not a bar to an indictment for gross indecency as there are essential elements in the former charge which are not essential in the latter. *R.* v. *Barron*, *supra*. Nor is an acquittal of conspiracy to do an act a bar to an indictment for aiding and abetting the commission of the same act. *R.* v. *Kupferberg*, 13 Cr. App. R. 166.

An acquittal by a competent jurisdiction outside England is a bar to an indictment for the same offence before any tribunal in England. *R.* v. *Roche*, 1 Leach, 134; *R.* v. *Hutchinson*, 3 Keb. 785; 1 Leach, 135, cit.; Bull. (N. P.) 245. See also *R.* v. *Aughet*, 82 J. P. 174; 13 Cr. App. R. 101. But in this case the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted. *See Beak* v. *Thyrwhit*, 3 Mod. 194: *S. C. sub nom. Beake* v. *Tyrrell*, 1 Show. 5; Bull. (N. P.) 245: *R.* v. *Roche*, 1 Leach, 134. Even an erroneous acquittal, standing unreversed, is a sufficient foundation for this plea: Y. B. 9 H. 5, no. 2, pl. 7; 2 Co. Inst. 318, 319; 2 Hale, 247: *R.* v. *Drury*, 18 L. J. (M. C.) 39; 3 C. & K. 193. An acquittal on an indictment for non-repair of a highway binds no right. *R.* v. *Burbon* [1816] 1 Man. & G. 392: *R.* v. *Hutchings*, 6 Q. B. D. 300, 306: and *see R.* v. *Ollis* [1900] 2 Q. B. 758.

An acquittal upon an indictment in a wrong county cannot be pleaded to a

subsequent indictment for the offence in another county. Com. Dig., Indictment (L.); 2 Hale, 245 : *R.* v. *Welsh*, 1 Mood. 175.

The acquittal of a man as principal is no bar to a subsequent prosecution against him (*a*) as accessory *after the fact;* 2 Hawk. c. 35, s. 11; nor (*b*) according to the ancient law, as accessory *before the fact.* Hale says that such an acquittal is a bar to a subsequent prosecution against him as an accessory *before the fact.* 1 Hale, 625; 2 Hale, 244; Kel. (J.) 35. This, however, is not the view of either Foster or Hawkins : Fost. 361; 2 Hawk. c. 35, s. 11; and in *R.* v. *Birchenough*, 1 Mood. 477; 7 C. & P. 575, where, to an indictment charging the defendant as an accessory before the fact to child murder, he pleaded *autrefois acquit* upon an indictment charging him with having been present, aiding and abetting in the said murder, the judges held that the plea was no bar, and had been properly overruled at the trial. And by 24 & 25 Vict. c. 94, s. 1, an accessory before the fact may be indicted as a principal felon.

An acquittal (or judgment for the defendant on demurrer, *R.* v. *Richmond*, 1 C. & K. 240) upon an insufficient indictment, is no bar to another indictment for the same offence. *Vaux's case*, 4 Co. Rep. 44b, 45a; *and see R.* v. *Coogan*, 1 Leach, 448 : *R.* v. *Taylor*, 3 B. & C. 502. An insolvent debtor, who had been indicted for omitting goods from his schedule and acquitted, afterwards pleaded *autrefois acquit* to another indictment for omitting other goods from the same schedule; and Patteson, J., held that the plea was no bar to the second indictment, but said that such a course ought not to be adopted except under very peculiar circumstances. *R.* v. *Champneys*, 2 M. & Rob. 26. And generally it may be laid down, that whenever, by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offences charged against him in the first indictment as it stood at the time of its finding, he has not been *in jeopardy*, in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment. *R.* v. *Drury*, 3 C. & K. 193; 18 L. J. (M. C.) 189 : *R.* v. *Green*, Dears. & B. 113; 26 L. J. (M. C.) 17; 7 Cox, 186 : *and see R.* v. *Marsham, ex parte Pethick Lawrence*, [1912] 2 K. B. 362; 81 L. J. (K. B.) 957.

Where a conviction has been quashed on appeal, the appellant is in the same position with regard to a plea of *autrefois acquit* as if he had been acquitted by the jury. *R.* v. *Barron, supra.*

Form.]—"In any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment. 14 & 15 Vict. c. 100, s. 28.

The following is the form of the plea of *autrefois acquit* :—

The King *v.* A. B.

Central Criminal Court.

A. B. says that the King ought not further to prosecute the indictment

against him, because he has been lawfully acquitted of the offence charged therein.

The plea may be made *ore tenus;* 2 Russ. Cr. (7th ed.) 1994; but should be on paper or parchment, and be signed by counsel. The court, however, will not reject the plea because it is informal, but will assign counsel to prepare it in a proper form for the defendant. *R.* v. *Chamberlain*, 6 C. & P. 93.

If the indictment be for treason or felony, the defendant, besides this plea of *autrefois acquit*, should also plead over to the treason or felony. *R.* v. *Vandercomb*, 2 Leach, 708, 712: *R.* v. *Drury*, *ante*, p. 149. In such a case therefore, continue the plea thus: "*And as to the offence of which the said* A. B. *now stands indicted he says that he is not guilty.*" If, however, the defendant pleads *autrefois acquit*, without pleading over to the felony, after his special plea is found against him, he may still plead over to the felony. 2 Hawk. c 23, s. 128: *R.* v. *Sheen*, 2 C. & P. 634: *R.* v. *Welsh* (1828); MS. Carr. Supp. 56.

It has been held that after a plea of "not guilty," a plea of *autrefois acquit* is bad. *R.* v. *Banks* [1911] 2 K. B. 1095; 81 L. J. (K. B.) 120; 6 Cr. App. R. 276.

In the case of a plea of *autrefois acquit*, a jury are sworn *instanter* to try the issue: *R.* v. *Scott*, 1 Leach, 401; and therefore there is no replication actually pleaded on the part of the crown. But *see R.* v. *Sheen*, *supra;* 2 Russ. Cr. (7th ed.) 1994 (*x*). But a replication and *similiter* must be entered upon the record, when it is made up. The form may be as follows:—

The King *v.* A. B.

Central Criminal Court.

H. A. (Clerk of the Court) joins issue on behalf of the King.

The proof of the issues lies on the defendant. To prove it, it used to be necessary to make up the record of the former acquittal, and to give in evidence the record itself, or an examined copy of it: *R.* v. *Bowman*, 6 C. & P. 101, 337; except where the second indictment was preferred at the same assizes, in which case the original indictment and minutes of the verdict were and are receivable in evidence in support of the plea, without a record being drawn up. *R.* v. *Parry*, 7 C. & P. 836. But by the *Evidence Act*, 1851 (14 & 15 Vict. c. 99), s. 13, "whenever in any proceeding whatever" [whether civil or criminal, *Richardson* v. *Willis*, L. R. 8 Ex. 69; 42 L. J. (Ex.) 15], "it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof." And by 34 & 35 Vict. c. 112, s. 18, provision is made for proving previous convictions by certificate.

If the former trial was at quarter sessions, the King's Bench Division can, if necessary, grant a *mandamus* to the justices to make up the record. *R.* v. *Justices of Middlesex*, 5 B. & Ad. 1113; 3 L. J. (M. C.) 32.

The judgment against the defendant on this plea, in felonies, is that he answer over (*respondeat ouster*); or rather, as the defendant generally pleads over to the felony with the plea of *autrefois acquit*, the jury are charged again to inquire of the second issue, and the trial proceeds as if no special plea in bar had been pleaded. *R.* v. *Vandercomb*, 2 Leach, 708 : *R.* v. *Coogan*, 1 Leach, 448,: *R.* v. *Sheen*, 2 C. & P. 634. In misdemeanors the judgment is final. *R.* v. *Goddard*, 2 Ld. Raym. 920; 3 Salk. 171. When the plea is allowed, the judgment is "that the defendant shall go without day," and he is altogether discharged from the prosecution. 2 Hale, 391; and *see* 1 Deacon Cr. Law, 90. The verdict for the defendant, upon the issue on the plea of *autrefois acquit*, cannot, it seems, be set aside, and a new trial had, although it be given without evidence and against the opinion of the judge. *R.* v. *Lea*, 2 Mood. 9.

As to the effect of dismissal of a charge tried summarily in a subsequent prosecution on indictment, *see post*, p. 161.

2. *Autrefois convict.*

By 52 & 53 Vict. c. 63 (*Interpretation Act*, 1889), s. 33, "where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts and at common law, but shall not be liable to be punished twice for the same offence." This enactment is substantially the same as the common law rule, that a man must not be put twice in peril for the same offence. 2 Hawk. c. 35.

The defence of *autrefois convict* applies whether the previous conviction was on indictment or summary, provided that it was before a court of competent jurisdiction after a hearing on the merits. *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; 44 L. J. (M. C.) 101.

The only cases in which a previous conviction can be effectually pleaded in bar to a subsequent indictment are :—

(1) Where the conviction was for the exact offence charged in the subsequent indictment, and was sufficient in law : 1 Chit. Cr. L. 461; 4 Bl. Com. 336; 2 Hale, 215; 2 Hawk. c. 36, s. 10 : *Vaux case*, 4 Co. Rep. 44b, 45a. A plea of *autrefois convict*, which showed that the judgment on the former indictment had been reversed for error in the judgment, was held not a good bar to another indictment for the same offence. *R.* v. *Drury*, 3 C. & K. 193; 18 L. J. (M. C.) 189.

(2) Where the subsequent indictment is based on the same acts or omissions as those in respect whereof the previous conviction was made, and some statute directs that a person shall not be punished twice in respect of the same acts or omissions. *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), s. 33 (*supra*); and statutes referred to, *ante*, p. 155. A conviction for obtaining credit or goods

under false pretences has been held to be a bar to a subsequent indictment for larceny on the same facts. *R.* v. *King* [1897] 1 Q. B. 214, 218; 18 Cox, 447, Hawkins, J. : explained and distinguished in *R.* v. *Barron* [1914] 2 K. B. 570; 83 L. J. (K. B.) 786; 10 Cr. App. R. 81.

The same rules apply generally to this plea as to the plea of *autrefois acquit*.

Where on an indictment containing counts for inflicting grievous bodily harm, unlawful wounding, assault occasioning actual bodily harm, and common assault, the jury convicted of common assault, but disagreed on the other counts, it was held, on a retrial on the other counts, that the conviction for common assault would support a plea of *autrefois convict*. *R.* v. *Grimwood*, 60 J. P. 809, Pollock, B.; *and see R.* v. *Elrington*, 1 B. & S. 688; 31 L. J. (M. C.) 14.

A person who has been convicted by a court of summary jurisdiction under 24 & 25 Vict. c. 100, s. 42, of a common assault, but has been discharged under s. 16, sub-s. 2 (*rep.*) of 42 & 43 Vict. c. 49, without any sentence or fine or imprisonment, on giving security to be of good behaviour, cannot, at common law and independently of the defence given by 24 & 25 Vict. c. 100, s. 45 (*infra*), afterwards be convicted on indictment for the same assault, although the indictment charges him with unlawful wounding or other circumstances of aggravation. *R.* v. *Miles*, 24 Q. B. D. 423; 59 L. J. (M. C.) 56. This rule seems applicable to release on probation. *See post*, p. 259.

The *Summary Jurisdiction Act*, 1879 (42 & 43 Vict. c. 49), which empowers a petty sessional court under certain circumstances to try summarily persons charged with certain indictable offences, enacts in s. 27, sub-s. 3, that "the conviction for any such offence shall be of the same effect as a conviction for the offence on indictment," and in sub-s. 4, that "where the court have assumed the power to deal with the case summarily, and dismiss the information, they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence."

The *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100), s. 44, enacts, that "if the justices on the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, under either of the last two preceding sections (ss. 42, 43), shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith* make out a certificate under their hands stating the fact of such dismissal, and shall deliver the certificate to the party against whom the complaint was preferred." "Forthwith" means so soon as it is applied for by the defendant, who has a right to it *ex debito justitiæ; Hancock* v. *Somes*, 1 E. & E. 795; 21 L. J. (M. C.) 196 : *Costar* v. *Hetherington*, 1 E. & E. 802; 28 L. J. (M. C.) 198; overruling *R.* v. *Robinson*, 12 A. & E. 672; 10 L. J. (M. C.) 9, where it was held that the certificate must be given before the justices separated. Such certificate of dismissal can only be granted when there has been a full hearing "upon the merits." If the certificate is granted on the withdrawal of the charge before hearing, it will be no bar to subsequent proceedings in respect of the same assault. *Reed* v. *Nutt*, 24 Q. B. D. 669. By s. 45, "if any person

against whom any such complaint, as in either of the last three preceding sections mentioned, shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, *for the same cause*." But by s. 46, the justices are prohibited from adjudicating on any assault or battery which they shall find to have been "accompanied by any attempt to commit felony," or which they shall think, "from any other circumstance, a fit subject for prosecution by indictment," or 'in which any question shall arise as to the title to any lands, tenements or hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."

A summary conviction under the *Children Act*, 1908, s. 12, for neglecting children in a manner likely to cause them unnecessary suffering or injury to health is not a bar to a subsequent indictment for the manslaughter of one of the children who has died since the summary conviction. The true test in such a case is whether the accused was in peril on the first trial of being convicted of the same crime as that for which he is in peril of being convicted in the second proceedings. *R.* v. *Tonks* [1916] 1 K. B. 443; 85 L. J. (K. B.) 396; 114 L. T. 81; 80 J. P. 165; 32 T. L. R. 137; 11 Cr. App. R. 284.

Where to an action for an assault the defendant pleaded that he had been summoned by the plaintiff before a metropolitan police magistrate, who convicted him in the costs of the complaint and hearing, which the defendant had paid; and at the trial the magistrate's clerk produced his note-book, by which it appeared that the magistrate had merely ordered the defendant to enter into his recognizances, and pay the expense thereof, and the clerk also said that in such cases no conviction was ever drawn up: it was held that the plea was bad, and disclosed no defence under 24 & 25 Vict. c. 100, s. 45; that it was not proved, and that even if there were a conviction, the proper proof was not adduced. *Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553; 35 L. J. (M. C.) 255. The judgment of the court in that case proceeded upon the grounds that there was no record of any conviction, and further that the magistrate did not adjudicate upon the case, but, as a conservator of the peace, ordered the defendant to enter into recognizances. *Per* Pollock, B., in *R.* v. *Miles*, 24 Q. B. D. 423; 59 L. J. (M. C.) 56, *ante*, p. 161.

A plea of a conviction or acquittal under 9 G. 4, c. 31, ss. 27, 28 (*rep.*), of which 24 & 25 Vict. c. 100, ss. 44, 45, are in substance a re-enactment, is a bar to an indictment for a felonious stabbing, etc., in the same transaction: *R.* v. *Walker*, *infra*; for the justices are to determine whether the assault was accompanied by any felonious transaction, and their decision on that point is final. *R.* v. *Stanton*, 5 Cox, 324, Erle, J. And a plea of a dismissal of the complaint by the justices under 2 G. 4, c. 31, ss. 27, 28 (*rep.*), was held to be a bar to an indictment for unlawfully wounding, and for an assault occasioning actual bodily harm, arising out of the same circumstances; *R.* v. *Elrington*, 1 B. & S. 688; 31 L. J. (M. C.) 14; 9 Cox, 86, where the two cases last cited

were approved; but a summary *conviction* for assault under 24 & 25 Vict. c. 100, s. 42, is not a bar to a subsequent indictment for manslaughter upon the death of the person assaulted, consequent upon the same assault. *R.* v. *Morris*, L. R. 1 C. C. R. 90; 36 L. J. (M. C.) 84; 10 Cox, 480: *R.* v. *Friel*. 17 Cox, 325: *R.* v. *Dyson* [1908] 2 K. B. 454; 77 L. J. (K. B.) 813; Stephen Dig. Cr. Proc. 325. This rule is not affected by 42 & 43 Vict. c. 49 (*The Summary Jurisdiction Act*, 1879), s. 27 (3): *R.* v. *Friel*, *supra*. The production of the certificate is of itself sufficient evidence of the dismissal by the justices, without proof of their signature or official character; 8 & 9 Vict. c. 113, s. 1: and if the defendant appeared before the justices, the recital in the certificate of the fact of a complaint having been made, and of a summons having been issued, is sufficient evidence of those facts, without producing the complaint or summons. *R.* v. *Westley*, 11 Cox, 139. Where the first count of an indictment charged the defendant with assaulting the prosecutor and inflicting upon him grievous bodily harm, and the second charged him with an assault upon the prosecutor occasioning actual bodily harm, and the defendant pleaded one plea only (instead of a plea to each count), setting up a dismissal of the charge by the justice, and it appeared upon the trial that there had only been in fact one assault on the day named in the indictment, and that that assault and the one named in the plea took place on the same day, it was held that the plea was a good answer to the whole indictment. *R.* v. *Westley*, *supra*.

The form of the plea of *autrefois convict* in such cases may be as follows:—

The King *v.* A. B.

Central Criminal Court.

A. B. says that the King ought not further to prosecute the indictment against him, because he has been lawfully convicted of the offence charged therein. [*If the indictment is for treason or felony add* "and as to the charge in the said indictment he says he is not guilty."]

The replication may be as follows:—

The King *v.* A. B.

Central Criminal Court.

H. A. (The Clerk of the Court) joins issue on behalf of the King.

The plea and any demurrer to it should be written or printed on paper or parchment. *R.* v. *Walker*, 8 C. & P. 446, Parke, B.: 5 & 6 Geo. 5, c. 90, s. 8 (3) and r. 1 (*ante*, pp. 60, 28).

3. *Autrefois attaint.* (*a*).

At common law if a man were attainted of treason or felony, whilst the attainder remained in force he could not, with certain exceptions, be indicted

(*a*) In *R.* v. *Jemmy Governor* [1900] 21 N. S. W. Rep. (Law) 279, on an indictment for murder an attempt was made to plead *autrefois attaint* on a colonial outlawry, but failed on the ground that the common law of England as to outlawry did not apply to New South Wales, and that outlawry under the colonial statutes was not equivalent to a conviction.

for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for any other offence was considered useless. 2 Hale, 251; 2 Hawk. c. 36, s. 10; 1 Chit. Cr. L. 724. But in 1827 it was enacted by 7 & 8 G. 4, c. 28, s. 4, that an attainder should be no bar, unless it be for the same offence as that charged in the indictment; and this enactment practically abrogated the plea of *autrefois attaint*. 4 Bl. Com. 337 n. Attainder for treason and felony was abolished in 1870, except in cases of outlawry (33 & 34 Vict. c. 23, s. 1), and in effect the plea of *autrefois attaint* is obsolete.

The same rules apply to this plea as to the plea of *autrefois acquit*, with respect to the pleading and production of the record, the averments of identity, and the proceedings on the plea at the trial.

4. *Pardon.*

A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. 2 Hawk. c. 37. A pardon under statute need not be pleaded, Staundf. 103 a; 3 Co. Inst. 234; Plowd. 83, 84; 2 Hawk. c. 37, s. 59; unless there be exceptions out of it; *Id.;* Fost. 43; 2 Hale, 252; 3 Co. Inst. 334; nor can the defendant lose the benefit of it by his own laches or negligence.

The King's pardon should be pleaded at the first opportunity which the defendant may have of so doing; if, for instance, he has obtained a pardon before arraignment, and, instead of pleading it in bar, he pleads the general issue, he is deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment. 2 Hawk. c. 37, s. 59.

Form of plea.]—In pleading a pardon under the great seal the letters patent were set out with *profert*, and the plea concluded thus: "*By reason of which said letters patent, the said* A. B. *prays that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.*"

Formerly only a pardon under the great seal could be pleaded. *Lord Warwick's case*, 13 St. Tr. 939, 1015: *R.* v. *Gully*, 1 Leach, 98: *Bull* v. *Tilt*, 1 B. & P. 199: *R.* v. *Miller*, 2 W. Bl. 799.

But 7 & 8 G. 4, c. 28, s. 13, provides for the grant of free or conditional pardons for felony under the King's sign manual countersigned by a secretary of state and that the discharge of the offender from custody in the former case, or the performance of the condition in the latter, shall have the effect of a pardon under the great seal as to the felony for which the pardon is granted, but shall not prevent or mitigate the punishment in any subsequent conviction for any felony committed after the grant of any such pardon. *See R.* v. *Harrod*, 2 C. & K. 294; 2 Cox, 242.

This enactment seems to have given statutory effect to the practice of circuit pardons referred to in *R.* v. *Beaton*, 1 W. Bl. 479: *R.* v. *Beacall*, 1 C. & P. 454, 456: *Bullock* v. *Dodds*, 2 B. & Ald. 258. In pleading under this enactment the stricter course would be to set out the pardon under the sign manual

and to aver compliance with the conditions, if any; but in *R.* v. *Harrod*, *supra*, the court seems not to have required a plea, but to have taken a certificate of discharge by the governor of a prison as evidence of the grant of a free pardon.

Any variance between the statements in the indictment and in the pardon could be made good in the plea, by averments of identity.

A free pardon places the person in the same position as to status as he was in before his conviction. *Hay* v. *Tower Division Justices*, 24 Q. B. D. 561; 59 L. J. (M. C.) 79. The endurance of the punishment awarded by the court, or of that substituted by the crown, has (in the case of a non-capital felony) the effect of a pardon under the great seal. 9 G. 4, c. 32, s. 3.

Sect. 5.

GENERAL ISSUE.

The general issue is pleaded by the prisoner *ore tenus* at the bar, in these words "*not guilty;*" by which plea, without further form, every person not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy, is "deemed to have put himself upon the country for trial." 7 & 8 G. 4, c. 28, s. 1. And "if any person being arraigned upon, or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information," the court may "order the proper officer to enter a plea of 'not guilty' on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same." 7 & 8 G. 4, c. 28, s. 2. If the defendant says that he declines to plead, a plea of not guilty is entered. *R.* v. *Bernard*, 8 St. Tr. (N. S.) 887, 899.

When the record is made up, the general issue appears upon it thus:—

"*And* A. B. *being brought to the bar of the court and having heard the indictment read says he is not guilty and puts himself upon the country and* H. A. (*the clerk of the court*) *joins issue on behalf of our lord the King.*"

In informations, and in indictments for not repairing roads and bridges, etc., where the defendant is allowed to appear by attorney, the general issue is regularly engrossed, and filed with the proper officer. It is in form thus:—"*And the said* A. B., *by* C. D. *his solicitor, saith, that he is not guilty; and of this the said* A. B. *puts himself upon the country.*" Afterwards, in making up the record, the *similiter* (*ante*, p. 154) is added thus: "*And* H. S., *who prosecutes for our said lord the King, joins issue,*" if it be pleaded to an indictment at the assizes, or sessions; but if to an indictment in the King's Bench Division, then thus: "*And, Sir Leonard Kershaw, Knight, coroner and attorney of our said lord the King, in the King's Bench Division of his Majesty's High Court of Justice, who prosecutes for our said lord the King in this behalf doth the like;*" or if to an information, then thus: "*And the said attorney-general* [or *coroner and attorney*] *of our said lord the King who prosecutes as aforesaid for our said lord the King, doth the like.*"

Where the general issue is pleaded it is incumbent upon the prosecution to prove every fact and circumstance constituting the offence or offences charged in the indictment or information. By sub-s. 1 of s. 8 of the *Indictments Act*, 1915 (*ante*, p. 60), "nothing in this Act or the rules thereunder shall affect the law or practice relating to the jurisdiction of a court or the place where an accused person can be tried, nor prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the laws of evidence in criminal cases." Under this plea the defendant may give in evidence, not only everything which negatives the allegations in the indictment, but also all matters of excuse and justification, and all matters which bring him within exceptions and provisoes in his favour contained in the enactment creating the offence, if the burden of proof thereof lies upon him (*ante*, p. 46).

CHAPTER V.

TRIAL, JUDGMENT, AND PUNISHMENT.

SECT. 1.

ARRAIGNMENT.

THE *arraignment* of prisoners, against whom true bills of indictment have been found by the grand jury, consists of three parts, first, calling the prisoner to the bar by name; secondly, reading the indictment to him; thirdly, asking him whether he is guilty or not. It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but this ceremony, which was never essential (*R.* v. *Radcliffe*, 1 W. Bl. 3), is now in most courts disused. As to the necessity of the presence of the accused, *see post*, p. 173. The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there is danger of escape; and "ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances." 2 Hawk. c. 28, s. 1; Kel. (J.) 10. In *R.* v. *Layer*, 16 St. Tr. 93, 96, a distinction was taken between the time of arraignment and the time of trial, and the prisoner was obliged to stand at the bar in irons during the arraignment; but the ruling in that case is at variance with the authority of all the expositors of the common law. Britton, c. 5, f. 14, says, "If felons come in judgment to answer, etc., they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of reason, nor constrain them to answer but at their free will." The Mirror of Justices, Book V., ch. 1, 54 (Seld. Soc. Publ., vol. vii., p. 160), says, "It

is an abuse that a prisoner should be loaded with irons or put in pain before he is attainted for felony." But it is possible that this passage relates to *peine forte et dure*. *See also* 3 Co. Inst. 34, where Coke cites Bracton, l. 3, f. 137; Staundf. 78; and a decision of the judges, 8 Edw. 2; also Hale's Sum. 212. However, where there is reason to believe that the prisoner will make an attempt to escape, or will be guilty of violence, the gaoler may, by order of the judge, bring up the prisoner for arraignment in irons, and he may be kept ironed during the trial, and even when giving evidence on his own behalf. *R.* v. *Brazier*, Hants Summer Assizes [1899] Wright, J.

Under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), rule 13 (1), it is the duty of the clerk of assize or of the peace, as the case may be, after a true bill has been found on any indictment, to supply to the accused person on request a copy of the indictment free of charge. The cost is to be treated as part of the costs of the prosecution for the purposes of section 1 of the *Costs in Criminal Cases Act*, 1908.

If the prisoner is charged upon indictment and inquisition for the same offence, he may be arraigned at the same time upon both; 1 East, P. C. 371; and where several defendants are charged in the same indictment, they ought all to be arraigned at the same time although their trials may be several. Kel. (J.) 9.

As soon as the indictment has been read to the prisoner, or its substance stated to him (which is now the usual practice), the officer of the court demands of him—*How say you, are you guilty or not guilty?* The course of proceeding where the prisoner pleads to the jurisdiction, moves to quash the indictment, demurs, or raises pleas in abatement, or in bar has already been dealt with (*ante*, p. 150 *et seq.*). On the prisoner pleading not guilty under the old practice, he was asked how he would be tried, and made the answer "By God and my country." This form is now rarely, if ever, used. If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. 1 Chit. Cr. L. 415.

It is important that there should be no ambiguity in the plea, and that where the accused makes some other answer than "Not guilty" or "Guilty," as the case may be, care should be taken that he understands the charge and to ascertain what the plea amounts to. Where the plea is imperfect or unfinished, and the court of trial has wrongly held it to amount to a plea of guilty, on appeal the Court of Criminal Appeal may order that a plea of not guilty should be entered and that the appellant be tried on the indictment: *R.* v. *Ingleson* [1915] 1 K. B. 512; 84 L. J. (K. B.) 280; 24 Cox, 527; 76 J. P. 215; 11 Cr. App. R. 21; or that the appellant be sent back to plead again to the indictment: *R.* v. *Baker*, 7 Cr. App. R. 217; 28 T. L. R. 363; or may merely quash the conviction without sending the appellant back for trial: *R.* v. *Alexander*, 7 Cr. App. R. 110; *R.* v. *Golathan*, 24 Cox, 704; 79 J. P. 270; 31 T. L. R. 177; 11 Cr. App. R. 79.

By s. 39 (1) of the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), where a prisoner is arraigned on an indictment for any offence, and can

lawfully be convicted on such indictment of some other offence not charged in such indictment (*see post*, pp. 211 *et seq.*), he may plead not guilty of the offence charged in the indictment, but guilty of such other offence.

Arraignment of peers.]—A person entitled to the privilege of peerage, if indicted for misdemeanor, is tried in the same manner as a commoner. 3 Co. Inst. 30; 2 Hawk. c. 44, s. 13. But persons entitled to such privilege cannot be tried *in pais* for treason, felony, or misprision of either offence, and it would seem that there is no power to waive the privilege. *Lord Grares' case*, 4 St. Tr. (N. S.) 609 n.; 310 Hansard, 246. When on arraignment the privilege is claimed or its existence is established, the indictment is removed by *certiorari* to the House of Lords, and if parliament be sitting is tried before that House as the court of the King in parliament: *R.* v. *Earl of Cardigan*, 4 St. Tr. (N. S.) 601; and if parliament be not sitting is tried in the court of the Lord High Steward, which is constituted by special commission. *R.* v. *Earl Russell* [1901] A. C. 446; 76 L. J. (K. B.) 998; 20 Cox, 51; *and see* 4 St. Tr. (N. S.) 666. At such trial the pleading and punishment are the same as in the case of any other accused person. 4 & 5 Vict. c. 22. The trial of peers for offences committed in Scotland is regulated by 6 G. 4, c. 66.

The privilege of peerage belongs to every peer except an Irish peer who is a member of the House of Commons, and to peeresses in their own right, to the wives of peers, and to the widows of peers who are not married to commoners; 20 H. 6, c. 9; 7 & 8 W. 3, c. 3, s. 10; but does not belong to archbishops or other bishops, who are lords of parliament but not peers. May Parl. Pr. (11th ed.).

Prisoner standing mute.]—If the prisoner, when called upon, stands mute of malice, or will not answer directly, the court may order the proper officer to enter a plea of not guilty; 7 & 8 G. 4. c. 28, s. 2: *see ante*, p. 165. At common law the consequences of standing obstinately mute in cases of felony, were forfeiture of goods, and *peine forte et dure*; Hale's Sum. 227; and by 12 G. 3, c. 20 (*rep.*), judgment as on a plea of guilty. *See R.* v. *Steel*, 1 Leach, 451. Where the defendant stands mute the court cannot itself determine whether in fact he is mute of malice or by the visitation of God, *R.* v. *Isreal*, 2 Cox, 263: *R.* v. *Schleter*, 10 Cox, 409; but must direct a jury to be forthwith impanelled and sworn, to try whether the prisoner be mute of malice or *ex visitatione Dei*, and such jury may consist of any twelve men who may happen to be present. Counsel may call witnesses for the defendant on the trial of the issue and may address the jury. *R.* v. *Roberts*, Carr. C. L. 57. The form of the oath to the jury in such a case may be as follows:—"*I swear by Almighty God that I will well and truly try whether* A. B., *the prisoner at the bar, who stands charged with felony, is mute of malice or by the visitation of God, and a true verdict give according to the evidence.*" *See* Cro. Circ. Comp. 542 (9th ed.).

A person is mute by the visitation of God who is deaf and dumb: *R.* v. *Jones*, 1 Leach, 102: *R.* v. *Pritchard*, 7 C. & P. 303: *R.* v. *Governor of Stafford Prison, Ex parte Emery* [1909] 2 K. B. 81; 78 L. J. (K. B.) 629; 100 L. T. 993; 73 J. P. 284; 25 T. L. R. 440; or so deaf that he cannot hear the indict-

ment when read. *R.* v. *Halton*, Ry. & M. 78 : *and see* 1 Russ. Cr. (7th ed.) 87. A finding that the prisoner is mute by the visitation of God is not an absolute bar to trial on the indictment. *R.* v. *Steel*, 1 Leach, 451 : *Ex parte Emery, supra:* and the mute may be nevertheless arraigned and tried if he is sane, and can read or write, or intelligence can be conveyed to him by signs or symbols. But before proceeding with the trial it is necessary to ascertain whether he can plead to the indictment or understand the proceedings. *R.* v. *Jones, supra: Ex parte Emery, supra.*

Prisoner unfit to plead or take his trial.]—The *Criminal Lunatics Act*, 1884 (47 & 48 Vict. c. 64), empowers a secretary of state to remove to a lunatic asylum all prisoners committed for trial who are certified in manner provided by the Act to be insane, and to order their detention as criminal lunatics until their remittal to prison or discharge. This power gets rid of the difficulty found in *R.* v. *Dwerryhouse*, 2 Cox, 446, where a prisoner was obviously unfit to be arraigned. If the secretary of state acts under the statute the hand of the court is stayed : *Ex parte Collins* [1899] 34 L. J. Newsp. 132. The *Criminal Lunatics Act*, 1800 (39 & 40 G. 3, c. 94), passed in consequence of *Hadfield's case*, 27 St. Tr. 1281, provides (s. 2) that " if any person indicted for *any* offence (*R.* v. *Little*, R. & R. 430), shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose " (that is, by a jury returned by the sheriff *instanter* in the nature of an inquest of office) " so that such person cannot be tried upon such indictment, it shall be lawful for the court before whom any such person shall be brought to be arraigned as aforesaid, to direct such finding to be *recorded*, and thereupon to order such person to be kept in strict custody until his Majesty's pleasure shall be known." Similar provisions are made by the same section as to persons brought up to be discharged for want of prosecution who appear to be insane. The enactment does not apply to grand juries. *R.* v. *Hodges*, 8 C. & P. 195. Persons detained after verdict under the section are dealt with as criminal lunatics. The form of oath to be administered to the jurors impanelled to try whether a prisoner be *non compos* or not, is as follows :—" *I swear by Almighty God that I will diligently inquire and true presentment make, for and on behalf of our sovereign lord the King, whether* A. B., *the defendant who stands indicted for (a misdemeanor) be insane or not, and a true verdict give accordingly to the best of my understanding.*" The proper time to raise the question of the prisoner's fitness to be tried is before he pleads. *R.* v. *Southey*, 4 F. & F. 864. The issue to be tried is the state of the prisoner's mind at the date of arraignment, not at any prior time. *R.* v. *Keary*, 14 Cox, 143; 4 Bl. Com. 24. As to the onus of proof on the trial of the issue, *see R.* v. *Davies*, 6 Cox, 326; 3 C. & K. 328; 22 L. J. (N. S.) M. C. 143 : *R.* v. *Turton*, 6 Cox, 385. In *R.* v. *Goode*, 7 A. & E. 536, where the prisoner was tried at bar for using seditious language against Queen Victoria in her presence, it was held that the jury might form their own opinion as to the state of the prisoner's mind when arraigned, from his demeanor during the inquest, without any evidence being given on the subject : but under ordinary circumstances it is usual to require some evidence as to the prisoner's state of mind. In *R.* v. *Pritchard*, 7 C. & P. 303, where

a prisoner arraigned on an indictment for felony, appeared to be deaf, dumb, and also of non-sane mind, Alderson, B., put three distinct issues to the jury, directing the jury to be sworn separately on each : 1. Whether the prisoner was mute of malice or by the visitation of God; 2. Whether he was able to plead; 3. Whether he was sane or not : and on the last issue they were directed to inquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror to whom he might wish to object, and to understand the details of the evidence (*supra*, p. 169); and he directed the jury that if there was no certain mode of communicating to the prisoner the details of the evidence so that he could clearly understand them and be able properly to make his defence to the charge against him, the jury ought to find that he was not of sane mind. This direction follows that given in *R.* v. *Dyson*, 7 C. & P. 305 n. *See also R.* v. *Whitfield*, 3 C. & K. 121. The directions in *R.* v. *Pritchard* were approved in *R.* v. *Berry*, 1 Q. B. D. 447; 45 L. J. (M. C.) 123; 13 Cox, 189; and again in *Ex parte Emery; R.* v. *Governor of Stafford Prison* [1909] 2 K. B. 81; 78 L. J. K. B. 629. In *R.* v. *Berry* (*supra*) a deaf mute being arraigned for felony, the jury who had been impanelled to try the case were sworn to try whether the prisoner stood mute of malice or by the visitation of God. The jury found that he was mute by the visitation of God. The judge then ordered that a plea of not guilty should be entered, and the trial proceeded. The better course in such cases would seem to be to proceed as in *R.* v. *Pritchard*, *supra*, and not to enter a verdict of not guilty at once. The jury found the prisoner guilty of the felony charged against him, but also found that he was incapable of understanding, and did not understand, the proceedings at the trial. Upon this finding it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. In *R.* v. *Governor of Stafford Prison*, *Ex parte Emery* [1909] 2 K. B. 81; 78 L. J. K. B. 629, a man who was totally deaf and unable to read or write was arraigned for a felony. On arraignment he stood mute. A jury duly impanelled and sworn found that he was mute by the visitation of God. They were then sworn to try whether he was capable of pleading to the indictment, and found that he was incapable of pleading to and taking his trial on the indictment and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others. It was held that this finding amounted to a finding that the accused was insane within the meaning of s. 2 of the *Criminal Lunatics Act*, 1800 (*ante*, p. 170). In *R.* v. *Harris*, 61 J. P. 792, the prisoner was unable to read or write, and owing to an unhealed wound in his throat could not speak. A jury impanelled to try whether he was sane and able to plead, found that he was both, but that at present he was unable to give instructions for his defence, and that his condition was due to his own act, attempted suicide. He was then called on to plead, pleaded not guilty, and his trial was adjourned. *Cf. R.* v. *Whitfield*, 3 C. & K. 121. As to feigned madness, *see R.* v. *Davies*, 6 Cox, 326, Williams, J. : *R.* v. *Berry* [1897] 104 L. T. 110, Wills, J. In *R.* v. *Wheeler*, Central Criminal Court, May 12, 1852, where the prisoner was indicted for the murder of his mother, and on his arraignment pleaded "not guilty," Platt, B., on

the motion of the prisoner's counsel, directed the jury to be sworn to inquire whether the prisoner was in a fit state of mind to plead to the indictment, and it appearing from the evidence that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty" the jury, at the suggestion of the learned judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. Where the jury are sworn (in the nature of an inquest of office) to inquire whether or not a prisoner is sufficiently sane to plead to the indictment, the court directs the finding to be recorded; and the following is the form of the record of the finding :—

MIDDLESEX :—*The King against J. G.—The defendant being brought here into court, in the custody of the keeper of his Majesty's prison of ——, by virtue of a writ of* habeas corpus, *it is ordered that the said writ and the return made thereto be filed; and the said defendant is now here in court arraigned upon the indictment found against him in this court for certain misdemeanors, in speaking and publishing certain scandalous and seditious words of and concerning our sovereign lord the King, and is asked by the court here whether he be guilty of the premises charged upon him by the said indictment or not. Whereupon the said defendant doth refuse to answer to the said indictment; and it appearing to this court that the said defendant may be insane, so that he cannot be tried upon the said indictment : therefore, on the prayer of Sir Gordon Hewart, knight, his Majesty's attorney-general, it is ordered that a jury in this behalf do immediately come here into court, to try and inquire for and on behalf of our sovereign lord the King, whether the said defendant be insane or not. And immediately thereupon, a jury being impanelled and returned for that purpose by the sheriff of the said county of Middlesex, come here into court, and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, say upon their oath that the said defendant is insane. And the said attorney-general, for and on behalf of our said sovereign lord the King, prays the said court here that the finding of the said jury may be recorded. It is thereupon ordered by the said court here, that the said finding of the said jury be recorded, and that the said defendant be kept in strict custody in the said gaol until his Majesty's pleasure in the premises shall be known. And the said defendant is now here in court re-committed to the custody of the keeper of the said gaol, to be by him kept in strict custody until his Majesty's pleasure shall be known. On the motion of the attorney-general: By the court.*

As to the proceedings on the trial of a person alleged to have been insane when the offence charged was committed, *see post*, p. 217.

Arraignment for subsequent offence.]—S. 116 of the *Larceny Act*, 1861 (24 & 25 Vict. c. 96), provides that the mode of arraigning a defendant on an indictment for any offence committed after a previous conviction is, in the first instance, to arraign him *upon so much only of the indictment as charges the subsequent offence*, and, if he pleads not guilty or the court orders a plea of not guilty to be entered, to charge the jury in the first instance to inquire only concerning the subsequent offence. A similar course is to be pursued

where the prisoner is indicted for an offence against the *Coinage Offences Act*, 1861 (24 & 25 Vict. c. 99), after a previous conviction (s. 37). The procedure prescribed by s. 116 of the *Larceny Act*, 1861, has been construed as applying not merely to proceedings on an indictment for an offence within that Act committed after a previous conviction, but to proceedings for any offence, *e.g.*, an attempt to commit larceny. *Faulkner* v. *R.* [1905] 2 K. B. 76; 74 L. J. (K. B.) 562. And s. 9 of the *Prevention of Crimes Act*, 1871 (34 & 35 Vict. c. 112), provides that the rules contained in 24 & 25 Vict. c. 96, s. 116, in relation to the form of *and the proceedings upon* an indictment for any offence punishable under that Act committed after previous conviction shall, with the necessary variations, apply to any indictment for committing a "crime" as defined by s. 20 of 34 & 35 Vict. c. 112 (viz., any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under 24 & 25 Vict. c. 96, s. 58, repealed and re-enacted by 6 & 7 Geo. 5, c. 50, s. 28), after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under 24 & 25 Vict. c. 96. And a similar procedure is prescribed on a charge of being a habitual criminal, under the *Prevention of Crime Act*, 1908 (8 Edw. 7, c. 59, s. 10 (4)).

The arraignment is not complete till the prisoner has pleaded. *R.* v. *Duffy*, 7 St. Tr. (N. S.) 795, 799. If the defendant pleads "not guilty," his plea is recorded by the officer of the court; either by writing on the indictment with the words "*po. se*" (an abbreviation of the words *ponit se super patriam*) or, as at the Central Criminal Court, the word "puts," and by an entry in the minute book of the court. *See R.* v. *Newman*, 2 Den. 390; 21 L. J. (M. C.) 74, 76. A plea of not guilty may by leave of the judge be withdrawn during the trial, and a plea of guilty substituted. *R.* v. *Brown*, 17 L. J. (M. C.) 145. There is a case to the contrary as to a trial on a *nisi prius* record. *R.* v. *Barrett*, 2 Lew. 264; but it is inconsistent with old precedent and modern practice. *R.* v. *Turner*, 24 L. J. Newsp. 469 (*see post*, p. 380). A plea of "guilty" may be withdrawn before sentence: *R.* v. *Plummer* [1902] 2 K. B. 339; 71 L. J. (K. B.) 805; but not after sentence. *R.* v. *Sell*, 9 C. & P. 346: *R.* v. *Clouter*, 8 Cox, 237. It is no bar to the right of the court to reserve a special case, or of the prisoner to appeal. *See post*, pp. 300 *et seq.*

Presence of accused.]—No trial (*a*) for felony can be had except in the presence of the defendant, and he must, it is said, stand in the dock to be tried. *R.* v. *St. George*, 9 C. & P. 483: *R.* v. *Douglas*, C. & Mar. 193: *R.* v. *Zulueta*, 1 C. & K. 215; 1 Cox, 20. But if the jury, for any reason, are discharged without giving a verdict, it is not necessary in order to constitute a valid discharge that the prisoner should be present. *R.* v. *Richardson*, 29 T. L. R. 228. If he creates a disturbance it is said that the trial may go on without his presence. Steph. Dig. Cr. Proc. art. 302: *R.* v. *Berry* [1897]

(*a*) The presence of the accused seems not to be necessary during the proceedings prior to arraignment, such as swearing the grand jury or finding the indictment. *See R.* v. *Maturin* [1903] 12 Quebec L. R. (K. B.) 494.

104 L. T. Journ. 110, Wills, J. The prisoner may be punished for contempt of court for the disturbance created. *R.* v. *Giles* [1895] Wilts Assizes, Wills, J. A charge of misdemeanor may be tried in the absence of the accused, if he has previously pleaded; 8 Rep. Crim. L. 143: *R.* v. *Browne* [1906] 70 J. P. 472; and it is not necessary for the defendant to be in the dock: *R.* v. *Lovett*, 9 C. & P. 462; 3 St. Tr. (N. S.) 1177. For sufficient reason a defendant may be removed out of sight though remaining within hearing distance. *R.* v. *Smellie*, 14 Cr. App. R. 128. Where a defendant, tried at bar for perjury, was taken ill in the course of the trial, he was allowed to absent himself from the court until his recovery, and the trial proceeded in his absence. *R.* v. *Orton*, alias, *Castro*, Queen's Bench, July, 1873, MS. The absence of one of several persons who are accused together does not affect the validity of the conviction of those who appear. *Ex parte O'Brien Dalton*, 28 L. R. Ir. 36.

Trial of fugitive offenders.]—The *Fugitive Offenders Act*, 1881 (44 & 45 Vict. c. 69), which regulates the arrest in one part of the British Empire of fugitives from the justice of another part of the empire and their reconveyance for trial contains no provision precluding an offender returned under that Act from being tried for offences other than those for which he was returned. It superseded the *Colonial Arrest Act* (6 & 7 Vict. c. 34), under which the same rule applied: *see R.* v. *Philip*, 1 F. & F. 105; 27 L. J. (N. S.) M. C. 199. The Act of 1881 has been extended to certain places subject to the *Foreign Jurisdiction Act*, 1890 (53 & 54 Vict. c. 37), by Orders in Council printed in the Statutory Rules and Orders Revised (ed. 1904), vol. 5, *tit. Foreign Jurisdiction*, and in the annual volumes of the Statutory Rules and Orders.

Under the *Extradition Acts*, 1870 to 1895, a fugitive criminal surrendered by a foreign state for an extradition crime in pursuance of a treaty can be tried only for offences "proved by the facts on which the surrender is granted" (33 & 34 Vict. c. 52, s. 19); *i.e.*, by the extradition documents submitted to the authorities of the foreign state for the purpose of securing the surrender. As to the mode of raising the question, *see ante*, p. 150. The burden of proof that he was surrendered under the treaty and that the offences charged were not included in the order for surrender seems to rest upon him and not on the crown. *R.* v. *Butler*, 18 New South Wales Rep. (Law) 146. Where he has been arrested or surrendered irrespective of treaty he can be tried for any offence. *Ex parte Scott*, 9 B. & C. 446: *Lord Advocate* v. *Sinclair*, 17 Rettie (Justiciary Sc.) 38.

Defence by counsel.]—In trials for treason and misprision of treason the prisoner is entitled to defence by counsel, by 7 & 8 W. 3, c. 3, s. 1. And the court on his request will assign him not more than two counsel. *R.* v. *Casement* [1917] 1 K. B. 98, at p. 114: *R.* v. *Lynch* [1903] 1 K. B. 444; 72 L. J. K. B. 167: *R.* v. *Frost*, 4 St. Tr. (N. S.) 85, 106; 9 C. & P. 129, 135, and n. Since 1836 (6 & 7 W. 4, c. 114, s. 1) all persons tried for felony have been entitled, "after the close of the prosecution, to make full answer and defence by counsel learned in the law, or by solicitor in courts where solicitors practise as counsel," *e.g.*, at courts of quarter sessions where less than four counsel

attend. Archbold Q. S. (6th ed.) 100, 101, citing *Ex parte Evans*, 9 Q. B. 279; 15 L. J. Q. B. 335. In trials for misdemeanors the accused has always been entitled to be defended by counsel. King's counsel cannot appear for the defence except by licence from the crown, now granted through the Home Office without fee. *See R.* v. *Bartlett*, 2 C. & K. 321 : *R.* v. *Jones*, 9 C. & P. 401.

Defence at request of judge.]—Quite apart from statute and the practice of the superior courts, where the prisoner is not defended by counsel, the court may properly request some member of the bar present to give his honorary services to the prisoner, if the prisoner is willing to accept them. *R.* v. *Fogarty*, 5 Cox, 161 (Ir.) : *R.* v. *Yscuado*, 6 Cox, 386. This course has hitherto been adopted only in the case of murder or other grave crime, or where the circumstances of the case are special. In *R.* v. *Gillingham*, 5 Cr. App. R. 187, the Court of Criminal Appeal considered that in cases of rape or offences of a similar nature the judge at the trial should endeavour to see that the defendant was defended by counsel.

Provision of legal aid for poor prisoners.]—The *Poor Prisoners Defence Act*, 1903 (3 Edw. 7, c. 38), enacts as follows :—

Sect. 1.—" (1) Where it appears, having regard to the nature of the defence set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to enable him to obtain such aid—

" (*a*) the committing justices, upon the committal of the prisoner for trial; or

" (*b*) the judge of a court of assize or chairman of a court of quarter sessions, at any time after reading the depositions,

may certify that the prisoner ought to have such legal aid, and thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him, subject to the provisions of this Act."

The best guide at present available in the application of this sub-section is contained in the following Home Office circular to justices' clerks :—

" *Home Office, Whitehall, Aug.* 31, 1904.

" SIR,—*I am directed by the Secretary of State to inform you that he has received a number of communications respecting the* Poor Prisoners Defence Act, 1903, *from which it would appear that magistrates have in many instances found some difficulty in determining what action they should take to give effect to the intention of the Act. He thinks, therefore, that the remarks made by the Lord Chief Justice when charging the grand jury at the recent Warwick Summer Assizes may afford magistrates valuable assistance in the proper administration of the Act, and he will be glad if you will bring them to the notice of the magistrates of your bench. The following is the report which appeared in* The Times *of July* 26, 1904, *corrected by the Lord Chief Justice himself* :—

" ' *At Warwick, on Saturday, Lord Alverstone, in charging the grand jury, referred to the working of the* Poor Prisoners Defence Act. *He said that during*

the six months since the Act had come into force there had been some difference of practice among magistrates as to its scope and the principle upon which it should be applied, and the Home Office had received many communications on the subject. This made it desirable that he should explain the guiding principles of the Act. The Act was not intended to give a prisoner legal assistance in order to find out if he had got a defence. He was not to have solicitor or counsel assigned to him for such a purpose. The governing principle of the Act was that people who had a defence should have every inducement to tell the truth about it at the earliest opportunity. Assistance under the Act could only be given where both (1) *the nature of the defence as disclosed was such that in the interests of justice the prisoner should have legal aid to make his defence clear; and* (2) *where also his means were insufficient for that end. Magistrates would have little difficulty in deciding the second point, upon which they could inform themselves by the ordinary means of information. As regards the first point, they should bear in mind that by a defence disclosed was meant not only a defence stated by the prisoner at the end of the hearing, but a defence disclosed on cross-examination, or by questions the prisoner might ask, or by remarks he interposed, or even in some cases such as might appear on the face of the evidence called for the prosecution. All they had to be sure of was that a defence requiring legal consideration was disclosed at the time by a prisoner devoid of pecuniary means. The Act was passed in the interest of innocent persons; and such would be advised in future not to "reserve their defence," but to disclose it at once, so that it could be investigated. The prisoner would thus prevent the suggestion that he had kept back his defence so as to give the prosecution no opportunity of investigating it.'*

"*I am, Sir, your obedient servant,*

"M. D. CHALMERS."

As to costs of defence under this Act, *see post*, p. 281.

Sect. 2. *Rules.*]—"Rules for carrying this Act into effect may be made in the same manner and subject to the same conditions as rules under the *Prosecution of Offences Act*, 1879" (42 & 43 Vict. c. 22). (*See infra.*)

Sect. 3. *Definitions.*]—"In this Act—

"'Prisoner' includes a person committed for trial on bail.

"'Committing justices' includes a magistrate of the police courts of the metropolis and a stipendiary magistrate.

"'Chairman' includes recorder or deputy-recorder or deputy-chairman."

That Act does not extend to Scotland or Ireland (s. 4), and appears not to apply to trials in the King's Bench Division (*see post*, p. 178). But the term "court of assize" includes the Central Criminal Court (52 & 53 Vict. c. 63, s. 13 (4)).

The following rules were made by the Attorney-General, dated May 13, 1904, with the approval of the Lord Chancellor and the Secretary of State for the Home Department, in pursuance of s. 2 of the *Poor Prisoners Defence Act*, 1903 (Stat. Rules and Orders, 1904, No. 1056, Legal Series, No. 8)—

1. "Every clerk of assize and clerk of the peace shall keep a list of solicitors who are willing to undertake the defence of poor prisoners, and shall insert in such list the names of all solicitors who are willing so to act. The name of any

solicitor shall be removed from the list, either on the application of the solicitor himself or by direction of any judge of assize or chairman of quarter sessions. A copy of such list shall be sent to every clerk to justices in the county of quarter sessions district."

2. "Every clerk of assize and clerk of the peace shall keep a list of the members of the bar attending the circuit or sessions who are willing to act as counsel for poor prisoners, and shall insert in such list the names of all such members of the bar who are willing so to act."

3. "Any certificate given by the justices in pursuance of s. 1 of the *Poor Prisoners Defence Act*, 1903, shall be in Form A in the Schedule hereto. It shall as soon as it has been given be sent by the clerk to the justices to the clerk of assize or clerk of the peace, together with the name of the solicitor assigned.

"The certificate given by a judge of assize or chairman of quarter sessions shall be in Form B in the schedule hereto."

4. "Any justices, judge of assize, or chairman of quarter sessions, who give such a certificate shall at the same time assign to the prisoner from the list kept under Rule 1 a solicitor to whose services the prisoner shall be entitled.

"A copy of the depositions shall be furnished to the solicitor so assigned by the justices' clerk, clerk of assize, or clerk of the peace, as the case may be."

5. "Any member of the bar whose name appears upon the list kept under Rule 2 may be instructed on behalf of the prisoner by the solicitor so assigned."

Schedule.

FORM A.—CERTIFICATE OF COMMITTING JUSTICES.

We [or *I*] *the committing justice*[*s*] *in the case of* ——, *having regard to the nature of the defence set up by him, as disclosed in the evidence given before us* [or *me*] [or *in the statement made by him before us*] [or *in the evidence given and statement made by him before us,*] *are* [or *am*] *satisfied that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to obtain such aid, and we* [or *I*] *therefore certify that the said* —— *ought to have such legal aid.*

A.B.,
C.D.,
Justice[s] of the Peace.

NOTE.—*The prisoner has been committed to* —— *Prison* [or *has been released on bail and may be communicated with at* ——].

FORM B.—CERTIFICATE OF JUDGE OR CHAIRMAN.

I, A.B.——, *having regard to the nature of the defence set up by* ——, *as disclosed in the evidence given* [or *in the statement made by him*] [or *in the evidence given and statement made by him*] *before the Committing Justices, am satisfied that it is desirable in the interests of justice that he should have legal aid in the conduct of his defence, and that his means are insufficient to*

enable him to obtain such aid, and I therefore certify that the said —— ought to have such legal aid.

A.B.

Judge of Assize *or*
Chairman of Quarter Sessions *or*
Recorder of

Law Officers' Department,
May 13, 1904.

R. B. FINLAY, Attorney-General.
Approved, { HALSBURY, C.
A. AKERS DOUGLAS.

Proceedings in formâ pauperis in the High Court, K. B. D.]—By the Cr. Off. Rules, 1906, r. 257, "any person may be admitted to prosecute or defend any proceedings on the Crown side as a pauper on proof that he is not worth 25*l.*, his wearing apparel only excepted." By r. 258, "the provisions of Order XVI. of the Rules of the Supreme Court, 1883, rr. 23-31, so far as the same may be applicable, shall apply to any proceedings under the foregoing rule, provided, nevertheless, that no person shall be allowed to prosecute any proceedings on the Crown side as a pauper unless a counsel and solicitor have been assigned to him."

The effect of these rules is to supersede most, if not all, of the old practice as to pauper litigants on the Crown side of the King's Bench Division, as to which *see* Archb. Cr. Pl. (23rd ed.) 190; Short and Mellor, Cr. Pr. (2nd ed.) 386.

The application, which is *ex parte*, is usually made to a judge in chambers, but may be made to a divisional court.

It must be supported by an affidavit as to means to the following effect:—

"*In the High Court of Justice, King's Bench Division.—The King on the prosecution of* A. B. *against* C. D.—*I*, C. D. [or *intending prosecutor*] *make oath and say, that I am not worth twenty-five pounds in the world, save and except my necessary wearing apparel. Sworn, etc.* C. D."

If the application is to prosecute *in formâ pauperis* a case must have been submitted to counsel and his opinion obtained that there is *probabilis causa litigandi*, and there must be an affidavit by the party or his solicitor exhibiting the case and opinion, and stating that the case contains a full and true statement of the material facts. No particular forms are prescribed, but they can be adapted from those used in civil cases. *See* Chitty's Archbold's K. B. Forms (13th ed.) 592; Ann. Pr. 1910, pp. 201 *et seq.*

If the application is granted an order is drawn up at the Crown Office without any fee, which must be produced when the pauper requires anything to be done without payment of fees. *See* Short and Mellor, Cr. Pr. (2nd ed.) 142, 386.

SECT. 2.

SUMMONING, IMPANELLING, SWEARING, AND CHARGING THE PETTY JURY.

Calling.]—The prisoner having put himself upon the country, the next proceeding is to call the petty jurors, which an officer of the court does in the following or like terms :—

"*You good men, who are returned and impanelled to try the issue joined between our sovereign lord the King and the prisoner at the bar, answer to your names and save your fines,*" [then calling the jurors by name]. It is not necessary in law that the names should be called over in the order in which they stand on the panel, although it is generally proper to do so : it was not, therefore, ground of error that the names were not so called over. *Mansell* v. *R.*, 8 St. Tr. (N. S.) 831; 8 E. & B. 54; Dears. & B. 375; 26 L. J. (N. S.) M. C. 137.

Where, on a trial for felony, the jury panel contained the names of J. T. and W. T., and when the name of J. T. was called, a person supposed to be J. T. went into the box and was sworn without objection; and it was discovered, after conviction of the accused, that W. T., by mistake, had answered to the name of J. T. and had served on the jury, it was held by a majority of the judges that this was not a mis-trial, but only ground of challenge (*see post*, p. 189). *R.* v. *Mellor*, Dears. & B. 468; 27 L. J. (M. C.) 121 : *see also R.* v. *Metcalf*, 3 Cox, 220; *Case of a Juryman*, 12 East, 231 n. But where one T. had been summoned to serve on a jury and on his name being called one C., who was his bailiff but not qualified to act as a juror, answered and served on the jury, it was held, on appeal after conviction, that there had been a mis-trial. *R.* v. *Wakefield* [1918] 1 K. B. 216; 87 L. J. (K. B.) 319; 82 J. P. 136; 13 Cr. App. R. 56, and *R.* v. *Mellor*, *supra*, was considered.

It is a common law misdemeanor to personate a juryman and it is not necessary to prove that the defendant had any corrupt motive or anything to gain by his conduct, nor any particular intention to deceive, and it is not an answer that the defendant did not know he was doing wrong. *R.* v. *Clark*, 82 J. P. 295.

Qualification.]—By s. 1 of the *Juries Act*, 1825 (6 G. 4, c. 50), "every man, except as hereinafter excepted [*see infra*], between the ages of twenty-one years and sixty years, residing in any county in England, who shall have in his own name or in trust for him, within the same county, 10*l.* by the year above reprizes, in lands or tenements, whether freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands, or tenements, or in such lands, tenements, and rents taken together in fee simple, fee tail, or for the life of himself or some other person; or who shall have within the same county 20*l.* by the year above reprizes, in lands or tenements held by lease or leases for the absolute term of twenty-one years, or some longer term, or for

any term of years determinable on any life or lives; or who, being a householder, shall be rated or assessed to the poor rate or to the inhabited house duty in the county of Middlesex, on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*; or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries for the trial of all issues joined in any of the king's courts of record at Westminster, and in the superior courts, both civil and criminal, of the three counties palatine, and in all courts of assize, nisi prius, oyer and terminer, and gaol delivery, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding, or division, in which every man so qualified respectively shall reside," including the new county of London, 51 & 52 Vict. c. 41, s. 89. The qualifications, it will be seen, do not apply to grand jurors except for general or quarter sessions (as to the qualifications of grand jurors, *see ante*, p. 72), nor to common jurors in the city of London; *see* 6 G. 4, c. 50, s. 50, and 51 & 52 Vict. c. 41, s. 88 (2). The qualifications for jurors summoned for a coroner's inquest are not regulated by the Act of 1825 (*see* s. 52), but by s. 8 of the *Coroners Act*, 1887 : *see In re Dutton* [1892] 1 Q. B. 486; 61 L. J. Q. B. 190 : *R.* v. *Waldo*, 67 J. P. 103, and *ante*, p. 141. The *Juries Act*, 1870 (33 & 34 Vict. c. 77, s. 7), enacts, that " the qualification of persons as jurors in Wales shall be the same as the qualification of persons as jurors in England," and repeals the prior provision to the contrary.

Women jurors.]—By s. 1 of the *Sex Disqualification (Removal) Act*, 1919 (9 & 10 Geo. 5, c. 71) . . . " a person shall not be exempted by sex or marriage from the liability to serve as a juror : provided that . . . (b) any judge, chairman of quarter sessions, recorder or other person before whom a case is or may be heard may, in his discretion, on an application made by or on behalf of the parties (including in criminal cases the prosecution and the accused) or any of them, or at his own instance, make an order that the jury shall be composed of men only or of women only as the case may require, or may, on an application made by a woman to be exempted from service on a jury in respect of any case by reason of the nature of the evidence to be given or of the issues to be tried, grant such exemption.

" Rules of court may be made—(a) prescribing the manner in which jurors are to be summoned and to be selected from the panel; and (b) exempting from attendance as jurors any women who are for medical reasons unfit to attend; and (c) as to the procedure to be adopted on any application under this section relating to service on juries.

" Rules so made may require or authorise an application under this section, or any order thereon, to be made in interlocutory proceedings, and shall have full effect notwithstanding any existing rule of law or practice to the contrary.

" As respects any criminal court in England the expression ' rules of court ' means rules made by the Rule Committee established under the *Indictments Act*, 1915."

On the 15th October, 1920, the Rule Committee established under the *Indictments Act*, 1915, made the following rules :

1. All jury precepts, warrants, writs, lists and returns required to be issued or made under the Juries Acts, or any of them, shall include all women qualified and liable to serve as jurors, and the jurors' books shall be made up accordingly.

2. All persons qualified and liable to serve as jurors shall be summoned to serve on juries without distinction of sex, but otherwise as heretofore; provided that a husband and wife shall not both be summoned to serve on the same occasion.

3. The number of women appearing on any panel of jurors shall be in the same proportions, as near as may be, to the number of men appearing thereon as the total number of women is to the total number of men in the jurors' book or other list of jurors from which the panel is drawn.

Provided that it shall be the duty of the under-sheriff or other person upon whom is cast the duty of summoning jurors to secure that, wherever possible, there shall not be less than fourteen women on the jury panel.

Provided also that this rule shall not apply to grand juries.

4. On every trial by jury, the jury shall be a jury selected from the panel by ballot in manner prescribed by s. 26 of the *Juries Act*, 1825: provided that this rule shall be without prejudice to the power of the court under s. 17 of the *Juries Act*, 1870, to order that a special jury be struck according to the practice then prevailing; provided also that this rule shall not apply to grand juries.

5. Upon every jury summons served upon a woman there shall appear a notice that she may apply to the summoning officer for exemption from attendance as a juror on account of pregnancy or other feminine condition or ailment provided that such application is received by the summoning officer within three days of the receipt of the jury summons by the applicant.

6. The under-sheriff or other person upon whom is cast the duty of forming the jury panels may in his discretion exempt from attendance any woman who has been summoned to serve as juror, if he is satisfied by medical certificate or otherwise that on account of pregnancy or some other feminine condition or ailment she is, or will be, unfit to serve.

7. In any criminal case an application under s. 1 (b) of the *Sex Disqualification (Removal) Act*, 1919, that the jury shall be composed of men only or of women only shall be made in the Court in which such case is depending for trial, and except by leave of such court at the first sitting thereof.

Provided always that the said court may in its discretion hear the application at such time as may appear convenient.

8. Written notice of an intention to make an application under rule 7 shall be given not later than at the first sitting of the court by or on behalf of the prosecutor to the clerk of assize, clerk of the peace, or other proper officer of the court as the case may be, and similarly so far as possible, by or on behalf of an accused person to such proper officer of the court, and to the prosecutor and upon receipt of such last-mentioned notice it shall be the duty of the said officer of the court to communicate the effect thereof to the prosecutor when practicable.

9. For the purposes of any criminal case depending for trial in the King's

Bench Division of the High Court of Justice the words "the day fixed for the trial" shall be substituted for the words "the first sitting of the court" in rules 7 and 8.

10. These rules may be cited as the Women Jurors (Criminal Cases) Rules, 1920.

Burgesses.]—Under the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50, s. 186, sub-s. 1), "every burgess of a borough having a separate court of quarter sessions or a borough civil court shall, unless by law exempt, or disqualified, be qualified and liable to serve on grand juries in the borough, and on juries for the trial of issues joined in either of those courts." By 23 H. 8, c. 13, burgesses worth 40*l.* in personalty are qualified as jurors to try felonies.

Aliens.]—By s. 8 of the *Juries Act*, 1870 (33 & 34 Vict. c. 77), "*aliens* having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and shall be liable to serve on juries or inquests in England and Wales as if they had been natural-born subjects of the King; but, save as aforesaid, no man not being a natural-born subject of the King shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever."

Disqualifications.]—By s. 10 of the same Act "no man who has been or shall be *attainted* (*see ante*, p. 163) of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever." Persons over sixty are exempt but not disqualified. *Mulcahy* v. *R.*, L. R. 3 H. L. 306.

Exemptions.]—The privilege of exemption from serving on juries depends mainly upon s. 9 of the *Juries Act*, 1870 (33 & 34 Vict. c. 77), which enacts that "The persons described in the schedule hereto shall be severally exempt (as therein specified) from being returned to serve, and from serving upon any juries or inquests whatsoever, and their names shall not be inserted in the lists of the persons qualified and liable to serve on the same, but, save as aforesaid, no man otherwise qualified to serve on such juries or inquests, shall be exempt from serving thereon, any enactment, prescription, charter, grant, or writ to the contrary notwithstanding." The *exemptions* extend to coroners' juries: *In re Dutton* [1892] 1 Q. B. 486; 61 L. J. Q. B. 190. A particular exemption given by the section to jurors of the city of Westminster was abolished by 51 & 52 Vict. c. 41, s. 89 (2), and such jurors are now liable to serve on any jury in the new counties of London and Middlesex, except at quarter sessions for Middlesex. Below is given the schedule (with the addition in italics of other exemptions added by the other statutes specified):—"PERSONS EXEMPT FROM SERVING ON JURIES. Peers; members of parliament; judges, clergymen; Roman Catholic priests; ministers of any congregation of Protestant Dissenters, and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster; . . . barristers-at-law, certi-

ficated conveyancers and special pleaders, if actually practising; members of the society of doctors at law, and advocates of the civil law, if actually practising; . . solicitors, . . . if actually practising and having taken out their annual certificates and their managing clerks and notaries public in actual practice; officers of the courts of law and equity, and of the Admiralty and Ecclesiastical courts, including therein the courts of Probate and Divorce, and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices; coroners; gaolers and keepers of houses of correction, and all subordinate officers of the same; keepers in public lunatic asylums; members and licentiates of the Royal College of Physicians in London, if actually practising as physicians; members of the Royal Colleges of Surgeons in London, Edinburgh and Dublin, if actually practising as surgeons; apothecaries certificated by the Court of Examiners of the Apothecaries Company, and all registered medical practitioners (*a*) and registered pharmaceutical chemists if actually practising as apothecaries, medical practitioners, or pharmaceutical chemists respectively (*see also* 21 & 22 Vict. c. 90, s. 35); *and registered dentists if they so desire* (41 & 42 Vict. c. 33, s. 30); officers of the navy, army, militia, and yeomanry, while on full pay; *all soldiers in his majesty's regular forces* (44 & 45 Vict. c. 58, s. 147); *and officers and men in the territorial forces of the Crown* (7 Edw. 7, c. 9, s. 23 (4)); the members of the Mersey Docks and Harbour Board: *and of the London Port authority* (8 Edw. 7, c. 68, s. 39); the master, wardens, and brethren of the Corporation of Trinity House of Deptford Strond; pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots (*see* 57 & 58 Vict. c. 60. part x.); the household servants of his majesty, his heirs and successors; the Postmaster-General and any officers of the Post Office (8 Edw. 7, c. 48, s. 43), commissioners of customs, and officers, clerks, or other persons acting in the management, *service* [39 & 40 Vict. c. 36, s. 9], or collection of the customs, commissioners *and collectors* of inland revenue, and officers or persons appointed by the commissioners of inland revenue or employed by them or under their authority or direction in any way relating to the duties of inland revenue (53 & 54 Vict. c. 21, s. 8: *general or additional commissioners of income tax, as to the counties in which they dwell so long as they hold a certificate under 5 & 6 Vict. c.* 35 (43 & 44 Vict. c. 19, s. 40); sheriffs' officers; officers of the rural and metropolitan police (*see also* 2 & 3 Vict. c. 93, s. 10), magistrates of the metropolitan police courts, their clerks, ushers, doorkeepers, and messengers; *members of the London County Council as to juries within the administrative county of London* [53 & 54 Vict. c. ccxlii. s. 26], *members of the council of a county of a city or town corporate so far as relates to service on the trial of indictments removed into the adjoining county at large* (38 G. 3, c. 52.

(*a*) It has been held in Ireland that duly qualified veterinary surgeons are exempt as medical practitioners. *See Re Allen* [1904] 2 Ir. Rep. 565. *Sed quære* whether they can be so held under the English Jury Acts. An attempt to get this point decided was unsuccessfully made in *Hagmaier* v. *Willesden Overseers* [1904] 2 K. B. 316: 73 L. J. K. B. 638.

s. 11); members of the council of the muncipal corporation of any borough, and every justice of the peace assigned to keep the peace therein, and the town clerk and treasurer for the time being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate; burgesses of every borough in and for which a separate court of quarter sessions shall be holden so far as relates to any jury summoned for the trial of issues joined in any court of general or quarter sessions of the peace in the county wherein such borough is situate; justices of the peace so far as relates to any jury summoned to serve at any sessions of the peace for the jurisdiction of which he is a justice; officers of the Houses of Lords and Commons," *and registrars of births, deaths, and marriages;* 7 W. 4 and 1 Vict. c. 22, s. 18. "No person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list." 33 & 34 Vict. c. 77, s. 12. That section does not apply to customs officials exempted by 39 & 40 Vict. c. 36, s. 9, *supra*.

Jury lists.]—The mode of preparing jury lists, returning the names of persons qualified as jurors, making up the jury book, and summoning the juries in counties, is prescribed by the *Juries Act*, 1825 (6 G. 4, c. 50), ss. 8-10, 12, 14, 20, 22, 25, as amended by the *County Common Juries Act*, 1910 (10 Edw. 7, and 1 Geo. 5, c. 17), s. 1; the *Juries Act*, 1862 (25 & 26 Vict. c. 107), ss. 4-6, 8-14, and the *Juries Act*, 1870 (33 & 34 Vict. c. 77), ss. 11, 13, 14, 15, 19, 20, as modified by the *Local Government Act*, 1888, and the *London Government Act*, 1899 (62 & 63 Vict. c. 14).

The clerk of the county council in every administrative county in England and Wales is required on or before the 20th July in every year to issue his precept, according to the form given in the schedule to 25 & 26 Vict. c. 107, to the [churchwardens and] overseers of the poor of the several parishes and townships within the administrative county for which he acts, requiring them to make out, before the 1st September then next ensuing, a true list of all men residing within their respective parishes and townships qualified and liable to serve on juries according to 6 G. 4, c. 50, and also to perform and comply with all other the requisitions in the said precepts contained (25 & 26 Vict. c. 107, s. 4, as modified by 51 & 52 Vict. c. 41, s. 83 (6)). The [churchwardens and] overseers then make out their lists, and fix a copy on the principal door of every public place of religious worship within their parish or township on the three first Sundays in September; 6 G. 4, c. 50, ss. 8, 9; 25 & 26 Vict. c. 107, s. 6; and at a special petty sessions, held in the last week in September (or at such adjournment thereof as is mentioned in 25 & 26 Vict. c. 107, s. 8), these lists are produced, and the justices then strike out the names of any persons not qualified, or not able to serve by reason of any infirmity, and insert the names of any qualified persons omitted; 6 G. 4, c. 50, s. 10. The justices cannot state a special case as to priority of law arising on the review of the lists: *Hagmaier v. Willesden Overseers* [1904] 1 K. B. 316; 73 L. J. K. B. 638. The lists

duly corrected and allowed by the justices present at such petty sessions are transmitted by their clerk to the clerk of the county council. 25 & 26 Vict. c. 107, s. 9; 51 & 52 Vict. c. 41, s. 83 (6). The lists are then copied into *The Jurors' Book* by the clerk of the county council, which book is delivered by him to the sheriff, to be used from the 1st of January, for one year. 6 G. 4, c. 50, s. 12; 25 & 26 Vict. c. 107, s. 10; 51 & 52 Vict. c. 41, s. 83 (6).

In the county of London the duty of making out the lists devolves on the town clerk of each metropolitan borough in substitution for the overseers, etc., of the parishes comprised therein. 62 & 63 Vict. c. 14, ss. 11 (1), 25. In rural parishes the churchwardens are no longer concerned with jury lists. 56 & 57 Vict. c. 73, s. 5 (2).

Summoning jurors.]—6 G. 4, c. 50, provides (s. 20) that "the court of King's Bench, and all courts of oyer and terminer or gaol delivery, [and] the courts of sessions of the peace in England . . . and Wales, shall respectively have and exercise the same power and authority as they have heretofore had and exercised, in issuing any *writ* or *precept*, or in making any *award* or *order*, orally or otherwise, for the return of a jury for the trial of any issue before any of such courts respectively, or for the amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to every such writ, precept, award or order, shall be made in the manner heretofore used and accustomed in such courts respectively, save and except that the jurors shall be returned from the body of the county, and not from any hundred, or any particular venue within the county, and shall be qualified according to this Act." (*a*).

Writs of *venire facias juratores* and *distringas juratores* and *habeas corpora juratorum* are abolished (*see* Short and Mellor Cr. Pr. (2nd ed.) 112), and the juries summoned under the present procedure are as effectual for all purposes as those summoned under the old writs (15 & 16 Vict. c. 76, s. 115).

High Court.]—The summoning of jurors for trial at the Royal Courts of Justice is regulated by a rule of January 15, 1903, made under s. 89 (3) of the *Local Government Act*, 1888 :—

" The sheriffs of the county of London and of the county of Middlesex respectively shall execute and obey all precepts and process which the judges or proper officers of the High Court of Justice shall award, issue, and direct unto them respectively, and shall whenever required and commanded summon and return from the said county of London and the said county of Middlesex a competent number of persons qualified according to law to inquire of, present, and try all offences, issues, and other matters cognizable by the justices of the High Court of Justice within the boundaries of the county of the county of London and the county of Middlesex, and the persons returned from the said county of London and the said county of Middlesex whether taken wholly from the said county of London or from the said county of Middlesex or taken indiscriminately from

(*a*) The court appears to have inherent authority to summon one or more grand juries. *See* Chit. Cr. L. 309, 310: *R.* v. *McGuire* [1898] 34 New Bruns. 430.

the said county of London and the said county of Middlesex shall have authority to inquire of, present, hear, try and determine all such offences and other matters and all issues and all matters of fact arising out of such trials or relating thereto as if the said county of London and the said county of Middlesex were one county;" *and see* Cr. Off. Rules, 1906, r. 147; Short and Mellor, Cr. Pr. (2nd ed.) 112.

Assizes.]—Before the justices of assize go their circuits, (*b*) they issue their precept, signed and sealed, to the sheriff, to cause all persons bound to attend at the assizes to appear before them on an appointed day, and requiring him (among other things) to return a competent number of good and lawful men of the body of the county, qualified as jurors according to law: and the judges are empowered by the *Jurors Act*, 1825 (6 G. 4, c. 50), s. 22, as amended by the *County Common Juries Act*, 1910 (10 Edw. 7 and 1 Geo. 5, c. 17), s. 1, if they think fit, to direct the sheriff to "summon and empanel such number of jurors, . . . as such judges shall think fit to direct, to *serve indiscriminately on the criminal and civil side*," dividing them into two sets, the first to serve at the beginning of the assizes, for such time as the judge may direct, and the second to serve for the residue of such assizes. (*For forms of judges' precepts to the sheriff, see* 4 Chit. Cr. L. 171, 174). "The precept issued by the justices of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes." 15 & 16 Vict. c. 76, s. 105. It is the duty of the sheriff, upon the receipt of the precept for the return of jurors, to return the names of men contained in the jurors' book for the current year and no others. 6 G. 4, c. 50, s. 14. "No juror shall be liable to any penalty for non-attendance on any jury, unless the summons requiring him to attend be duly *served* six days at least before the day on which he is required to attend; but no longer period than such six days shall in any case be required between the service and such last mentioned day." 33 & 34 Vict. c. 77, s. 20. Jurors *may* be summoned by post, provided that when any summons shall be served by post, two additional days shall be allowed for the transmission of such summons by post, over and above the number of days required by law for the service of a summons, before the day on which the juror is required to attend. 25 & 26 Vict. c. 107, s. 11. As to dispensing with attendance, *see* 8 Edw. 7. c. 41, s. 1.

The sheriff must for 1*s.* deliver a copy of the jury panel to any party requiring the same. 15 & 16 Vict. c. 76, s. 106.

Quarter sessions.]—For county quarter sessions jurors are summoned by the sheriff in pursuance of the precept issued by the clerk of the peace. The mode

(*b*) The circuits are regulated by a series of Orders in Council printed in Statutory Rules and Orders Revised (ed. 1904), vol 12. *tit. Supreme Court E.*, and the commission days are fixed by Orders in Council issued before each circuit and printed in the Statutory Rules and Orders of the year of issue. Certain of these orders contain directions as to the precepts for summoning jurors. They are made under 3 & 4 W. 4, c. 71, and 38 & 39 Vict. c. 77, s. 23; and as to spring and winter assizes under 39 & 40 Vict. c. 57, 40 & 41 Vict. c. 46, and 42 & 43 Vict. c. 1.

of summons is the same as in the case of assize jurors. Jurors may be summoned in the same way for general sessions of the peace or for adjourned quarter sessions (1 & 2 Vict. c. 4). For borough quarter sessions jurors are summoned by the borough clerk of the peace in the manner directed by s. 186 of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50). As to dispensing with the attendance of jurors, *see* 8 Edw. 7, c. 41, s. 1.

Special jury.]—The qualification of special jurors is regulated by 33 & 34 Vict. c. 77, s. 6. A special jury cannot be given in treason or felony, 6 G. 4, c. 50, s. 30 : *R.* v. *Mayne*, 32 W. R. 95 : *Gray* v. *R.*, 6 St. Tr. (N. S.) 123. By s. 30 of the *Juries Act*, 1825 (6 G. 4, c. 50), the High Court (King's Bench Division), may, upon the motion of any *prosecutor*, relator, plaintiff, or demandant, or of any *defendant* in any case whatsoever, whether civil or *criminal*, or on any penal statute, *excepting only indictments for treason or felony*, depending in the said court, order and appoint a special jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury, in such manner as the said courts respectively have usually ordered the same, and every jury so struck shall be the jury returned for the trial of such issue. As to the old practice, *see* 1 Chit. Cr. L. 522. As to the cost of such jury, *see* 6 G. 4, c. 50, s. 34 (*post*, p. 188) : *R.* v. *Moate*, 3 B. & Ad. 237; 1 L. J. (N. S.) K. B. 78. By the *Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76), s. 108, as modified by 61 & 62 Vict. c. 6, s. 1 (1), the precept issued by the judges of assize for the sheriff to summon jurors for the assizes directs the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to; and a printed panel of the special jurors so summoned shall be made, kept, delivered and annexed to the *nisi prius* record, in like time and manner, and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors : Provided that the court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause. And *see* 15 & 16 Vict. c. 76, ss. 112, 113, as to the course to be pursued in cases where a special jury is desired.

As to special juries in London and Middlesex, *see* 33 & 34 Vict. c. 77, ss. 15-18; 51 & 52 Vict. c. 41, s. 89. The nomination and reduction of the jurors in London and Middlesex is regulated by 15 & 16 Vict. c. 76, s. 110, and 51 & 52 Vict. c. 41, s. 89. The rule committee of the Supreme Court has, under the *Special Juries Act*, 1898 (61 & 62 Vict. c. 6, s. 1), power to make rules as to special juries, and thereby to repeal or alter rules made under any previous Act as to special juries. This enactment is aimed at what remains of the

Regulae Generales of Hilary Term, 1853 (*see* Statutory Rules and Orders Revised (ed. 1904), vol. 12, *tit. Supreme Court E.*, p. 417).

By the Cr. Off. Rules, 1906, r. 147, in the King's Bench Division, "Either the prosecutor or the defendant may, except in case of felony, obtain a special jury upon giving the like notice as is required in civil cases, and the court or a judge may, at the instance of either party, order that a special jury be struck as provided for by the *Juries Act*, 1870 (see s. 17), or any subsequent Juries Act. And when the jury has been reduced either party may draw up an order at the Crown Office directing the sheriff to summon that particular jury at such time and place as may be required." As to the mode of striking and reducing such a jury, *see* Short and Mellor Cr. Pr. (2nd ed.) 113. The jury thus reduced may be challenged for cause. *Barrett* v. *Long*, 8 St. Tr. (N. S.) 1076; 3 H. L. C. 395. As to the Irish Practice, *see R.* v. *Parnell*, 14 Cox, 505; and Huband, Grand Jury, etc., in Ireland. "The person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same upon taxation of costs, than such person or party would be entitled to in case the cause had been tried by a common jury, unless the judge before whom the case is tried shall immediately after the verdict certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." 6 G. 4, c. 50, s. 34. This enactment applies to criminal cases: *R.* v. *Pembridge*, 3 Q. B. 901; 12 L. J. (Q. B.) 47; and *R.* v. *Rowlands*, 2 Den. 364, 371 (n.).

If sufficient special jurors are not in attendance, a *tales* for deficiency or default of jurors may be awarded, by warrant of the attorney-general for a *tales de circumstantibus*. *See Att.-Gen.* v. *Parsons*, 2 M. & W. 23: *R.* v. *Dolby*, 2 B. & C. 104; 2 St. Tr. (N. S.) 939; 1 C. & K. 238; 1 L. J. K. B. 241: *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785, *post*, p. 197). For the form of this warrant and the mode of obtaining it, *see* Short and Mellor Cr. Pr. (2nd ed.) 115, 545. If an order is made for a special jury, and the parties proceed to trial before a common jury, it would seem that the verdict cannot be afterwards impeached. *R.* v. *Perry*, 5 T. R. 453.

Jury de medietate linguæ.]—S. 5 of the *Naturalization Act*, 1870 (33 & 34 Vict. c. 14), took away the right which aliens previously had to be tried by a jury *de medietate linguæ*, when indicted of any felony or misdemeanor, but not when indicted of high treason. *See* Arch. Cr. Pl. 143 (16th ed.): *R.* v. *Manning*, 1 Den. 467; 19 L. J. (N. S.) M. C. 1: *Levinger* v. *R.*, L. R. 3 P. C. 282; 39 L. J. P. C. 49. Under that Act (s. 5) an alien is now "triable in the same manner as if he were a natural-born subject."

Panel.]—On a trial for high treason the accused has a right to a copy of the jury panel. 7 & 8 W. 3, c. 3, s. 7; 7 Anne, c. 21, s. 14. But he has no such right in cases of felony or misdemeanor. *R.* v. *Dowling*, 7 St. Tr. (N. S.) 381; 3 Cox, 509: *R.* v. *Nicholson*, 8 Dowl. 422: *R.* v. *Mitchel*, 6 St. Tr. (N. S.) 599; 3 Cox, 1.

Challenge of grand jurors.]—*Vide ante*, p. 72.

Challenge of petty jurors.]—When a sufficient number of persons charged with felony have pleaded, and put themselves upon the country, the clerk of the court addresses the prisoners thus: "*Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lord the King and you upon your respective trials* [or *who are to try you*]; [or in a capital case, *upon your life and death*;] *if therefore you or any of you will challenge* [or *object to*] *them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.*" The officer then proceeds to call twelve jurors from the panel, calling each juror by name and address. When a full jury has appeared (*R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785, 916; 4 B. & Ald. 471), and before any juror is sworn (*R.* v. *Frost*, 4 St. Tr. (N. S.) 85, 122; 9 C. & P. 129, 137: *R.* v. *Key*, 2 Den. 347; 3 C. & K. 371; 21 L. J. (M. C.) 35: *R.* v. *Giorgetti*, 4 F. & F. 546), the proper time comes for the exercise of the right of *challenge* or exception to the jurors returned to pass upon the trial (*a*). The party intending to challenge the array may pray a *tales* to complete the number, and then object to the panel. Bull (N. P.) 307: *R.* v. *Dolby*, 1 C. & K. 238; 1 L. J. K. B. 241. If the defendant was not allowed his full right of challenge the proceedings might be quashed on writ of error, and a *venire de novo* awarded. *Gray* v. *R.*, 6 St. Tr. (N. S.) 117; 11 Cl. & F. 427. In England appeal is substituted for writ of error. *See post*, pp. 300 *et seq.*

Challenges are of two kinds: 1. To the *array*, when exception is taken to the whole number impanelled, and 2. To the *polls*, when individual jurymen are excepted against. They are also divided into challenges *peremptory*, made to the polls without reason assigned, and challenges *for cause*, which may be to the array or the polls for some definite reason assigned and proved. Both are comparatively rare in England, and the leading modern cases on the subject have occurred in Ireland. *See* Huband, Grand Jury in Ireland, 611.

Peremptory challenge.]—Jurors impanelled to try collateral issues may not be challenged peremptorily. *R.* v. *Radcliffe*, 1 W. Bl. 3. At common law, the crown might, it seems, have challenged peremptorily any number of jurors, without alleging any other reason than "*quod non boni sunt pro rege.*" 2 Hawk. c. 43, ss. 2, 3; 2 Rolle Abr. 645; Co. Litt. 156 b; Bac. Abr. Juries (E.) 10. But this power was taken away by 33 Edw. 1, c. 4 (*ordinacio de inquisitionibus*), Bac. Abr. Juries (E.) 11 (*a*). Under the present law in all inquests to be

(*a*) Probably a challenge to the array should be made before any juror is sworn. In the case of a challenge as to the polls it is submitted that it is time enough to challenge before the swearing of the juror objected to begins. *R.* v. *Brandreth*, 32 St. Tr. 755, 777, Abbott, C.J. It has been held in two Colonial cases that a challenge to an individual juror for cause is not too late if made before the juror has done any act showing assent to take the oath, even if he is touching the book. *R.* v. *Freeman*, 6 Queensland L. J. 281, Griffith, C.J.: *R.* v. *Longland*, 6 *Id.* 56. In *R.* v. *Longland* the juror with the book in his hand said that he was opposed to capital punishment, and a challenge for cause was allowed to be made.

(*b*) The English and Irish authorities on this subject are fully stated in Huband, Grand Jury in Ireland, 632—644. As to challenge by the Crown in New Zealand, *see* *R.* v. *Bourke* [1900] 19 N. Z. L. R. 335.

taken before the High Court (King's Bench Division), and all courts of oyer and terminer, or gaol delivery, and courts of sessions of the peace in England and Wales (*see* 6 G. 4, c. 50, s. 20), "wherein the King is a party, howsoever it be, notwithstanding it be alleged by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisitions as it shall be found, if the challenges be true or not, after the discretion of the court." 6 G. 4, c. 50, s. 29. The crown, however, is entitled to ask that a juror should "stand by," *i.e.*, to postpone consideration of the cause of challenge until the panel has been "gone through" and it appears that there will not be jurors enough to try the defendant, if the peremptory challenges are allowed to prevail. *R.* v. *Parry*, 7 C. & P. 836: *R.* v. *Geach*, 9 C. & P. 499; and this was done in *R.* v. *Casement* [1917] 1 K. B. 98; *and see* 2 Hale, 271; 2 Hawk. c. 43, s. 3; Staundf. 162. By "*going through*" or "*perusing*" the panel is meant ascertaining according to the usual practice of the court, and what may reasonably be expected, that there are no more jurors in the panel whose attendance can be procured, and that unless the crown be put to show its cause of challenge, "the inquest would remain untaken." *Mansell* v. *R.*, 8 St. Tr. (N. S.) 831; 8 E. & B. 54; Dears. & B. 375; 27 L. J. (M. C.) 4. In that case the panel contained fifty-four names: eighteen, when called, were peremptorily challenged by the prisoner; fifteen were, on the prayer of the counsel for the crown, the prisoner's counsel objecting, and praying that cause of challenge should be shown, ordered to "stand by"; and nine were elected and tried to be sworn. This left twelve other persons only on the panel, and those twelve were at that time absent, deliberating upon their verdict in another case. The name of W. J. (the first person who upon the prayer of the counsel for the crown had been ordered to stand by) was then again called, and the counsel for the crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner prayed that cause of challenge should be shown forthwith. At that moment, and before any judgment was given, the twelve persons who sat as a jury in the other case came into court and gave their verdict; and the counsel for the crown then prayed that W. J. should be ordered to stand by until those twelve persons had been called; but the counsel for the prisoner demanded that W. J. should be sworn, unless cause of challenge to him were shown. The court ordered that W. J. should stand by; and three persons, the number required to complete the jury, were taken from the said twelve jurors, and elected and tried to be sworn (*sic*), although the prisoner's counsel objected that such persons ought to be called in their proper order with other persons in the panel, and that J. J., the person whose name stood in the panel immediately after that of W. J., ought to be next called. Upon a writ of error, the record stating all these facts, it was held that, under the circumstances, the panel was not gone through, so as to put the crown to assign cause of challenge, until the twelve persons who came into court before the complete formation of the jury had been called; that W. J.

was properly ordered to stand by the second time; and that the three persons required to complete the jury were properly called and taken from the said twelve, without again calling the whole panel through in its order. *Id.*

The defendant is bound to show all his causes of objection before the prosecutor can be called upon to show the grounds of his challenges. 2 Hawk. c. 43, s. 3; Bac. Abr. Juries (E.) 10; 14 Bl. Com. 353 (*a*).

Peremptory challenges are allowed to the defence in all cases of treason and felony, but not in cases of misdemeanor. Co. Litt. 56; 4 Bl. Com. 352; 3 Co. Inst. 27; Com. Dig. Challenge (C.) : *Gray* v. *R.*, 6 St. Tr. (N. S.) 117, 134; 11 Cl. & F. 427; *and see Levinger* v. *R.*, L. R. 3 P. C. 282; 39 L. J. P. C. 49. The number of peremptory challenges allowed in cases of high treason is thirty-five (7 & 8 W. 3, c. 3, s. 2), except where the treason charged is the compassing of the King's death, and an overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, whereby his life may be endangered, or his person may suffer bodily harm (39 & 40 G. 3, c. 93); or attempts against the person of the King; 5 & 6 Vict. c. 51, ss. 1, 2. In the last-mentioned cases of high treason, and in murder and all other felonies, the number is twenty. 6 G. 4, c. 50, s. 29; *and see* 2 Hawk. c. 43, ss. 7, 8; 2 Hale, 268; Bac. Abr. Challenge, 70, 74, 75, 217; Fost. 106; Co. Litt. 156; Bac. Abr. Juries (E.) 9, 10. "If any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made." 7 & 8 G. 4, c. 28, s. 3. And when he has exhausted his challenges he cannot withdraw one objection in order to challenge a fresh juror. *R.* v. *Parry*, 7 C. & P. 836. In Ireland only twenty peremptory challenges are allowed even in high treason. 9 G. 4, c. 54, s. 9 : *Smith O'Brien* v. *R.*, 2 H. L. C. 465; 7 St. Tr. (N. S.) 1, 43, 359. In misprision of treason, it seems to be doubtful whether peremptory challenge is allowed. *See* 2 Hawk. c. 43, s. 5; 3 Co. Inst. 27 a. In cases of misdemeanor, though no right of peremptory challenge exists in England, it is usual for the officer, on application to him, to abstain from calling any reasonable number of names objected to either by the prosecutor or by the defendant, taking care that enough are left to form a jury; and this practice has often been sanctioned by the Court. *See Dick*, Q. S. 485, 486 (6th ed.) : *R.* v. *McGowan*, 11 Ir. C. L. Rep. 207, cit.; 3 Ir. Jur. (N. S.) 403 : *R.* v. *Blakeman*, 3 C. & K. 97. As to Ireland, *see* 39 & 40 Vict. c. 78, s. 10; Huband, Grand Jury in Ireland, 649, 652.

Where several defendants are tried by the same inquest for treason or felony, each has a right to the full number of his challenges; and if they refuse to join in their challenges, the crown has the right of trying each, or any number of them less than the whole, separately from the others, so as to prevent the delay which might arise from the whole panel being exhausted by the challenges.

(*a*) Hereon *see R.* v. *Bourke* [1900] 19 N. Z. L. R. 335: *R.* v. *Wardell*, 9 Queensland L. J. 49.

Fost. 106; Co. Litt. 156; 2 Hale, 268 : *R.* v. *Charnock*, 3 Salk. 81. But in *R.* v. *Fisher*, 3 Cox, 68, Platt, B., refused an application that principal and accessory should be allowed to sever their challenges.

Challenge for cause.]—Challenges *for cause* may be made either by the prosecutor or by the defendant (2 Hale, 271; 2 Co. Inst. 431), whether the indictment is for treason, felony, or misdemeanor. *See R.* v. *Lovett*, 3 St. Tr. (N. S.) 1177, 1179. They are either to the *array* or to the *polls*, *i.e.*, to individual jurymen.

1. *To the array.* The challenge to the array is either a *principal* challenge, or *for favour*. The right applies whether the array is the panel originally summoned or the array of a *tales; R.* v. *Dolby*, 1 C. & K. 238. "The only ground upon which the challenge to the array is allowed by the English law is the unindifferency or default of the sheriff." *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1, 799. The causes of a principal challenge to the array are—where the sheriff is the actual prosecutor or party aggrieved : *R.* v. *Sheppard*, 1 Leach, 101 : *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785; 4 B. & Ald. 471; or where, at the time of the return, he was of actual affinity to either party, or if he returns any jurors at the request of the prosecutor or defendant, or any person whom he believes to be more favourable to the one side than to the other; and *see R.* v. *Adams* [1832] Huband, Grand Jury in Ireland, p. 614; or if the defendant have an action depending against the sheriff; Co. Litt. 156 a; or if the sheriff, or the bailiff who made the return, is under the distress of the prosecutor or the defendant; or if he has any pecuniary interest in the event; or if he is counsel, attorney, servant, or arbitrator, in the same cause; *Id.*; Bac. Abr., Juries (E.); Huband, p. 618; or a subscriber to a society which is the prosecutor. *R.* v. *Dolby*, 2 St. Tr. (N. S.) 939; 2 B. & C. 104; 1 C. & K. 238. It is no ground of challenge for unindifferency on the part of the sheriff, that the officer had omitted to summon one of the twenty-four special jurymen returned on the panel. *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785, 916; 4 B. & Ald. 471. It is a legal ground of challenge to the array that the sheriff has selected the jurors on the ground of religion; *R.* v. *O'Doherty*, 6 St. Tr. (N. S.) 831; but not that he has returned a large proportion of the panel of a different religion from the defendant. *Smith O'Brien* v. *R.* [1849] 7 St. Tr. (N. S.) 31. The religion of the jurors must be strictly proved, and the mere fact of a disproportion is not sufficient to prove unindifferency. *R.* v. *Mitchel*, 6 St. Tr. (N. S.) 599 : *R.* v. *O'Doherty*, *supra*: *R.* v. *Duffy*, 7 St. Tr. (N. S.) 795, 871 : *Smith O'Brien* v. *R.*, 7 St. Tr. (N. S.) 1, 20, 24, 31. There can be no challenge to the array on the ground of unindifferency in the master of the crown office, he being the officer of the court expressly appointed to nominate the jury; in such case the only remedy is to apply to the court to appoint some other officer to nominate the jury. *R.* v. *Edmonds*, *supra*. It is no ground of challenge to the array that the justices have omitted the duties prescribed by the Jury Acts in making out the list of names for the special or common jury book, and that the sheriff has summoned the jury from a jury book so improperly made. *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 69, 78 : *R.* v. *Burke*, 10 Cox, 519. 3 & 4 Will. 4, c. 91 (*Irish Jury Act*), s. 9 (*rep.*), which in this respect corresponded with s. 12 of the

English *Juries Act*, 1825 (6 G. 4, c. 50), directed a jurors' book to be made up in each year for use in the year following, and declared that such book should be in use from the 1st of January for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book; the jurors were not then called, but the sitting was duly adjourned to 19th January, 1866, at which time the trial took place, when the jurors named in the return of 1865 were called. It was held that this was not a ground of challenge to the array: *Mulcahy* v. *R.*, L. R. 3 H. L. 306; and also that the fact of one of the jurors who had been duly returned in November, 1865, not being on the list for 1866, was no ground of challenge to him. *Id.*

The *default* of the sheriff may also be a ground of principal challenge to the array; as where, the array being returned by the bailiff of a liberty, the sheriff returns it as from himself. If, however, the sheriff returns a panel *from the liberty*, it will be good, though he may be liable to the lord of the franchise in an action. Co. Litt. 156 a.; Bac. Abr. Juries (E.) 1. Since 1825 (6 G. 4, c. 50, s. 13), the jury has been taken from the body of the county: and this has put an end to the ancient right of challenging the array "for want of hundredors," *i.e.*, if four persons were not returned from the hundred in which the offence was alleged to have been committed; 2 Hale, 272; Huband, Grand Jury in Ireland, 632.

There may also be a challenge to the array *for favour*, in cases where the ground of partiality is less apparent and direct: as where one of the parties is tenant to the sheriff; or the sheriff and one of the parties are united in the same office; or where a relationship exists between the children of one of the parties and of the sheriff or officer; or where the sheriff has an action of debt depending against one of the parties. Co. Litt. 156 a; Bac. Abr. Juries (E.) 1; 3 Dyer, 367 a, pl. 40.

A principal challenge to the array being founded upon some manifest partiality or error, if the cause is truly alleged, the court, it is said, will at once quash the array, and direct a new panel to be summoned. Where cause exists for a challenge to the array, on the ground of relationship or otherwise, the party liable to the objection may himself suggest it to the court, in order to prevent the delay which the challenge would occasion, and pray that the coroners or elisors, as the case may be, may be ordered to summon the jury. *See* 1 St. Tr. (N. S.) 913. If the other party admits the fact, and agrees to the prayer, the order will at once be made; if he refuses, denying the existence of the cause of challenge, he cannot afterwards avail himself of it. Co. Litt. 157 b; 3 Dyer, 367 a, pl. 40; *Baynham's case*, 5 Co. Rep. 36 b.

A challenge to the array ought to be in writing, so that it may be put upon the record, and the other party may demur or counter-plead to it. *See R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785; 4 B. & Ald. 471: *Mayor, etc., of Carmarthen* v. *Evans*, 10 M. & W. 274. The form of it is as follows:—

"*And now at this day come as well the said* J. N., *who for our said lord the King prosecutes in this behalf, as the said* J. S., *in his own proper person, and the jury thereupon empanelled likewise come; and thereupon the said* J. S. *challenges the array of the said panel, because he says that the said panel was*

arrayed and returned by A. B., *esquire, now and at the time of the making of the array aforesaid sheriff of the said county of* ——, *which said sheriff is a kinsman of the said* J. N., *to wit* [setting out the mode of relationship]; *and this he is ready to verify, whereupon he prays judgment, and that the said panel may be quashed.*" *And see* Huband, Grand Jury in Ireland, 623, 689.

The ground of objection must be specifically stated in the challenge: for a challenge merely stating that the sheriff "has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel," is demurrable as being too general: *R.* v. *Hughes*, 1 C. & K. 235. The opposite party may either plead to the challenge, traversing the cause of challenge alleged, or demur to it for insufficiency. In the latter case, the party challenging joins in demurrer, and the matter is determined by the court. The demurrer and joinder may be in the following form:—

"*And the said* J. N. *says, that the said challenge of the said* J. S. *to the array of the panel aforesaid is not sufficient in law to quash the array of the panel aforesaid, and that there is no necessity for him the said* J. N., *nor is he obliged by the law of the land to answer to the said challenge in manner and form as it is above alleged; wherefore he prays judgment, and that the array of the said panel may be affirmed,*" etc.

"*And the said* J. S. *says, that he hath above alleged sufficient matter in law, in the said challenge by him above made to the array of the panel aforesaid, to quash the array of the said panel, which he the said* J. S. *is ready to verify; which said matter the said* J. N. *does not deny, nor in any manner answer thereto: wherefore the said* J. S., *as before, prays judgment, and that the array of the said panel may be quashed,*" etc.

If the challenge is overruled, the judgment should be entered on the original record. *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785; 4 B. & Ald. 471. The challenge might be removed as part of the record, where it was a principal cause of challenge. 3 Woodeson, s. 347: *see O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1.

If the party pleads to the challenge (in the case, at least, of a challenge *for favour*, and also, it would seem, in the case of a principal challenge, unless the fact is admitted or apparent) two *triers* are appointed by the court, who are sworn, and charged to try whether the array is an impartial or a favourable one. *See Smith O'Brien* v. *R.*, 7 St. Tr. (N. S.) 1; 2 H. L. C. 469. These triers are generally two of the jurymen returned. The court may, however, in its discretion, refer the trial to two coroners, or to two solicitors, or to any other two indifferent persons. 2 Hale, 275; 4 Bl. Com. 353; 2 Rolle Rep. 363. If the triers find against the challenge, the trial proceeds as if no such challenge had been made. The improper disallowance of a challenge was ground, not for a new trial, but for a *venire de novo*. *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785; 4 B. & Ald. 471. If the triers find in favour of the challenge, a new *venire* is awarded to the coroners, or, if they are interested, to elisors. *See* 1 Co. Inst. 158; Huband, Grand Jury in Ireland 480, 1084. In *R.* v. *Dolby*, 2 B. & C. 104; 2 St. Tr. (N. S.) 939, the defendant, who was indicted for a seditious libel, challenged the array on the ground that the prosecution was instituted by an association called the Constitutional Association, and that one of the sheriffs

who returned the jury was one of the association. The counsel for the prosecution thereupon took issue; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first addressed these triers, and called a witness, who proved that the sheriff named was one of the subscribers to the association. The counsel for the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it. The triers were then addressed by the counsel for the defendant in reply. The chief justice summed up. The triers found in favour of the challenge, and the case was adjourned.

2. *To the polls.*]—Even where a challenge to the array is determined against the party making it, he may afterwards still have his challenges *to the polls*, *i.e.*, he may object separately to each juryman as he is about to be sworn. The challenge must be made when the juror comes to the book to be sworn, and before the officer begins to administer the oath; and it comes too late afterwards, although made before the juror has taken the oath: *R.* v. *Brandeth*, 32 St. Tr. 755, 777: *R.* v. *Giorgetti*, 4 F. & F. 546; and *see ante*, p. 189. These challenges are generally made by parol, although, in strictness, if any question is raised upon the validity of such a challenge, it must be entered in due form on the record. The defendant, in treason or felony, may for cause shown object to all or any of the jurors called, after exhausting his peremptory challenges of thirty-five or twenty. Challenges to the polls for cause are, like those to the array, either *principal* or *to the favour*. The principal causes of challenge are:—1. *Propter honoris respectum*; where a peer or lord of parliament is sworn on a jury for the trial of a commoner. Co. Litt. 156 b; 2 Hawk. c. 43, s. 11; Bac. Abr. Juries (E.) 6; 3 Bl. Com. 361. 2. *Propter defectum*, *i.e.*, on account of some personal objection, as alienage (*R.* v. *Sutton*, 8 B. & C. 417; 6 L. J. (O. S.) M. C. 162), infancy (*R.* v. *Tremearne*, 5 B. & C. 254; 4 L. J. K. B. 157), or want of the requisite qualification (as to which see *ante*, p. 179). Where a disqualified juror is on the panel, and no challenge is made, the presence of the juror does not invalidate the trial. *R.* v. *Sutton*, *supra*. A juror may challenge himself, by stating that he is not qualified, and he may be examined upon oath. *R.* v. *Cook*, 13 St. Tr. 311, 316, 317. 3. *Propter affectum*, *i.e.*, on the ground of some presumed or actual partiality in the juror: as if he be of affinity to either party, or in his employment, or is interested in the event, etc.; in short, any such presumed partiality as would be a good ground for a principal challenge to the array in the case of the sheriff will be also a cause of principal challenge to an individual juror. *See R.* v. *Martin*, 6 St. Tr. (N. S.) 925: *R.* v. *Swain*, 2 M. & Rob. 112; 2 Lew. 116. So where an actual partiality is shown to exist, or if the juror has expressed a desire as to the result of the trial, or an opinion as to the guilt or innocence of the defendants, or personal ill will. In *R.* v. *O'Coigly*, 26 St. Tr. 1191, 1231 (a trial for treason), a juryman was set aside on the trial because, on looking on the prisoners, he had uttered the words "damned rascals." A person who has acted as a grand juror on the finding of a bill of indictment may also be challenged for cause if returned to serve on the petty jury, either on the trial of that indictment or any other

indictment for the same offence. 25 Edw. 3, stat. 5, c. 3; Y. B. 14 & 15 Edw. 3 (ed. Pike), p. xxvi. : *R.* v. *Perceval*, 1 Sid. 243 : *R.* v. *Cook*, 13 St. Tr. 311, 334 : *R.* v. *Sullivan*, 8 A. & E. 831; 8 L. J. (M. C.) 3. But a person who has sat upon a former petty jury, which convicted other defendants on the same indictment, is not therefore subject to challenge. *See* Co. Lit. 157 a; Bac. Abr. Juries (E.) 5; 3 Bl. Com. 363. And in *R.* v. *Sawdon*, 2 Lew. 117, it was held not to be a good ground of challenge that the juror who had sat on previous trials during the same assize had in no case returned a verdict for the crown. 4. *Propter delictum*, *i.e.*, on the ground of infamy, which meant at common law conviction or attainder of treason, felony, perjury, conspiracy, or any other infamous offence, which had to be proved by the record of the conviction. Even a pardon would not remove this objection. 2 Hale, 278; Bac. Abr. Juries (E.) 2 : *Brown* v. *Crashaw*, 2 Bulstr. 154. Under 33 & 34 Vict. c. 77, s. 10 (*ante*, p. 182), the disqualification attaches to jurors who are under outlawry, or attainted of treason or felony, or convicted of any infamous crime, unless a free pardon has been obtained.

Challenges to the polls *for favour* are where, although the juror is not so manifestly partial as to render him liable to a principal challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice or undue influence; as where he has been entertained in the house of the party, or has been arbitrator in the same matter; or where the juror and the party are fellow-servants, or any other cause exists, such as would constitute in the case of the sheriff a ground of challenge to favour to the whole panel. Co. Litt. 157 b; Bac. Abr., Juries (E.) 5.

Trial of challenges.(*a*)]—In the case of a *principal challenge to the polls*, if the partiality is made apparent to the satisfaction of the court, the challenge is at once allowed, and the juror set aside. But in the case of a challenge *to the favour*, it is left to the discretion of two triers who are sworn and charged to try whether the juror challenged stands indifferent between the parties. *See* Huband, Grand Jury in Ireland, 688. The form of oath to a *trier*, to try whether a juror stands indifferent or not, is as follows :—

"*I swear by Almighty God that I will well and truly try whether* A. B., *one of the jurors, stands indifferent between our sovereign lord the King and the prisoner at the bar, and a true verdict give according to the evidence.*" (*See R.* v. *O'Coigley*, 26 St. Tr. 1191).

No challenge of triers is admissible. The form of oath to be administered to a witness sworn to give evidence before the trial is as follows :—

"*I swear by Almighty God that the evidence which I shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth.*" (*See R.* v. *Dolby*, 1 C. & K. 238 : *R.* v. *Hughes*, 2 Cr. & D. (C. C. Ir.) 396).

If the challenge is to the first juror called, the court may select any two indifferent persons as triers; if they find against the challenge, the juror will be

(*a*) As to challenges in Canada, *see Mathurin* [1903] 12 Quebec L. R. (K. B.) 494.

sworn, and be jointed with the triers in determining the next challenge; but as soon as two jurors have been found indifferent, and have been sworn, every subsequent challenge will be referred to their decision. *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 792 n., 922 : *and see* 2 Hale, 275; Co. Litt. 158 a; Bac. Abr., Juries (E.) 12.

The burden of proof of a challenge for cause is on the person who makes it (*R.* v. *Savage*, 1 Mood. 51); and he is not entitled to question a juror before challenging him. *R.* v. *Dowling*, 7 St. Tr. (N. S.) 381 : *R.* v. *Stewart*, 1 Cox, 174. When the challenge has been made, the trial proceeds by witnesses called to support or defeat the challenge; the juror objected to may also be examined on the *voire dire*, as to his qualification, or the leaning of his affection. *R.* v. *Dowling*, *supra*. But he cannot be interrogated as to matters which tend to his own discredit, as whether he has been convicted of felony, etc., nor, as it seems, whether he has expressed a hostile opinion as to the guilt of the defendant. *R.* v. *Cook*, 13 St. Tr. 311, 334 : *R.* v. *Edmonds*. 1 St. Tr. (N. S.) 785; 4 B. & Ald. 471 : *R.* v. *Martin*, 6 St. Tr. (N. S.) 925; and *see* 2 Hawk. c. 43, s. 28. In *R.* v. *Cuffey*, 7 St. Tr. (N. S.) 467. a trial at the Central Criminal Court, in 1848, for treason-felony, the latter question was asked of some of the jurors who had been challenged for favour, the attorney-general not objecting on the part of the crown.

The form of oath on the *voire dire* is as follows :—

"*I swear by Almighty God that I will true answer make to all such questions as the court shall demand of me.*"

If the panel is so far exhausted by challenges that a full jury is not left, a fresh panel will be returned; and thereupon the defendant may challenge peremptorily any of those who were sworn before, if they are again returned; but he cannot challenge them for cause, except for some matter which has arisen since the original hearing. 2 Hale, 274.

Whether or not a criminal court has the power to award a *tales*, in case of deficiency or default of jurors, without a warrant from the attorney-general, is not a settled point. Hawkins (Book 2, c. 43, s. 18) says : "But it seems that such a *tales* cannot be prayed for by the King upon an indictment or criminal information, without a warrant from the attorney-general, or an express assignment from the court before which the inquest is taken"; *see* 1 Lev. 223; but Blackstone says (4 Comm. 355), "If by reason of challenges, or default of jurors a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn." In *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785, which was tried at Warwick, *tales* men were allowed (without any warrant from the attorney-general) to supply deficiencies in the panel of a special jury struck in the crown office. Blackstone's opinion is supported as to high treason by *R.* v. *Stapleton* [1680] Sir T. Raym. 367; 4 Co. Inst. 161 : *R.* v. *Dolby*, 2 B. & C. 104; 2 St. Tr. (N. S.) 939.

The judge, however, may, where the panel is exhausted and no *tales* has been prayed, order the sheriff to return a panel *instanter* without further precept; and the justices of the peace in sessions may issue a special precept commanding the sheriff to return a sufficient number of jurors immediately, and thereupon

may proceed with the trial at the then sessions. 2 Hale, 28, 261, 265; *see* 6 G. 4, c. 50, s. 20 : *R.* v. *Cropper*, 2 Mood. 18.

The usual, and in general the proper course, where the panel is exhausted by challenges of the prisoner and the crown, or of either, before a full jury remains is to call over the whole panel again in the same order as before, but omitting those peremptorily challenged by the prisoner; and then, as each juror again appears, whichever party challenges must show cause. If no sufficient cause of challenge is shown, the jurors are then sworn. *R.* v. *Geach*, 9 C. & P. 499. *See ante*, p. 189. And no cause of challenge to the jury, whether to the array or to the polls, can be taken, either in arrest of judgment, or otherwise, after the jury are sworn. *R.* v. *Sheppard*, 1 Leach, 101 : *R.* v. *Sutton*, 8 B. & C. 417; 6 L. J. (M. C.) 102. No challenge can be made, nor need the jury be re-sworn, when the defendant is given in charge to them on an allegation of a previous conviction, under 7 & 8 G. 4, c. 28, s. 11, or 6 & 7 W. 4, c. 111, or on a charge of being a habitual drunkard under 61 & 62 Vict. c. 60, s. 1, sub-s. 2 : *R.* v. *Key*, 2 Den. 347; 21 L. J. (M. C.) 35, or a habitual criminal within 8 Edw. 7, c. 59. By the *Larceny Act*, 1861 (24 & 25 Vict. c. 96), s. 116, which now regulates most of such cases, *see ante*, p. 172, and the *Inebriates Act*, 1898 (61 & 62 Vict. c. 60), and the *Prevention of Crime Act*, 1908 (8 Edw. 7, c. 59, s. 10 (4)), where the prisoner is given in charge to the jury on an allegation of a previous conviction, or of being a habitual drunkard or habitual criminal, it is not necessary to swear the jury again (and therefore no challenge can be taken). *See R.* v. *Turner* [1910] 1 K. B. 346, 357; 79 L. J. (K. B.) 176. The same rule appears to apply to the *Coinage Offences Act*, 1861 (24 & 25 Vict. c. 99), s. 37, which contains a like provision.

The court, even without challenge taken, may and ought to excuse a juror on the panel when called, if he is obviously unfit to perform his duty, from physical or mental infirmity, or *semble*, from expressed unindifferency. *Mansell* v. *R.*, 8 St. Tr. (N. S.) 831; 8 E. & B. 54; Dears. & B. 375; 27 L. J. (M. C.) 4.

Oath of jurors.]—In cases of felony every juror, as he or she comes to the book to be sworn, unless challenged, shall take the oath (or make solemn affirmation) in the following form :—"*I swear by Almighty God* [or *I do solemnly, sincerely and truly declare and affirm*] *that I will well and truly try and true deliverance make between our sovereign lord the King and the prisoners at the bar whom I shall have in charge, and a true verdict give according to the evidence.*"

In cases of misdemeanour only, the oath (or affirmation) is as follows :—"*I swear by Almighty God* [or *I do solemnly, sincerely and truly declare and affirm*] *that I will well and truly try the several issues joined between our sovereign lord the King and the prisoners at the bar, and a true verdict give according to the evidence.*"

Giving the prisoner in charge to the jury.]—When a full jury have been sworn [or have made solemn affirmation in cases where they are entitled to do so, under 51 & 52 Vict. c. 46, s. 2, or any other Act, *see post*, *Evidence*, p. 479]; in cases of treason and felony, the crier (at the assizes) makes proclamation in

the following form :—"*If any one can inform my lords the King's justices, or the King's attorney-general, or the King's serjeant, or this inquest to be taken between our sovereign lord the King and the prisoners at the bar, of any treason, murder, felony, or misdemeanor, committed or done by them, or any of them, let him come forth, and he shall be heard; for the prisoners stand at the bar upon their deliverance.*" Cro. Cir. Com. 6 (10th ed.). The clerk of the court then calls the prisoner to the bar and says :—"*Members of the jury, the prisoner stands indicted for that he, on the*" [stating the substance of the offences charged in the indictment]. "*To this indictment he has pleaded not guilty and it is your charge to say, having heard the evidence, whether he be guilty or not.*" As to the mode of giving the prisoner in charge to the jury where he is indicted for any offence committed after a previous conviction, *see ante*, p. 172; or as a habitual criminal, *post, tit. Habitual Criminal*; or for an offence again the *Coinage Offences Act*, 1861 (24 & 25 Vict. c. 99), committed after a previous conviction for an offence against any Act relating to the coin, *see* s. 37 of that Act : and where he is indicted for a crime as defined by 34 & 35 Vict. c. 112, after previous conviction for a crime, *see* s. 9 of that Act (*ante*, p. 172).

SECT. 3.

PROCEEDINGS AT TRIAL.

Publicity of trial.]—At common law a trial on indictment or criminal information must be held in a public court with open doors. In dealing with certain classes of criminal trials the presiding judges not infrequently order women and young persons to leave the court, and there is undoubted power to exclude or eject persons who disturb the proceedings. All proceedings under the *Punishment of Incest Act*, 1908, must be held *in camerâ* (8 Edw. 7, c. 45, s. 5); and by s. 114 of the *Children Act*, 1908 (8 Edw. 7, c. 67), in addition to, and without prejudice to, any powers which a court may possess to hear proceedings *in camera*, the court may, where a person who in the opinion of the court is under sixteen is called as a witness in any proceedings in relation to an offence against, or any conduct contrary to decency or morality, direct the exclusion from the court of all persons other than members or officers of the court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case and other than *bonâ fide* representatives of a newspaper or press agency; and by s. 115 children under fourteen other than infants in arms are prohibited from being present in court during the trial of other persons except for so long as their presence is required as witnesses or otherwise for the purposes of justice.

Official shorthand note.]—By s. 16 of the *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23), shorthand notes are to be taken of the proceedings at the trial of any person on indictment, coroner's inquisition, or criminal information,

who if convicted is entitled or may be authorised to appeal under that Act. This provision is directory, and absence of a shorthand writer does not invalidate the proceedings. *R.* v. *Rutter*, 73 J. P. 12; 25 T. L. R. 73: *R.* v. *Elliott*, 25 T. L. R. 572; 2 Crim. App. R. 171. The provision does not extend to the trial of peers for treason or felony (s. 20 (2)), nor to the trial of indictments at common law in relation to the non-repair or obstruction of a highway, public bridge, or navigable river (s. 20 (3)).

Trial of foreigner.]—Where a foreigner, who is ignorant of the English language, is being tried and is not defended by counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. If he is defended by counsel, the evidence must be translated to him unless he or his counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him. *R.* v. *Lee Kun* [1916] 1 K. B. 337; 85 L. J. (K. B.) 515; 114 L. T. 421; 25 Cox, C. C. 304; 80 J. P. 166; 32 T. L. R. 225; 11 Cr. App. R. 293.

Separate trials.]—When persons jointly indicted plead not guilty the court has power to order them to be separately tried where the interests of justice seem to require that course to be taken. *See* Kel. (J.) 8, 9 (*treason*); *R.* v. *Ahearne*, 2 Ir. C. L. Rep. 381; 6 Cox, 7 (*conspiracy*): *R* v. *Bradlaugh*, 15 Cox, 217. Separate trials are sometimes ordered where evidence admissible against one of the accused would not be admissible against the others, or where the separate trial would enable the accused to call for the defence persons jointly indicted with him, or where it is desired to call an accomplice on behalf of the crown, or where persons jointly indicted for felony refuse to join in their challenges (*a*) (*ante*, p. 191). Prisoners jointly charged with a crime, and also charged severally with being habitual criminals, should be tried separately on the habitual criminal charge. *R.* v. *Taylor*, 5 Cr. App. R. 168, explaining *R.* v. *Blake*, 4 Cr. App. R. 275.

Case for the prosecution.]—In a criminal prosecution on indictment the prosecutor has no right to address the jury or state the case for the prosecution. *R.* v. *Brice*, 2 B. & Ald. 606; 1 Chit. Rep. (K. B.) 352; *R.* v. *Gurney*, 11 Cox, 414. He must be represented by counsel, or by a solicitor in those courts of quarter sessions at which solicitors have a right of audience. It is usual for counsel to make an opening statement: *see Re Morgan*, 6 Cox, 116, Talfourd, J. When the prisoner is given in charge to the jury, the counsel for the prosecution, or, if there is more than one, the senior counsel, opens the case to the jury, stating the leading facts upon which the prosecution rely. In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there is any discrepancy between the opening statements of counsel, and the evidence afterwards

(*a*) *See R.* v. *Millewski* [1908] Queensland State Rep. 27.

adduced in support of them; *per* Parke, B., *R.* v. *Edward*, 1 M. & Rob. 257: *R* v. *Hartel*, 7 C. & P. 773: *R.* v. *Davis*, *Id.* 785; unless such declarations should amount to a *confession*, when it would be improper for counsel to open them to the jury. *R.* v. *Swatkins*, 4 C. & P. 548, Bosanquet, J., and Patteson, J.: *R.* v. *Davis*, 7 C. & P. 785, Parke, B.: *R.* v. *Orrell*, *Id.* 774, Bolland, B.: *R.* v. *Creau*, 8 Cox, 509 (Ir.). The reason for this rule is, that the circumstances under which the confession was made may render it inadmissible in evidence. The *general effect* only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecuting counsel. When any additional evidence, not mentioned in the opening speech of counsel, is discovered in the course of a trial, counsel is not allowed to state it in a second address to the jury: *R.* v. *Courvoisier*, 9 C. & P. 362. In opening a case for murder, the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the crown, and say that should any such attack be made he shall be prepared to meet it. *Per* Tindal, C.J., and Parke, B., *R.* v. *Courvoisier*, 9 C. & P. 362. It was also ruled by the same learned judges that counsel may read to the jury the observations of a judge in a former case, as to the nature and effect of circumstantial evidence, provided that he adopts them as his own opinions, and makes them part of his address to the jury. And in *R.* v. *Dowling*, 7 St. Tr. (N. S.) 381, 390; 3 Cox, 509, the attorney-general having, in his opening address to the jury, made reference to disturbances in Ireland, Erle, J., held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in courts of justice to notorious matters, even of contemporaneous history. And *see R.* v. *Duffy*, 7 St. Tr. (N. S.) 795, 917.

After counsel's opening statement, witnesses are called for the prosecution, who make oath (or affirmation) as follows:—"*I swear by Almighty God* [or *I do solemnly, sincerely and truly declare and affirm*] *that the evidence I shall give to the court and jury sworn between our sovereign lord the King and the prisoners at the bar shall be the truth, the whole truth, and nothing but the truth.*"

As to the order of proof, the mode of examining witnesses, and the evidence necessary to support the case for the prosecution, *see post*, *Evidence*, p. 349.

Summing up the evidence on behalf of the prosecution.]—Since 1865 the counsel for the prosecution has been entitled, in certain cases, at the close of the examination of his witnesses, to sum up his evidence. This right was first given, and the circumstances under which it may be exercised are defined, by s. 2 of *Denman's Act* (28 & 29 Vict. c. 18), the first clause of which enacts that:—"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of

summing up the evidence against such prisoner or prisoners, or defendant or defendants." The right of the prosecution to sum up the evidence is not taken away, nor is any right to reply given by the calling of the prisoner as sole witness on his own behalf under the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36, s. 3). The effect of that Act is to postpone the summing up by the prosecution until after the prisoner's evidence has been given : *R.* v. *Sherriff*, 20 Cox, 334. In that summing up counsel for the prosecution may comment on the prisoner's evidence : *R.* v. *Gardner* [1899] 1 Q. B. 150; 68 L. J. (Q. B.) 42 (C. C. R.).

In exercising this right of summing up evidence, it is not lawful for counsel for the prosecution to comment on the failure of the prisoner, or of the husband or wife of the prisoner, to give evidence; 61 & 62 Vict. c. 36, s. 1 (b) (*post*, p. 206), *and see R.* v. *Dickman*, 74 J. P. 449; 26 T. L. R. 640; 5 Cr. App. R. 135; nor is it proper to comment on the absence of other witnesses for the defence, unless it might be fairly expected that witnesses would be called; or to urge, on a trial for rape, as an argument for conviction, that otherwise the character of the prosecutrix would be blasted. *R.* v. *Rudland*, 4 F. & F. 495 : *R.* v. *Puddick*, *Id.* 497. Prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates. *Ib.*, *per* Compton, J., at p. 499, approved in *R.* v. *Banks* [1916] 2 K. B. 621; 12 Cr. App. R. 74. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses, or only calls the defendant. His right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. *R.* v. *Holchester*, 10 Cox, 226, Blackburn, J. : *R.* v. *Berens*, 4 F. & F. 842, 843, and n. *See also R.* v. *Webb*, *Id.* 862.

The Defence.]—As to the right to be defended by counsel and to the provision of legal aid for poor prisoners, *see ante*, pp. 174 *et seq.* When a prisoner is not defended by counsel the judge should inform him of his right to cross-examine witnesses, to address the jury, and to give evidence on his own behalf or to make an unsworn statement, but omission to give this information does not invalidate the conviction. *See R.* v. *Saunders*, 63 J. P. 24; 68 L. J. (Q. B.) 296 : *R.* v. *Warren*, 73 J. P. 359; 25 T. L. R. 633. The following form is suggested for giving the prisoner this information :—" You have heard the evidence against you. Now is the time for you to make your defence. You may go into the witness box, and give evidence on oath, and be cross-examined like any other witness, or you may make a statement to the jury from where you stand." Where a prisoner is undefended, he cross-examines the witnesses for the prosecution if he thinks fit, or the judge does so on his behalf. On a trial for misdemeanor in the Court of King's Bench in 1824, where the defendant reserved to himself the right to address the jury, and to examine and cross-examine witnesses, he was allowed to do so, and his counsel was allowed to argue any points of law that arose in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses; *R.* v. *Parkins*, Ry. & M. 166; 1 C. & P. 548. But the defendant cannot have counsel to

examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. *R.* v. *White*, 3 Camp. 98; and *see R.* v. *Redhead Yorke*, 25 St. Tr. 1003, 1021. Where the accused is defended by counsel, who intends to call witnesses in support of the defence, counsel has the right to open his case to the jury before calling his evidence. *R.* v. *Hill*, 7 Cr. App. R. 1. As to the order in which witnesses must be called, *see post*, p. 46. As to counsel's discretion in conducting the defence, *see R.* v. *Denoel*, 114 L. T. 1215; 32 T. L. R. 473; 12 Cr. App. R. 49.

Where two prisoners are jointly indicted, and are defended by different counsel, there has been some difference of opinion as to the order in which counsel should cross-examine and address the jury. In *R.* v. *Esdaile*, 1 F. & F. 213, 237, Lord Campbell directed counsel to cross-examine and address the jury in the order of seniority at the bar. But the general, and it is submitted the established rule, is that in the absence of agreement between counsel the court will call on them to cross-examine and address the jury in the order in which the names stand on the indictment; *R.* v. *Barber*, 1 C. & K. 434: *R.* v. *Meadows* [1856] 2 Jur. (N. S.) 716, and n., Erle, J.: and *see Fletcher (P. O.)* v. *Crosbie*, 2 M. & Rob. 417, Rolfe, B.: *R.* v. *Richards*, 1 Cox, 62.

Statement to jury by defendant when defended by counsel.]—The *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36), which enables every person charged with an offence to be a witness for the defence at every stage of the proceedings, provides (s. 1 (h)) that "Nothing in this Act shall affect . . . any right of the person charged to make a statement without being sworn." This provision entitles the prisoner if he chooses to make an unsworn statement instead of giving evidence on his own behalf. *R.* v. *Pope*, 18 T. L. R. 717. It was at one time held that the effect of s. 1 of the *Trials for Felony Act*, 1836 (6 & 7 W. 4, c. 114), which first enabled counsel appearing on behalf of persons charged with felony to address the jury on their behalf, was to take away from the prisoner, except under some very special circumstances, any right to make any statement on his own account: *R.* v. *Rider*, 8 C. & P. 539: *R.* v. *Malings*, *Id.* 242: *R.* v. *Manzano*, 2 F. & F. 64: *R.* v. *Stephens*, 11 Cox, 669. But for many years prior to the coming into operation of the *Criminal Evidence Act*, 1898, it was the practice of the judges to allow a prisoner defended by counsel to address the jury as well as his counsel. There was, however, considerable divergence of opinion as to whether the prisoner should address the jury before or after his counsel. Where the prisoners, who were indicted for robbery with violence, were defended by counsel, but called no witnesses, Hawkins, J., after consultation with Lush, J., allowed the prisoners to give their own account of the matter to the jury, *after* their counsel had addressed the jury: *R.* v. *Hull and Smith*, Yorkshire Winter Assizes at Leeds, 3rd Feb., 1880. Where a prisoner, who was indicted for murder, was defended by counsel, but called no witnesses, Bowen, J., allowed the prisoner to read a statement of his account of the matter to the jury, *before* his counsel addressed them: *R.* v. *Blades*, Yorkshire Summer Assizes at Leeds, 2nd Aug., 1880. Under similar circumstances, Stephen, J., allowed a prisoner to make a statement to the jury *before* his counsel addressed them, at the same time warning the prisoner that his

making such statement would give the counsel for the prosecution a right to reply : *R.* v. *Doherty*, 16 Cox, 306. This ruling was followed by Phillimore, J., in *R.* v. *Pope*, 18 T. L. R. 717, so far as relates to the making of the statement by the prisoner before his counsel's address. In *R.* v. *Millhouse*, 15 Cox, 622, Lord Coleridge, C.J., stated that by the resolution of the majority of the judges, in which he did not agree, but by which he was bound, it was undoubtedly competent for a prisoner defended by counsel to make a statement of facts to the jury, and that the proper time for his doing so was *after* his counsel had addressed the jury. His Lordship, however, held that the resolution did not extend to cases where it was proposed to call witnesses for the prisoner. *See* the cases collected in Warburton's Leading Cases in the Criminal Law (5th ed.), 521 *et seq.*, and 2 Russ. Cr. (7th ed.) 1998 *et seq.* In *R.* v. *Shimmin*, 15 Cox, 122, Cave, J., stated that the rule which the judges intended to follow was that a prisoner defended by counsel should make his statement at the conclusion of his counsel's speech, with this proviso, that what he stated from the dock should be subject to the right of reply on the part of the prosecution as being in the nature of new matter laid before the jury. And *see R.* v. *Everett*, 97 C. C. C. Sess. Pap. 335, Hawkins, J. : *R.* v. *Doherty*, *supra.* In *R.* v. *Sherriff*, 20 Cox, 334, Darling, J., held that a prisoner's unsworn statement must be made before the counsel for the prosecution sums up the case and before his own counsel addresses the court.

Address of prisoner's counsel.]—"In the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury as alleged existing facts matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." Resolution of the Judges, 26th Nov., 1881 : *R.* v. *Shimmin*, 15 Cox, 122. This resolution settled the practice as to a matter upon which there had previously been a conflict of authority. *See R.* v. *Butcher*, 2 M. & Rob. 228; *R.* v. *Beard*, 8 C. & P. 142 : *R.* v. *Weston*, 14 Cox, 346.

Where two prisoners are indicted together, and one of them only is defended by counsel, it seems to be in the discretion of the judge whether he will allow the prisoner who is undefended to make his statement to the jury before or after the address of counsel. Where A., B., and C. were jointly indicted, and separately defended, and at the close of the case for the prosecution C. was acquitted, and was then called as a witness for A., and his evidence tended to criminate B., it was held that B.'s counsel had a right to cross-examine C., and to reply. *R.* v. *Burdett.* Dears. 431; 24 L. J. (M. C.) 63; 6 Cox, 458 : *R.* v. *Woods*, 6 Cox, 224 : *R.* v. *Copley*, 4 F. & F. 1097. The same rule applies where one defendant is called as a witness and inculpates a co-defendant. *R.* v. *Hadwen and Ingham* [1902] 1 K. B. 882; 71 L. J. (K. B.) 581; 18 Cox, 206.

The counsel for the prisoner, or the prisoner himself, is entitled, at the close of the examination of his witnesses, to sum up his evidence. This right was first given by *Denman's Act* (28 & 29 Vict. c. 18), s. 2, in the following terms :—"Upon every trial for felony, or misdemeanor, whether the prisoners or

defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." In summing up the evidence for the defence, the prisoner's counsel is not to be restricted merely to remarks on the evidence of his witnesses, but if anything occurs to him as desirable to say on the whole case, he is at liberty to say it. *R.* v. *Wainwright*, 13 Cox, 171, Cockburn, C.J.

The reply.]—If any witness *other than the defendant* is called for the defence or any document is put in evidence for the defence, the counsel for the prosecution has the right to reply. 28 & 29 Vict. c. 18, s. 2, *supra*; 61 & 62 Vict. c. 36 (*Criminal Evidence Act*, 1898), s. 3: *see R.* v. *Gardner* [1899] 1 Q. B. 150: 68 L. J. (Q. B.) 42. Where two or more are jointly indicted and one called as a witness in his own behalf gives evidence hostile to another defendant, and is cross-examined on behalf of that defendant, the prosecution does not thereby obtain a right of reply against the latter defendant. *R.* v. *Haddwen* [1902] 1 K. B. 882; 71 L. J. (K. B.) 581. Even if the evidence for the defendant is only as to his character, it gives, in strictness, a right of reply, although the right is never now exercised in such case. *R.* v. *Stannard*, 7 C. & P. 673; 6 L. J. (M. C.) 37: *R.* v. *Corfell*, 1 Cox, 123, Alderson, B. But *see R.* v. *Dowse*, 4 F. & F. 492. And even if the defendant's counsel, in addressing the jury, introduces new matter (whether it be the prisoner's own account of the transaction or not), without intending to support it by evidence, it has been said that the prosecutor will be entitled to a reply. *R.* v. *Butcher*, 2 M. & Rob. 228. The better opinion, however, is that a reply in such case is not as of right, but may be allowed by the judge in his discretion. Taylor, Evid. (11th ed.), s. 887, D., and authorities there cited. The decision to the contrary in *R.* v. *Shimmin*, 15 Cox, 122 (*ante*, p. 204), will probably not now be followed since the passing of the *Criminal Evidence Act*, 1898, as the course adopted in *R.* v. *Sherriff*, 20 Cox, 334 (*ante*, pp. 195, 197), gives the prosecutor adequate opportunity for dealing with any new matter introduced by a prisoner in an unsworn statement. If two prisoners are indicted jointly for the same offence, and one calls witnesses, it seems that the counsel for the prosecution is entitled to a general reply; but if the offences are separate, and they might have been separately indicted, he can reply only on the case of the party who has called witnesses: *R.* v. *Hayes*, 2 M. & Rob. 155: *R.* v. *Jordan*, 9 C. & P. 118. Where four prisoners were jointly indicted for an assault with intent to do grievous bodily harm, and one of them was not defended by counsel and the other three were defended by counsel, and the prisoner who was not defended by counsel called witnesses to prove an alibi, but no witnesses were called on behalf of the other three prisoners, it was held that counsel for the prosecution had no general right of reply, but that the proper course was that he should

sum up his evidence generally and reply upon the evidence called by the prisoner who was not defended by counsel, before the counsel for the other prisoners addressed the jury: *R.* v. *Kain*, 15 Cox, 388, Stephen, J. So where several prisoners were jointly indicted, and defended by several counsel, and witnesses were called for some of the prisoners but not for the others, it was held that the counsel for the prosecution should first reply to the counsel of those prisoners who called no witnesses, but that the counsel for the prisoners who called no witnesses had the right to address the jury last. *R.* v. *Burns*, 16 Cox, 195, Day and Wills, JJ.; and *see* Warburton, Leading Cases on Cr. Law (5th ed.), 518 *et seq.* Where on an indictment against several defendants, one of them calls evidence which is applicable to the cases of all, the prosecution has a general right of reply, although the other defendants call no witnesses: *R.* v. *Hayes*, 2 M. & Rob. 155: *R.* v. *Davis*, 17 T. L. R. 164, Lawrance, J.; but where such evidence is applicable only to the case of the defendant calling it, and does not apply to the cases of the other defendants, the right of the prosecution to reply is confined to the case of the defendant calling the evidence. *R.* v. *Trevelli*, 15 Cox, 289, Hawkins, J. Where the prosecution has the right of reply, no comment may be made by the prosecution on the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence. 61 & 62 Vict. c. 36, s. 1 (*b*); and see *ante*, p. 202. By leave of the court fresh evidence may be called by the defence during the final speech for the prosecution where there are special circumstances. *R.* v. *Morrison*, 75 J. P. 272; 22 Cox, 214.

Rebutting evidence.]—Whenever evidence has been given by the defence introducing new matter which the crown could not foresee, counsel for the prosecution may be allowed to give evidence in reply to contradict it. The matter is one within the discretion of the judge at the trial. *R.* v. *Crippen* [1911] 1 K. B. 149, at p. 156; 80 L. J. (K. B.) 290; 22 Cox, 289; 103 L. T. 705; 75 J. P. 141; 27 T. L. R. 69; 5 Cr. App. R. 255, commenting on *R.* v. *Frost*, 4 St. Tr. (N. S.) 85, 386; 9 C. & P. 159; and *see* 2 Russ. Cr. (7th ed.) 2327; *R.* v. *Whelan*, 8 L. R. (Ir.) 314; 14 Cox, 595 (Ir.): *R.* v. *Coyle*, 7 Cox, 74, Erle, J.; *R.* v. *McGavaran*, 6 Cox, 64. In *R.* v. *Haynes*, 1 F. & F. 666, the court refused to allow a new witness to be called for the crown after the close of the case. This discretion is not confined to cases where evidence has been given by the defence on matters which the crown could not foresee. *R.* v. *Crippen*, *supra*. Where evidence in rebuttal is given, counsel for the defence is entitled to comment on the evidence so called. *R.* v. *Frost*, *supra*. Evidence may also be called to meet evidence of good character given for the defence. *R.* v. *Rowton*, L. & C. 520; 34 L. J. (M. C.) 57; 10 Cox, 25: *R.* v. *Hughes*, 1 Cox, 44, Rolfe, B.; *contra*, *R.* v. *Burt*, 5 Cox, 284, Martin, B. Where the defendant is called this class of evidence may be rendered unnecessary by the result of his cross-examination under 61 & 62 Vict. c. 36, s. 1 (f), *post*, p. 458. Where, after the examination of witnesses as to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, the prisoner's counsel was invited to cross-examine him

again. *R.* v. *Watson*, 6 C. & P. 653. In a proper case evidence may be called to rebut an alibi. *See R.* v. *Froggatt*, 4 Cr. App. R. 115.

Right of reply by law officers of the crown.]—"In those crown cases in which the attorney or solicitor-general is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the crown, and in no others." Resolution of the Judges of Dec., 1884; 5 St. Tr. (N. S.) 3, n. (*c*). (*a*). This disposes of doubts formerly existing as to the right of reply in such cases by counsel other than the law officers appearing for a government office. *See* 2 St. Tr. (N. S.) 1019.

View of locus in quo by the jury.]—It is competent for the judge, even without the consent of the prosecutor, to permit the jury to view the *locus in quo* at any time during the trial, if it is within the county of trial (*R.* v. *Whalley*, 2 C. & K. 376; 2 Cox, 231), and even after his summing up, but he should take precautions not to allow improper communications being made to them at the view. *R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M. C.) 113. A view may be permitted on an indictment for perjury. *Anon.*, 2 Chit. Rep. (K. B.) 422. Where it is alleged that the jury upon the view have received evidence in the absence of the judge and of the prisoner, it is for the court before which the trial takes place to investigate the facts, and ascertain whether the alleged irregularity has occurred. *R.* v. *Martin*, *supra*. *Quære*, whether if such irregularity is found to have occurred, the Court of Criminal Appeal, as successor to the Court for Crown Cases Reserved, has jurisdiction to order a *venire de novo*, as for a mis-trial. *Id.*

Adjournment of trial.]—If the trial is not concluded on the same day on which it began, the judge has authority to adjourn it from day to day without the defendant's consent. *R.* v. *Castro*, L. R. 9 Q. B. 350, 356; 43 L. J. (Q. B.) 105, 108: *R.* v. *Stone*, 25 St. Tr. 1155; 6 T. R. 530: *R.* v. *Hardy*, 24 St. Tr. 199, 418. The adjournments should be stated in the record if it is made up. *O'Brien* v. *R.*, 26 L. R. Ir. 451. But for the purposes of a record at assizes they are treated as one day. *Whitaker* v. *Wisbey*, 6 Cox, 109, 114; 21 L. J. (N. S.) C. P. 116, Maule, J.

On the adjournment of a trial for treason, treason felony, or murder, the jury must be kept together during the night, under the charge of officers of the court (60 & 61 Vict. c. 18, s. 1), and they may have a fire and reasonable refreshment at their own expense (33 & 34 Vict. c. 77, s. 23). If during the trial a juryman

(*a*) Prior to this resolution the solicitor-general appearing for the attorney-general in post-office prosecutions had been allowed his right of reply. *R.* v. *Toakley*, 10 Cox, 406: *R.* v. *Barrow*, *id.* 407. In *R.* v. *Gardner*, 1 C. & K. 628, the right had been admitted where counsel prosecuting on behalf of a government office stated that he appeared as the representative of the attorney-general. But in *R.* v. *Christie*, 7 Cox, 506; 1 F. & F. 75, Martin, B., refused the right to the attorney-general of the Duchy of Lancaster, and stated that he should confine the right to the attorney-general in person. All these decisions seem to be superseded by the rule above enunciated, which is not affected by the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36): *see* s. 3, and 2 Russ. Cr. (7th ed.) 2001.

suddenly becomes so ill as to necessitate his leaving the jury box temporarily the trial may be adjourned for a while, a bailiff being sworn to take charge of the absent juryman if there is time to administer the oath, and the utmost care being taken that not the slightest opportunity is afforded of tampering with the juryman. During his absence he may receive such medical assistance as is necessary. The rule prohibiting the separation of jurymen does not mean that under no circumstances must there be any actual physical separation. *R.* v. *Crippen* [1911] 1 K. B. 149; 80 L. J. (K. B.) 290; 22 Cox, 289; 5 Cr. App. R. 255. *See also R.* v. *O'Neill*, 3 Cr. & Dix (Ir.) 146.

In the case of misdemeanors the judge may by the common law allow the jury to separate during any adjournment of the court, and to return to their homes for the night, being charged not to converse with any person on the subject of the trial. In the case of all felonies (except treason felony and murder) by the *Juries Detention Act*, 1897 (60 & 61 Vict. c. 18, s. 1), the court may, if it sees fit, *at any time before the jury consider their verdict*, permit the jurors to separate in the same way as the jury upon the trial of any person for misdemeanor are at common law permitted to separate. If the jurors separate without leave, the jury must be discharged and a new trial had. *R.* v. *Ward*, 10 Cox, 573; 16 W. R. 281; *R.* v. *Kinnear*, 2 B. & Ald. 462.

Where the witnesses for the prosecution have all been examined, the court may order the case to be adjourned, and direct another trial to be proceeded with, in order to give time for the production of a thing essential to the proof, but deposited at a distance. *R.* v. *Wenborn*, 6 Jur. 267. And on a trial for murder, where, after the opening address of counsel, it was discovered that, in consequence of the detention of a railway train, the witnesses for the prosecution had not arrived in the city, the trial was adjourned, the jury were locked up, a fresh jury was called into the jury box, and another case was proceeded with. *R.* v. *Foster*, 3 C. & K. 201, Maule, J.; but *see R.* v. *Parr*, 2 F. & F. 861, Wightman, J. It has been held that adjournments except to the next day are not permitted after the jury is sworn or evidence called. *R.* v. *Tempest*, 1 F. & F. 381, Watson, B.: *R.* v. *Robson*, 4 F. & F. 360, Willes, J. But in *R.* v. *Fernandez*, 2 F. & F. 862 n., Cockburn, C.J., said that the trial could be temporarily suspended for part of a day, the jury remaining in the box. And it has been held that the judge may, in a proper case, adjourn the trial after the close of the case for the defence. *R.* v. *Jackson*, 83 J. P. 196; 14 Cr. App. R. 41. Where a juror was sworn in a wrong name, and the objection was taken before verdict, Maule, J., intimated that the proper course was to *discharge* the jury, and try the prisoners again; although, there being in that case a second indictment against the prisoners, such a course was there not necessary. *R.* v. *Metcalf*, 3 Cox, 220. The same course was adopted when it was discovered during the trial that a juror not on the panel had been sworn. *R.* v. *Phillips*, 11 Cox, 142. But it has been held that a trial must proceed, although in the course of the proceedings it is discovered that one of the jurors is related to the prisoner on trial, as that fact was a ground of challenge. *R.* v. *Wardle*, C. & Mar. 647. But under 7 G. 4, c. 64, s. 21, a judgment after verdict cannot be stayed or reversed because a person has served on the jury who has not been returned as a juror, nor for a misnomer or misdescription of any juror. *R.* v. *Tremearne*,

5 B. & C. 254; 4 L. J. (K. B.) 157, appears to be overruled by this enactment. The usual course is to swear a fresh juror in place of the one incapacitated, but to offer the prisoner in a case of felony his full right of challenge to the whole panel. *R.* v. *Edwards*, R. & R. 224; 3 Camp. 207. The trial must begin *de novo*, and the witnesses must be resworn and examined afresh; and it is not sufficient to reswear the witnesses and read over to them the judge's note of their evidence. *R.* v. *Bertrand*, L. R. 1 P. C. 520, 534; 36 L. J. P. C. 51, which disapproves the contrary practice followed in *R.* v. *Beere*, 2 M. & Rob. 242, and *R.* v. *Foster*, 7 C. & P. 495. But in *R.* v. *Monson*, 67 J. P. 267; 47 Sol. J. 529, 574; 38 L. J. Newsp. 261: and *R.* v. *Lawrence*, 25 T. L. R. 374, those cases were followed, *R.* v. *Bertrand* not being cited.

Where a prisoner indicted for felony and given in charge of the jury was by sudden illness rendered incapable of remaining at the bar, the jury were discharged and the prisoner on recovering was tried before another jury: *R.* v. *Stevenson*, 2 Leach, 546.

In a case of misdemeanor, where the defendant became ill and was carried out of court, the judge discharged the jury, being of opinion that the case should not proceed in the absence of the defendant, even with the consent of his counsel. *R.* v. *Streek*, 2 C. & P. 413: *contrà*, *R.* v. *Castro*, *ante*, p. 207. That case was, however, tried in the Court of Queen's Bench. If a prisoner so taken ill recovers during the assizes, he may be put on his trial again, the trial being, of course, begun *de novo*. *R.* v. *Streek*, *supra*.

[As to separation of the jury after retirement from the box to consider their verdict and as to their discharge when they cannot agree as to their verdict, or in case of misconduct or other reason, *see post*, pp. 218, 221.]

Agreement to withdraw from or to stifle prosecution.]—*See post*, *tit. Compounding Offences.*

Summing up.]—The court, in summing up the case after the conclusion of the evidence and arguments, usually directs the jury as to the law applicable, and may go through and comment on the evidence given, and may even comment on the absence of evidence which might have been given, including the failure of the defendant to exercise his right to give evidence under 61 & 62 Vict. c. 36, if in the discretion of the court such comment appears to be fair and just. *See R.* v. *Rhodes* [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83; *Kops* v. *R.* [1894] A. C. 650; 64 L. J. P. C. 34. The existence of this power to direct the jury is recognised in *Fox's Libel Act*, 32 G. 3, c. 60, s. 2. But a summing up is not so essential a part of a trial where the facts are clear and the law simple that the Court of Criminal Appeal will necessarily quash a conviction where there has been no summing up. *R.* v. *Newman*, 9 Cr. App. R. 134; though it may do so where the trial was such that the jury ought to have had the assistance of the presiding judge in directing them and he has failed to do so. *R.* v. *Finch*, 85 L. J. (K. B.) 1575; 25 Cox C. C. 537; 12 Cr. App. R. 77. The facts must be left to the jury to decide, and the judge must not usurp their function. *R.* v. *West*, 4 Cr. App. R. 179: *R.* v. *Beeby*, 6 Cr. App. R. 138: *R.* v. *Frampton*, 12 Cr. App. R. 202. But he is entitled

to express his opinion strongly in a proper case provided he leaves the issues to the jury. *R.* v. *O'Donnell*, 12 Cr. App. R. 219. As to appeal generally, *see* further, *post*, p. 300.

SECT. 4.

VERDICT.

Verdict.]—After the conclusion of the trial the jury are not allowed to separate until they have considered and returned their verdict, or have been discharged for failure to agree. *See post*, p. 221. On a trial for treason or felony the jurors must deliver their verdict in open court, in the presence of the defendant. In *R.* v. *Haynes* [1900] 64 J. P. 441, Ridley, J., allowed a verdict of not guilty to be found on a coroner's inquisition for manslaughter on proof that the accused was certified insane and detained in an asylum; but the case was exceptional, and affords no precedent. In cases of misdemeanor, the presence of the defendant is not essential during the trial or at the return of the verdict. Co. Litt. 227 b; 3 Co. Inst. 110; Bac. Abr., Verdict (B.). It is doubtful whether a verdict can be received and recorded on Sunday. *Winsor* v. *R.*, L. R. 1 Q. B. 289, 317, 322; 35 L. J. (M. C.) 121. The verdict is delivered by the foreman; and the assent of all the jurors to a verdict pronounced by the foreman in the presence and hearing of the rest, without their express dissent, is to be conclusively presumed. *R.* v. *Wooller*, 2 Stark. (N. P.) 111. The verdict in a criminal case is either (1) *general*, on the whole charge (which the jury are at liberty to find in all cases, both upon the law and facts of the case; Co. Litt. 228; 4 Bl. Com. 361): or (2) *partial*, as to a part of the charge; as where the jury find the defendant guilty on one or more counts of the indictment, and acquit him of the residue; or find him guilty on one part of a divisible count, and acquit him as to the residue; or find him guilty of an offence other than the full offence charged; *vide infra:* or (3) *special*, where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court. As to special verdicts, *see post*, p. 216. Where several defendants are included in the same indictment, the jury may find one guilty and acquit the others, and *vice versâ*. But if several are indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment, and proved, that they committed the riot together with some other person not tried upon that indictment. 2 Hawk. c. 47, s. 8. And if, upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, unless it is charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment. 2 Hawk. c. 47, s. 8; 3 Chit. Cr. L. 1141: *R.* v. *Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183: *R.* v. *Manning*, 12 Q. B. D. 241; 53 L. J. (M. C.) 85: *R.* v. *Plummer* [1902] 2 K. B. 339; 71 L. J. (K. B.) 805; 20 Cox, 269. And where a count in an indictment charged eight defendants with one conspiracy to effect certain objects a finding that three of the defendants were

guilty generally, and that five of them were guilty of conspiracy to effect some, and not guilty as to the residue of these objects, was held bad and repugnant. *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1; 11 Cl. & F. 155; 8 Eng. Rep. 1061. The principle underlying that decision is that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count, and cannot be separated into parts. *R.* v. *Manning* (*supra*), *per* Coleridge, C.J.: *R.* v. *Plummer* (*supra*).

Verdict for lesser offence than charged in the indictment. 1. Common Law.]—At common law a defendant may not be convicted of an offence of an entirely different character from that charged in the indictment. For instance, he may not be convicted of misdemeanor on an indictment for felony, or of felony on an indictment for misdemeanor. For felony and misdemeanor are different things, and on an indictment for one there can be no conviction of the other, except under the express provisions of some statute. *R.* v. *Thomas*, L. R. 2 C. C. R. 141; 44 L. J. (M. C.) 42. Therefore where the prisoner was indicted under 24 & 25 Vict. c. 99, s. 12, for the *felony* of uttering counterfeit coin after a previous conviction for uttering, and the jury found him guilty of the subsequent uttering, but negatived the previous conviction, it was held that he could not be convicted of the *misdemeanor* of uttering. *Id.* So a prisoner indicted under 24 & 25 Vict. c. 96, s. 42 (now repealed and replaced by section 23 (3) of the *Larceny Act*, 1916 (6 & 7 Geo. 5. s. 50)), of the felony of an assault with intent to rob, cannot be convicted of a common assault. *R.* v. *Woodhall*, 12 Cox, 240. Stokes (1926) 28 Cox 140

This rule is subject to the statutory exceptions stated below at pp. 213—215. But at common law a defendant may be convicted of a less aggravated felony or misdemeanor on an indictment charging a felony or misdemeanor of greater aggravation, provided that the indictment contains words apt to include both offences. *See R.* v. *O'Brien*, 75 J. P. 192; 22 Cox, 374; 27 T. L. R. 204; 6 Cr. App. R. 108. In other words, it is not necessary to prove the offence charged in the indictment to the whole extent laid, provided that the facts proved constitute an offence punishable by law, of which the defendant may by law be convicted on the indictment. *R.* v. *Hollingberry*, 4 B. & C. 329; 3 L. J. (K. B.) 226: *R.* v. *Hunt*, 2 Camp. 583; 31 St. Tr. 367, 408. Thus, where a statute annexes a higher degree of punishment to a common law felony or misdemeanor, if committed under certain circumstances, and, upon an indictment under the statute, the prosecutor proves the felony or misdemeanor to have been committed, but fails in proving it to have been committed under the circumstances specified in the statute, the defendant may be convicted of the common law felony or misdemeanor. 2 Hale, 191, 192.

By s. 39 (1) of the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), where a prisoner is arraigned on an indictment for any offence, and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence.

Upon an indictment for murder, if the prosecutor fails in proving the *malice prepense*, the defendant may be convicted of manslaughter: *R.* v. *Mackalley*,

9 Co. Rep. 67 b. On a charge of burglary and stealing goods, if no burglary is proved; or of robbery, if the property is not taken from the person by violence or putting in fear, the prisoner may be convicted of the simple larceny. 2 Hale, 302. Indeed, upon an indictment for burglary and stealing, the prisoner may be convicted either of burglary, of entering a dwelling-house in the night with intent to commit felony therein, of housebreaking, of stealing in a dwelling-house to the amount of 5*l.* (if the property stolen be laid to be of that value in the indictment), or of simple larceny, according to the facts proved: *R.* v. *Compton*, 3 C. & P. 418: *R.* v. *Bullock*, 1 Mood. 324 n.: *R.* v. *Brookes*, C. & Mar. 543. So, upon an indictment for housebreaking and stealing, the prisoner may be convicted, as the proof may be, either of housebreaking, of stealing in a dwelling-house to the amount of 5*l.* (if the property be laid as of that amount), or of simple larceny. 2 Russ. Cr. (7th ed.) 1118. And upon an indictment for robbery the prisoner may be convicted either of the robbery, of stealing from the person, of simple larceny, or (under 6 & 7 Geo. 5, c. 50, s. 44 (1) of an assault with intent to rob, according to the facts proved. Upon an indictment for assaulting and unlawfully wounding and ill-treating the prosecutor, and thereby occasioning him actual bodily harm (24 & 25 Vict. c. 100, s. 47), the defendant may be convicted of a common assault. *R.* v. *Oliver*, Bell, 287; 30 L. J. (M. C.) 12: *R.* v. *Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70. So, also, the defendant might have been convicted of a common assault upon an indictment containing one count only, charging that the defendant in and upon a girl between the ages of ten and twelve, "unlawfully did make an assault, and her did then unlawfully and carnally know and abuse against the form," etc., being the ordinary form of an indictment for a misdemeanor under 24 & 25 Vict. c. 100, s. 51 (*rep.*): *R.* v. *Guthrie*, L. R. 1 C. C. R. 241; 39 L. J. (M. C.) 95. The defendant may also be convicted of a common assault upon an indictment charging him in the first count with unlawfully and maliciously wounding, and in the second count with unlawfully and maliciously inflicting grievous bodily harm, although the word "assault" is not used in the indictment. *R.* v. *Taylor*, L. R. 1 C. C. R. 194; 38 L. J. (M. C.) 106. On a count for indecent assault, and *semble* even on a count under 48 & 49 Vict. c. 69, s. 5 (1), the defendant may be convicted of common assault. *R.* v. *Bostock*, 17 Cox, 700, Charles, J. On an indictment for riot and assault the accused may be convicted of a common assault. *R.* v. *O'Brien*, 75 J. P. 192; 22 Cox, 374; 27 T. L. R. 204; 6 Cr. App. R. 108. Where an indictment contained a count for an assault upon a gamekeeper, framed on 9 G. 4, c. 69, s. 2, and a count for a common assault, and the prosecution at the trial elected to abandon the latter count, it was held that the defendant could not, after such abandonment, be convicted of a common assault upon the first count. *R.* v. *Day*, 11 Cox, 505 (C. C. R.).

On an indictment for publishing a defamatory libel, "knowing the same to be false," a misdemeanor the punishment of which is provided for by 6 & 7 Vict. c. 96, s. 4, the defendant may be convicted of merely publishing a defamatory libel, a misdemeanor the punishment of which is provided for by s. 5. *Boaler* v. *R.*, 21 Q. B. D. 284; 57 L. J. (M. C.) 85. Where the defendant was indicted for stealing a colt, it was held that he could not be convicted under

1 Edw. 6, c. 12, s. 10 (*rep.*), which did not mention colts, but might be convicted of the simple larceny. *R.* v. *Beaney*, R. & R. 416. Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *See R.* v. *Rhodes*, 2 Ld. Raym. 886.

Upon an indictment for high treason, proof of any one overt act is sufficient, provided the overt act so proved be a sufficient overt act of the treason laid in the indictment. 1 Hale, 122; Fost. 194; 2 Hawk. c. 46, s. 188. Upon an indictment for conspiring to prevent the workmen of J. G. from continuing to work, it was held sufficient to prove a conspiracy to prevent any of the workmen from working. *R.* v. *Bykerdike*, 1 M. & Rob. 179.

Upon an indictment charging two persons jointly with an offence, as stealing in a dwelling-house, either may be found guilty; but they cannot be found guilty of separate parts of the charge, or upon proof of two distinct felonies. In the former case, a pardon must be obtained, or a *nolle prosequi* entered, as to the one who stands second upon the indictment, before judgment can be given against the other: *R.* v. *Hempstead*, R. & R. 344. In the latter case, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. *R.* v. *Dovey*, 2 Den. 86; 20 L. J. (M. C.) 105. But where several are indicted for burglary and larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only. *R.* v. *Butterworth*, R. & R. 520; and *see ante*, p. 59.

2. Under statute. (a) Conviction of a felony not charged.]—By s. 39 (1) of the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), where a prisoner is arraigned on an indictment for an offence, and can lawfully be convicted on such indictment of some other offence not charged in such indictment, he may plead not guilty of the offence charged in the indictment, but guilty of such other offence. On an indictment for robbery the accused may be convicted of an assault with intent to rob; on an indictment for embezzlement he may be convicted of stealing; on an indictment for stealing he may be convicted of embezzlement or of fraudulent application or disposition; *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 44 (1) (2).

(b) Proof of felony on indictment for misdemeanor, or vice versâ.]—By 14 & 15 Vict. c. 100, s. 12, "if, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." *See R.* v. *Garland* [1910] 1 K. B. 154; 79 L. J. (K. B.) 239; 74 J. P. 135. By the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 44 (4), on the trial of an indictment for false pretences the defendant is not entitled to be acquitted because it is

proved that he stole the property. Conversely, by the same Act (s. 44 (3)), if on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit him of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly.

Upon an indictment for child murder the jury may find the defendant guilty of endeavouring to conceal the birth of the child. 24 & 25 Vict. c. 100, s. 60.

Upon an indictment for manslaughter of a person under sixteen by a person over sixteen who had custody, charge, or care of the deceased, the jury may acquit of manslaughter and convict of cruelty. 8 Edw. 7, c. 67, s. 12 (4), re-enacting 4 Edw. 7, c. 15, s. 1 (*rep.*). *See R.* v. *Dyson* [1908] 2 K. B. 454; 77 L. J. (K. B.) 813; 99 L. T. 201; 72 J. P. 303; 24 T. L. R. 653; 1 Cr. App. R. 13.

Upon an indictment charging the defendant with any felony (except murder or manslaughter) where the indictment alleges that the defendant cut, stabbed, or wounded any person, the jury may acquit of the felony charged, and find the defendant guilty of unlawfully wounding (14 & 15 Vict. c. 19, s. 5), and thereupon the defendant is liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawful wounding. This enactment does not apply to an indictment charging felonious shooting with intent to do grievous bodily harm. *R.* v. *Miller*, 14 Cox, 356, Bowen, J.; *see* 24 & 25 Vict. c. 100, ss. 11, 18, 20.

Upon an indictment for the felony of administering poison, etc., so as to endanger life or to inflict grievous bodily harm, the jury may find the defendant guilty of the misdemeanor of administering poison, etc., with intent to injure, aggrieve, or annoy. 24 & 25 Vict. c. 100, ss. 23, 24, 25.

On an indictment for felonious damage by rioters within s. 11 of the *Malicious Damage Act*, 1861 (24 & 25 Vict. c. 97), the accused may be convicted of a misdemeanor within s. 12 of that Act.

By 48 & 49 Vict. c. 69 (*Criminal Law Amendment Act*, 1885), s. 9, "If upon the trial of any indictment for rape, or any offence made felony by s. 4 of this Act, the jury shall be satisfied that the defendant is guilty of an offence under ss. 3, 4, or 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such an offence as aforesaid, or for the misdemeanor of indecent assault." This enactment overrides the decision in *R.* v. *Catherall*, 13 Cox, 109.

By the *Punishment of Incest Act*, 1908 (8 Edw. 7, c. 45), s. 4 (3), on an indictment for rape the jury may convict of incest or attempted incest, and on an indictment for incest or attempted incest the jury may convict of *the felony* created by 48 & 49 Vict. c. 69, s. 4, or the misdemeanors created by 48 &

49 Vict. c. 69, s. 5. By virtue of these provisions the accused may be convicted of indecent assault. *R.* v. *Simmonite* [1916] 2 K. B. 821; 25 Cox C. C. 544; 12 Cr. App. R. 142. Any person charged with a *corrupt* practice at an election for parliament, or a municipal office, or for a county, district, or parish council, may, if the circumstances warrant such finding, be found guilty of an *illegal* practice (which offence is ordinarily punishable on summary conviction, but for that purpose shall be an indictable offence). 46 & 47 Vict. c. 51, s. 52; 47 & 48 Vict. c. 70, s. 30; 51 & 52 Vict. c. 41, s. 75; 56 & 57 Vict. c. 73, s. 48.

(c) Conviction of attempt on indictment for complete offence.]—Section 9 of 14 & 15 Vict. c. 100, after reciting that offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof, for remedy thereof enacts, that "if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." Under this enactment it has been held that defendant can only be convicted of the attempt to commit the very offence with which he is charged: *R.* v. *McPherson*, Dears. & B. 197; 26 L. J. (M. C.) 134. The authority of this case is shaken by *R.* v. *Ring*, 61 L. J. (M. C.) 116: and *R.* v. *Brown*, 24 Q. B. D. 357; 59 L. J. (M. C.) 47

In *R.* v. *Connell*, 6 Cox, 178, to an indictment for administering poison with intent to murder, a plea of *autrefois acquit* was pleaded, setting up a prior acquittal of murder; and it was argued that on the former trial the accused might under 14 & 15 Vict. c. 100, s. 9, have been convicted of the attempt. The court held the plea bad, on the ground that that section only authorized a conviction of the attempt where it was a misdemeanor; but in *R.* v. *White* [1910] 2 K. B. 124; 22 Cox. 325; 79 L. J. (K. B.) 854; 4 Cr. App. R. 257, on an indictment for murder, the prisoner was convicted and sentenced for an attempt to murder as a statutory felony (*a*).

On an indictment which charged H. with rape, and W. with aiding and abetting in the rape, the jury found H. guilty of attempting to commit a rape, and W. of aiding H. in the attempt. It was contended that this finding amounted to an acquittal of W., as the case was not within 14 & 15 Vict. c. 100, s. 9. The objection was, however, overruled, and the conviction of W. for misdemeanor was affirmed: *R.* v. *Hapgood*, L. R. 1 C. C. R. 221: *S. C. sub nom. R.* v. *Wyatt*, 39 L. J. (M. C.) 83.

(*a*) And *see* thereon *R.* v. *Cook* [1899] 20 New South Wales Rep. (Law) 264; 2 Russ. Cr. (7th ed.) 1967.

Special verdict.]—The jury have a right, in all criminal cases, to find a special verdict; 2 Hawk. c. 47, s. 3; and *see* 32 G. 3, c. 60, ss. 1, 3; but the judge has no power to compel them to find a special verdict: *R.* v. *Allday*, 8 C. & P. 136. (*See* forms of special verdict in *R.* v. *Dudley*, 14 Q. B. D. 273; 54 L. J. (M. C.) 32. *R.* v. *Staines Local Board*, 52 J. P. 215.) Such verdict must state positively the facts themselves, and not merely the *evidence* adduced to prove them, and all the facts necessary to enable the court to give judgment must be found; for the court cannot supply by intendment or implication any defect in the statement. 2 Hawk. c. 47, s. 9; 2 East, P. C. 708, 784: *see R.* v. *Plummer*, Kel. (J.) 109: *R.* v. *Francis*, 2 Str. 1015: *R.* v. *Royce*, 4 Burr. 2073; 1 Chit. Cr. L. 643. But if the jury find all the substantial requisites of the charge, they are not bound to follow in terms the technical language of the indictment. Thus where the defendant was charged with forgery of a bank note, and the special verdict stated that he erased and altered the note by changing the word "two" into "five," this was held sufficient: *R.* v. *Dawson*, 1 Str. 19. So, where an indictment for murder enumerated three wounds, and the special verdict mentioned one only, this was held not to be a fatal variance: *R.* v. *Morgan*, 1 Bulstr. 84, 87. So, where the evidence need not correspond precisely with the statement in the indictment (*see post*, p. 349), the special verdict will be good, although in the same respects it vary from the statement in the indictment; as where the fact is found to have occurred, in a case of a transitory nature, at a different place within the jurisdiction of the court, or (where time is immaterial) on a day different from that stated in the indictment. *Dowdale's case*, 6 Co. Rep. 47; 2 Rolle Abr. 689. If the verdict does not state the time when the facts occurred, it seems that the court will intend them to have happened in the order in which the jury have stated them: *R.* v. *Keite*, 1 Ld. Raym. 138, 142. The jury need not, and indeed ought not, after stating the facts, to draw any legal conclusion, for that is the matter referred to the court: and if they do so, and the inference drawn by them is erroneous, the court will reject it as superfluous, and pronounce the judgment warranted by the facts stated. *See* 1 Chit. Cr. L. 645, *and cases there cited.* A special verdict is not amendable as to matters of fact (*supra*); but a mere error of form may be amended, even, as it seems, in capital cases, in order to fulfil the evident intention of the jury, where there is any note or minute to amend by; 2 Hawk. c. 47, s. 9: *R.* v. *Hayes*, 2 Str. 844: *R.* v. *Hazel*, 1 Leach, 368, 382; 1 East, P. C. 236: *R.* v. *Woodfall*, 5 Burr, 2661. If three offences are charged in the indictment, and the special verdict states evidence which applies to two of them only, the court may adjudge the defendant guilty of those two, and enter an acquittal as to the residue. *R.* v. *Hayes*, *supra.* The court cannot, however, on a special verdict on an indictment for felony, adjudge the defendant guilty of a misdemeanor: *R.* v. *Westbeer*, 2 Str. 1133; 1 Leach, 12. But where it appears clearly from the facts stated in the special verdict, that the defendant has been guilty of a crime, though not of the degree charged against him in the indictment, the court will not discharge him, but will direct a fresh indictment to be preferred. *R.* v. *Francis*, 2 Str. 1015. Where the verdict is so imperfect that no judgment can be given upon it, *venire de novo* may, in misdemeanors, be awarded. *See post*, p. 346. In cases of felony the court may

enter a judgment of acquittal where the facts found by the special verdict do not warrant a judgment *against* the defendant; *see R.* v. *Huggins*, 2 Ld. Raym. 1574, 1585; 17 St. Tr. 309; but this will be no bar to another prosecution for the same felony. *R.* v. *Burridge*, 3 P. Wms. 439, 480; 24 Eng. Rep. 1133, 1148: Com. Dig., *Indictment* (*N.*).

A verdict is not vitiated by surplusage. 2 Hawk. c. 47, s. 10.

Until 1908, where a special verdict had been found at the assizes, the record might be brought into the High Court of Justice by an order of that court only, without a writ of *certiorari*, the courts of oyer and terminer and gaol delivery (including the Central Criminal Court) being by the 16th section of the *Judicature Act*, 1873 (36 & 37 Vict. c. 66), made part of the High Court. *R.* v. *Dudley*, 14 Q. B. D. 273, 280, 560; 54 L. J. (M. C.) 32, 34: *R.* v. *Parke* [1903] 2 K. B. 432, 439; 72 L. J. (K. B.) 839. Where on a special verdict the High Court was of opinion that the defendant ought to be convicted, that court ought to pronounce judgment and pass sentence. *R.* v. *Dudley*, 14 Q. B. D. 273, 278; 54 L. J. (M. C.) 32-34.

Special verdicts are now dealt with by the Court of Criminal Appeal under 7 Edw. 7, c. 23, s. 5 (3), *post*, p. 305.

Special verdict of insanity.]—By s. 1 of the *Criminal Lunatics Act*, 1800 (39 & 40 G. 3, c. 94), the petty jury was empowered to find a verdict of insanity upon the evidence; and under s. 2 of the same Act they can, if it appears to them that a person on trial is insane, return a verdict to that effect. As to what constitutes insanity, *see ante*, pp. 13 *et seq.* Where, on the trial of a deaf mute for felony, the jury returned the following verdict: "We find the prisoner guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings;" it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. *R.* v. *Berry*, 1 Q. B. D. 447; 45 L. J. (M. C.) 123; 13 Cox, 189; and *see ante*, pp. 169, 170. Section 1 was expressly, and s. 2 on this point is virtually, repealed by the *Trial of Lunatics Act*, 1883 (46 & 47 Vict. c. 38, s. 4). Section 2 of the latter Act provides that, "Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission" (sub-s. 1).

"Where such special verdict is found, the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct, till his Majesty's pleasure shall be known; and it shall be lawful for his Majesty thereupon, and from time to time, to give such order for

the safe custody of the said person during pleasure, in such place and in such manner as to his Majesty may seem fit" (sub-s. 2).

"All provisions in any existing Act, or in any rules or orders made in pursuance of any existing Act, having reference to a person or persons acquitted on the ground of insanity, shall apply to a person or persons in respect of whom a special verdict is found under this Act" (sub-s. 4).

The Acts referred to in sub-s. 4 are the *Criminal Lunatics Acts* (*see* Wood-Renton, Lunacy, 792-880, 856). A form of detention order was prescribed in 1884. The prisons now in use for the detention of criminal lunatics are Broadmoor and Parkhurst. The rules regulating Broadmoor Prison are printed in Statutory Rules and Orders Revised (ed. 1904), vol. 8, *tit. Lunatic* (*E.*). The Act of 1883 is modified as to the control of persons detained under it by the *Criminal Lunatics Act*, 1884 (47 & 48 Vict. c. 6).

There is no appeal from such a special verdict. *Felstead* v. *R.* [1914] A. C. 534; 10 Cr. App. R. 129; 30 T. L. R. 469. On an appeal against a conviction the Court of Criminal Appeal have power to make an order under the *Trial of Lunatics Act*, 1883, in the same manner as if a special verdict had been found by the jury. *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23), s. 5 (4), and *R.* v. *Jefferson*, 72 J. P. 467; 1 Cr. App. R. 95 : *R.* v. *Jones*, 4 Cr. App. R. 207; and *see post*, p. 305.

Retirement of jury.]—If the jury are unable to agree upon their verdict without retiring from their box, they withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them, and to suffer none to speak to them without leave of the court, nor to speak to them himself, except only to ask them whether they are agreed. 2 Hale, 297. There was an old rule against allowing them food, drink, or fire. 1 Co. Inst. 227; 4 B. & Ald. 681; Doct. and Student, 158, 272 : *Winsor* v. *R.*, L. R. 1 Q. B. 289, 308, 317; 35 L. J. (M. C.) 121. But it was abolished in 1870, and they may now have fire and reasonable refreshment at their own expense. 33 & 34 Vict. c. 77, s. 23. The jury when once enclosed for deliberation must not separate or leave the place appointed for their deliberations without the special permission of the court. Co. Litt. 227 b; 4 Bl. Comm. 360 : *R.* v. *O'Connell*, 1 Cox, 410. The law in this respect has not been altered by 60 & 61 Vict. c. 18 (*ante*, p. 208). If a juror falls ill while the jury are enclosed, a medical man may, by leave of the court, see and prescribe for him. *R.* v. *Newton*, 13 Q. B. 716, 735; 18 L. J. (M. C.) 201. During the retirement of the jury no officer of the court may enter into any discussion with the jury as to the case or answer any question put to him by them. If any further assistance is required by them it must be given in open court by the Judge in the presence of the accused. *R.* v. *Willmont*, 78 J. P. 352; 30 T. L. R. 499; 10 Cr. App. R. 173. Where a juror, after the summing-up, and after the jury had deliberated in the box for some minutes and then had signified their wish to retire to consider their verdict, separated himself from his colleagues by mistake and left the building, and was absent for a quarter of an hour, when he rejoined them, it was held, on appeal, to constitute an irregularity which rendered all the proceedings abortive, and that the only course open to the court was to discharge the jury and commence the

proceedings afresh, and that it was not relevant to consider whether the irregularity had in fact prejudiced the accused. *R.* v. *Ketteridge* [1915] 1 K. B. 467; 84 L. J. (K. B.) 352; 24 Cox, 675; 79 J. P. 216; 31 T. L. R. 115; 11 Cr. App. R. 54. But where before the summing-up members of the jury had conversed with witnesses for the prosecution, and it was ascertained that the accused could not be prejudiced by the conversations, it was held on appeal that as in fact the accused had not been prejudiced, though there had been improper conduct on the part of the jurymen, the conviction could stand, and *R.* v. *Ketteridge*, *supra*, was distinguished. *R.* v. *Twiss* [1918] 2 K. B. 853.

The Court of Criminal Appeal will not readily allow evidence on appeal to show misconduct on the part of a juryman. *See R.* v. *Syme*, 24 Cox, 502; 79 J. P. 40; 10 Cr. App. R. 284 : *R.* v. *Melik*, 12 Cr. App. R. 100. Evidence was allowed in *R.* v. *Hancox*, 29 T. L. R. 331; 8 Cr. App. R. 193, where it was alleged that the jury were so constituted that a fair trial was not likely to result, but it was expressly stated that this admission was not to be considered as a precedent.

Disagreement of jury.]—If the jury agree to a verdict on some counts of an indictment, but disagree on others, it would seem that the defendant can be retried on the counts on which the disagreement has taken place, even after judgment on the counts on which he has been convicted or acquitted, as each count is a separate indictment. *Latham* v. *R.*, 5 B. & S. 636; 33 L. J. (N. S.) M. C. 197 : *cf. Selvester* v. *U. S.*, 170 U. S., 262. But where the counts are not for distinct offences, but merely vary the legal description of a single transaction, the defendant would apparently be entitled to plead *autrefois convict* or *acquit* on the second trial. *R.* v. *Grimwood*, 60 J. P. 809, Pollock, B.

Ambiguous verdicts.]—Where on an indictment for obtaining food and money by false pretences the jury found the following verdict of "guilty of obtaining food and money under false pretences : but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy," it was held that this amounted to a verdict of not guilty, as it negatived one of the most material allegations in the indictment, namely, the intent to defraud. *R.* v. *Gray*, 17 Cox, 299 (C. C. R.). (*a*). Where the words of a verdict are not clear or are confused, but the intention of the jury is plain, the Court of Criminal Appeal will give effect to that intention under s. 4 (1) of the *Criminal Appeal Act*, 1907 (6 Edw. 7, c. 23). *See post*, p. 304.

Receiving the verdict.]—A judge is not bound (unless the jury insist on having it recorded) to receive the first verdict which the jury give, but may direct them to reconsider it : and the verdict which the jury ultimately return is the verdict to be recorded. *R.* v. *Meany*, L. & C. 213; 32 L. J. (M. C.) 24 : *per* Pollock, C.B., in *R.* v. *Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70; and *see* Cromp. 114; 2 Harg. St. Tr. 60 : *R.* v. *Philpot*, 7 Cr. App. R. 140. This is so

(*a*) *See R.* v. *Trebilcock*, 27 L. J. M. C. 103: *R.* v. *Harding*, 25 T. L. R. 139; 1 Cr. App. R. 219: *Myersan* v. *R.*, 5 Austr. C. L. R. 597.

even though the first verdict may amount to one of not guilty. *R.* v. *Crisp*, 76 J. P. 304; 28 T. L. R. 296; 7 Cr. App. R. 173. The jury may, before the verdict is recorded (or even promptly after the verdict is recorded, *R.* v. *Parkin*, 1 Mood. 45), rectify their verdict, and it will stand as ultimately amended. 1 Chit. Cr. L. 647. This may be done even after the defendant has been discharged out of the dock (in pursuance of a supposed verdict of acquittal), if it is done before the jury have left the box. *R.* v. *Vodden*, Dears. 229; 23 L. J. (M. C.) 7. On the trial at *nisi prius* of a criminal case the *postea* could be amended, on sufficient cause shown, where there was a judge's note or other sufficient document to show that it was incorrect. *R.* v. *Virrier*, 12 A. & E. 317; 9 L. J. (M. C.) 120 : and *see R.* v. *King*, 7 Q. B. 782. Where an indictment contains two counts for misdemeanor, to which the defendant pleads not guilty, and the finding of the jury is guilty on the second count (without noticing the first), whereupon judgment is passed, such judgment is not affected by reason of no finding being entered on the first count, for each count is a separate indictment on which a separate judgment can be entered. *Latham* v. *R.*, 5 B. & S. 635; 33 L. J. (M. C.) 197 : *cf. Selvester* v. *U. S.* [1898] 170 U. S. 262.

Upon the delivery of the verdict, if the defendant is thereby acquitted *on the merits*, he is for ever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there is some other legal ground for his detention. (The old form of recording acquittal was *quorum eat quietus sine die*). As to pleading an acquittal in bar of another indictment, *see ante*, p. 155, *Autrefois acquit*. As to immediate discharge, *vide post*, p. 227.

Entry of verdict.]—The *form* of entry of the verdict on the record is as follows :—After the *similiter* (*ante*, p. 153), comes the award of *venire*, thus : —" *Therefore let a jury thereupon here immediately come before the said justices of our lord the King last above mentioned, and others their fellows aforesaid, of free and lawful men of the said county of* ——, *by whom the truth of the matter may be better known, and who are not of kin to the said* A. B., *to recognise upon their oath whether the said* A. B. *be guilty of the felony in the indictment above specified, or not guilty; because as well the said* H. A., *who prosecutes for our said lord the King in this behalf, as the said* A. B., *have put themselves upon the said jury. And the jurors of the said jury, by the sheriff for this purpose impanelled and returned to wit* [naming them], *being called, come: who, to speak the truth of and concerning the premises being chosen, tried, and sworn, upon their oath say, that the said* A. B. *is guilty* [or *not guilty*] *of the felony aforesaid, on him above charged, in manner and form aforesaid, as by the said indictment is above supposed against him.*"

An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two separate occasions. The verdict was in the following form, " that the said T. C. is guilty of the premises on him above charged in and by *both* counts of the indictment aforesaid above specified, in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." It was held that this was in fact a finding of guilty upon *each* count of the indictment. *Castro* v. *R.*, 6 A. C. 229; 50 L. J. (Q. B.) 497 : *cf. O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1.

Discharge of jury.(*a*)]—It is established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial, without giving a verdict, if a "necessity," that is, a high degree of need, for such discharge is made evident to his mind. *Winsor* v. *R.*, L. R. 1 Q. B. 289, 390; 35 L. J. (M. C.) 121, 161 (dissenting from *Conway* v. *R.*, 7 Ir. L. R. 149; 1 Cox, 210): *R.* v. *Shields*, 28 St. Tr. 619, 647: *R.* v. *Cobbett*. 2 St. Tr. (N. S.) 789, 903; 3 Burn's J. 98 (30th ed.); 4 Bl. Com. 360.

Where the jury, on a trial for murder at the assizes, were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible they should ever agree, and that was the first day of business at the next assize town, whereupon the judge discharged them, it was held that he was warranted by law in doing so. *R.* v. *Newton*, 13 Q. B. 716; 18 L. J. (M. C.) 201.

It is for the judge alone to decide whether a necessity exists for discharging the jury, and his decision is not subject to review or appeal: *Winsor* v. *R.*, *supra*: *R.* v. *Lewis*, 78 L. J. (K. B.) 722; 100 L. T. 976; 73 J. P. 346; 2 Cr. App. R. 180: *R.* v. *Davison*, 8 Cox, 360; 2 F. & F. 250; 2 Russ. Cr. (7th ed.) 2006. The same view has been adopted in the United States: *U. S.* v. *Perez* [1824] 9 Wheaton 579, Story, J.: *Dreyer* v. *Illinois* [1903] 187 U. S. 71, 86: and in New South Wales, *R.* v. *Grand* [1903] 3 N. S. W. State Rep. 216.

If one of the jury dies before the delivery of the verdict, the remaining eleven will be discharged, and a new jury may be at once sworn or a new juror added to the eleven, and the defendant tried by them, or (if necessary) remanded to the next assizes. *R.* v. *Gould*, 3 Burn's Justice, 98 (30th ed.). So, also, if one of the jurors is taken so ill that he is not able to proceed with the trial. *R.* v. *Scalbert*, 2 Leach, 620: *R.* v. *Beere*, 2 M. & Rob. 472: *R.* v. *Ashe*, 1 Cox, 150. In case another juror is added to the eleven, they must be sworn anew, and the prisoner must again have his challenges. *R.* v. *Edwards*, R. & R. 224; 4 Taunt. 309; 2 Leach, 621 n.; 3 Camp. 207 n. The evidence must be taken *de novo*: and it is not proper to read over to the witnesses the note taken of their evidence at the first trial. *R.* v. *Bertrand*,

(*a*) It has been said that, in the case of a trial at the assizes, the jury, if they do not agree before the judges depart the county, may be carried with them in a cart to the borders of the county, or, according to some authorities, from place to place through the circuit, until they are unanimous: 19 Ass. Pl. 6: 41 Ass. Pl. 11: 2 Hale, 297; Bac. Abr., Juries (G.); *R.* v. *Ledgingham* (1670); 1 Vent. 97. This dictum, however, rests on no foundation of judicial decision or actual practice, and if it was ever law, which seems doubtful, is not so at the present day. *Winsor* v. *R.*, L. R. 1 Q. B. 289, 326; 35 L. J. (M. C.) 121. It has also been said to be a general rule of law, "that a jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." Co. Litt. 227 b. *See also* 3 Co. Inst. 110; Bro. Abr. Enquest, 30; Bac. Abr., Juries (G.); 2 Hawk. c. 47, s. 1; Fost. 29—39. This doctrine, however, which, if taken literally, seems to command the confinement of the jury till death if they do not agree, is too broadly stated by Lord Coke, and was denied to be law in *Ferrar's case*, Sir T. Raym. 84 (an indictment for forgery), where it is laid down as having been "resolved by all the justices, that although the jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition which hath been held by many learned in the law."

L. R. 1 P. C. 520; 36 L. J. (P. C.) 51 (*see ante*, p. 209). Where misconduct on the part of one or more jurors is discovered before verdict the court may discharge the jury (*a*). Where, in the course of a trial, one of the jurors, without leave, left the jury box and also the court, whereupon the jury was discharged, and a fresh one impanelled for the trial of the prisoner, it was held, that this was the only course that could have been adopted. *R.* v. *Ward*, 10 Cox, 573; 11 W. R. 281 (C. C. R.); and *see R.* v. *Ketteridge* [1915] 1 K. B. 467, cited *ante*, p. 218. And so where in the course of a trial it was discovered that a person was on the jury who was not on the jury panel, and who had by mistake been summoned as a juryman, the jury were discharged, and a fresh jury constituted by taking another juryman in the place of the one who had served in mistake. *R.* v. *Phillips*, 11 Cox, 142; and *see R.* v. *Wakefield* [1918] 1 K. B. 216, cited *ante*, p. 179. This defect would have been cured by verdict under 7 G. 4, c. 64, s. 21 (*ante*, p. 44.) Where it is accidentally elicited during the course of the case for the Crown that the defendant has been previously convicted, the jury is frequently discharged in the interests of the defendant.

In *Hill* v. *Yates*, 1 East, 229, it was held that the granting of a new trial because a juror not summoned had served was discretionary, and that if no injustice had resulted, a new trial should be refused. Ellenborough, C.J., said: "If we were to listen to such an objection we might set aside the verdicts given at every assize, where the same thing might happen from accident and inadvertence, and possibly sometimes from design, especially in criminal cases." He cited the *Case of a Juryman* (1783, 12 East, 231 n.), where the judges in a crown case held that service of a man not summoned was no ground of objection to verdict even on a writ of error, much less on a summary application. *See* Criminal Appeal, *post*, pp. 300 *et seq.*

It has been also held, that in order to enable a prisoner to take a point in his defence which he could not otherwise have taken, the court might, *by his consent*, discharge the jury, and that the doing so would not bar any further proceedings. *Kinloch's case*, Fost, 16, 31; 18 St. Tr. 395: *R.* v. *Stokes*, 6 C. & P. 151: and *see R.* v. *Deane*, 5 Cox, 501, Erle, J. The jury have also been discharged, or a juror withdrawn, in a criminal case, on account of the sudden illness of a witness; 2 Harg. St. Tr. 832: *R.* v. *Streek*, 2 C. & P. 413: *R.* v. *Stevenson*, 2 Leach, 546; and so, also, where material witnesses had been kept away by collusion; 1 Vent. 69; or even were absent by accident: *R.* v. *Stokes*, 6 C. & P. 151. But *see R.* v. *Wedderburn*, Fost. 9, 22, 30; 18 St. Tr. 425: and *see* 2 Hale, 295. In *R.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 25, all the judges who decided that case expressed a strong opinion against the propriety of discharging the jury, merely because the case for the prosecution fails for want of evidence, and in the hope that further evidence may be got on a second trial. In *R.* v. *Lewis*, 78 L. J. (K. B.) 722; 100 L. T. 916; 73 J. P. 346; 2 Cr. App. R. 180, the jury was discharged because it appeared that some of the witnesses of the crown were not ready; but the

(*a*) As to the remedy against a juror for misconduct, *see R.* v. *Brown* [1907] 7 N. S. W. State Rep. 290, 300, 301.

Court of Criminal Appeal, while unable to overrule this exercise of discretion, intimated that a jury should not be discharged in order to allow the prosecution to present a stronger case on another trial. In *R.* v. *Wade* [1825] 1 Mood. 86, it was held not proper to discharge a jury sworn to try an indictment for rape in order to give time for the instruction of a witness to fit her to be sworn. *See also R.* v. *Nicholas*, 2 C. & K. 246; 2 Cox, 136. But where the jury has not yet been sworn postponement of a trial for this purpose has been allowed. *See* 2 Russ. Cr. (7th ed.) 2267.

The power of discharge, while discretionary, ought not to be exercised without very strong reasons: yet it may be exercised without any absolute "necessity." Where a material and necessary witness for the prosecution refused to answer a question put to him, and, although informed by the judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged to be guilty of a contempt of court, and fined and imprisoned, the judge, on the application of the counsel for the prosecution, and against the will of the defendant, discharged the jury. *R.* v. *Charlesworth*, 2 F. & F. 326; 31 L. J. (N. S.) M. C. 25, Hill, J. The course pursued in this case was afterwards questioned in the Court of Queen's Bench, and although it did not become necessary to give judgment upon its propriety, Blackburn, J., expressed an opinion that it was right, which opinion seems to have been shared by Cockburn, C.J., who denied that the rule laid down in 4 Bl. Com. 360, that "the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict," is a true or correct exposition of the law as practised in our day. Wightman, J., and Crompton, J., on the other hand, thought the discharge of the jury, under the circumstances mentioned above, was improper. *R.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J. (M. C.) 25. In *R.* v. *Lewis*, *supra*, the Court of Criminal Appeal seem to have accepted the view of Wightman, J.

Where a court of quarter sessions was sitting in two courts, and during the retirement of the jury to consider their verdict the chairman of the second court adjourned for a while, and the chairman of the first court on being informed that the jury could not agree sent for them and discharged them, it was held that the discharge was by the court of quarter sessions and was valid, and furthermore that it was not essential that the defendant should be present at the discharge. *R.* v. *Richardson*, 108 L. T. 384; 77 J. P. 248; 23 Cox, 332; 82 L. J. (K. B.) 333; 8 Cr. App. R. 159.

Effect of discharge.]—The discharge of the jury is not equivalent to a verdict of acquittal: and the prisoner can be remanded for a fresh trial. *Id.*: *R.* v. *Davison*, 8 Cox, 360; 2 F. & F. 250.

A defence founded on the improper discharge of the jury cannot be taken by *plea*, for the only pleas known to the law founded upon a former trial are pleas of a former conviction, or a former acquittal, for the same offence (*ante*, pp. 155, 160); but if the former trial had been abortive without a verdict, there has been neither a conviction nor an acquittal. *Winsor* v. *R.*, L. R. 1 Q. B. 390, 395; 35 L. J. (M. C.) 161 (Ex. Ch.). And the discretion exercised by the judge in this respect, at all events where he discharges the jury on the ground of *necessity*, of the existence of which necessity it is for him alone to

determine, cannot be reviewed in any way. *Winsor* v. *R.*, *supra*: *R.* v. *Lewis*, 78 L. J. (K. B.) 722; 100 L. T. 976; 73 J. P. 346; 25 T. L. R. 582; 2 Cr. App. R. 180.

As to discharge of the jury where the prisoner appears to be insane, *see ante*, p. 170.

After an acquittal on one indictment the prosecution have no right to claim that a second indictment should be tried before another jury. *R.* v. *Sims*, 69 J. P. 8.

SECT. 5.

PROCEEDINGS BETWEEN VERDICT AND JUDGMENT.

The allocutus.]—If the defendant is found guilty, it is thereupon demanded of him by the court, in cases of treason and felony, what he has to say why the court should not proceed to judgment against him; and this (which is called the *allocutus*) ought to appear on the record when made up. *R.* v. *Geary*, 2 Salk. 630; 3 Mod. 265. It is not necessary to demand of the defendant why the court should not proceed to judgment, *and execution* against him. *O'Brien* v. *R.*, 7 St. Tr. (N. S.) 1; 2 H. L. C. 465; 9 Eng. Rep. 1169; 3 Cox, 360: *cf. O'Neill* v. *R.*, 6 Cox, 495 (Ir.). In misdemeanors it is not usual thus to call upon the defendant before judgment. "On all trials for felonies or misdemeanors in the King's Bench Division, except upon informations filed by leave of the court, and *ex-officio information* where the attorney-general shall pray that the judgment may be postponed, judgment may be pronounced during the sittings or assizes at which the trial has taken place by the judge before whom the verdict has been taken, as well upon the defendant who shall have suffered judgment by default or confession as upon those who shall have been tried and convicted, and whether such persons be present or not in court." Cr. Off. Rules, 1906, r. 162, which reproduces 11 G. 4 and 1 W. 4, c. 70. s. 9 (*rep.* 51 & 52 Vict. c. 57). "The judge before whom the trial shall be had may either issue an immediate order or warrant, for committing the defendant in execution, or respite the execution of the judgment on such terms as he shall think fit, and for such time as may be necessary, for the purpose of enabling the defendant to move for a new trial, or in arrest of judgment, and if imprisonment be part of the sentence, may order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison," r. 163.

New trials have been abolished except in the case of convictions on highway indictments.

The *allocutus* is entered on the record after the verdict in the following form: "*And thereupon it is forthwith demanded of the said* A. B., *if he hath or knoweth anything to say why the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further*

saith, unless as he had before said. Whereupon," *etc.* [continuing with the judgment], as *post*, p. 231.

Suspending entry of judgment.]—*See R.* v. *N. E. Rail. Co.*, 70 L. J. (K. B.) 548; 19 Cox, 682; 49 W. R. 524.

Arrest of judgment.]—The defendant may, at any time between the conviction and the sentence, but not afterwards, move the court in *arrest of judgment*. 1 Chit. Cr. L. 661. This motion can be grounded only on some objection arising on the face of the record itself; and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict, will be a ground for arresting the judgment. We have already seen (*ante*, p. 44) what defects of form are cured by verdict, or have become altogether immaterial, under 7 G. 4, c. 64, s. 21, and 5 & 6 G. 5, c. 90, s. 3. Even if the defendant himself omits to make any motion in arrest of judgment, the court, if on a review of the case it be satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment. *R.* v. *Waddington*, 1 East, 143, 146. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a fresh indictment. Com. Dig. Indictment (N.); 4 Bl. Com. 375; *Vaux's case*, 4 Co. Rep. 45 a.

Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment. *R.* v. *Denton*, Dears. 3; 18 Q. B. 761; 21 L. J. (M. C.) 207: see *also R.* v. *Mawgan in Meneage*, 8 A. & E. 496; 7 L. J. (M. C.) 98: *R.* v. *McKenzie*, R. & R. 429. But *see* effect of Interpretation Act, 1889, *ante*, p. 8.

On a motion in arrest of judgment in misdemeanor, it would seem that the defendant must be present in court. *R.* v. *Spragg*, 2 Burr. 928.

Where on a conviction on indictment or criminal information in England the court of trial refuses to arrest judgment, an appeal lies subject to the terms of the *Criminal Appeal Act*, 1907, *post*, p. 300, or the court may reserve a case for the Court of Criminal Appeal under 11 & 12 Vict. c. 78, *post*, p. 340. As to the former practice in the King's Bench Division, *see* Short and Mellor, Cr. Pr. (2nd ed.) 142. This does not apply to convictions of peers for treason or felony or to convictions on indictments relating to obstruction or non-repair of a highway, public bridge, or navigable river. 7 Edw. 7, c. 23, s. 20, *post*, p. 302.

Proceedings after verdict and before judgment.]—In the case of treason or felony the defendant must be present when judgment is given. 1 Ld. Raym. 48, 267. In the case of a misdemeanor this is not necessary, but his presence is usually required (*R.* v. *Harwood*, 2 Str. 1088), unless the judgment is to be only for payment of a fine (*R.* v. *Williams*, 18 W. R. 806); or the court is satisfied by evidence that the defendant is too ill or infirm to be brought up;

R. v. *Constable*, 7 D. & R. 663 : *R.* v. *Kinglake*, 18 W. R. 806, cit.; or is in prison and unable to find bail. *R.* v. *Boltz*, 5 B. & C. 334; 4 L. J. (O. S.) K. B. 262. Wherever it is necessary that a defendant found guilty by verdict of a jury should be present in court when judgment is pronounced against him (*see R.* v. *Chichester*, 17 Q. B. 504 n.; 2 Den. 458), if he is at large and will not voluntarily attend in court, process may be issued for the purpose of bringing him up to receive judgment, in the same way as process is issued for the purpose of bringing an offender into court to answer to an indictment found or information filed against him, and he is liable upon such process to be prosecuted to outlawry. (*See ante*, p. 85.) If a defendant is under recognizance to appear and receive sentence in a King's Bench Division, notice of the intention in bring him up for judgment on a day specified is served on such defendant and his bail; and in default of appearance after such notice served and appearance required according to the course and practice of the court, the recognizances, in the discretion of the court, will be estreated, and a warrant issued for his apprehension, or a *capias* for proceeding to outlawry. *R.* v. *Chichester*, *supra*.

As an aid to determining the appropriate punishment the court will, after verdict, hear evidence for the crown or the defendant, either *viva voce* or by affidavit. *R.* v. *Bunts*, 2 T. R. 683 : *R.* v. *Dignam*, 7 A. & E. 593 : *R.* v. *Cox*, 4 C. & P. 540. The court may consider the acts of the defendant subsequent to the trial and up to the day of sentence. *R.* v. *Withers*, 3 T. R. 428. Under 11 G. 4 and 1 W. 4, c. 70, s. 9 (*rep.*), it was held that the defendants could not move in mitigation of punishment on affidavits showing nothing which might not have been adduced at the trial. *R.* v. *Lloyd*, 2 L. J. (N. S.) K. B. 214; 4 B. & Ad. 135; and *see R.* v. *Cox*, 4 C. & P. 540. The section is now represented by Cr. Off. Rules, 1906, r. 162. It is the practice at the Central Criminal Court, after verdict, to hear evidence of character generally, and of previous convictions not included in the indictment. In *R.* v. *Campbell* 75 J. P. 216; 27 T. L. R. 256; 6 Cr. App. R. 131, the Court of Criminal Appeal considered that in all trials after conviction there should be given accurate information as to the general character and other material circumstances of the prisoner even though such information was not available in the form of evidence proper, and that such information when given could rightly be taken into consideration by the judge in determining the *quantum* of punishment unless it was challenged and contradicted by or on behalf of the prisoner, in which case the judge should either direct proper proof to be given or should ignore the information. It is important that there should be precision and accuracy in any such information. *See R.* v. *Stratton*, 10 Cr. App. R. 35 : *R.* v. *Elley*, 85 J. P. 144; 15 Cr. App. R. 143. Where a prisoner pleads guilty the judge may before passing sentence, in order to form an opinion as to the degree of culpability, hear evidence as to the motive which induced the prisoner to commit the offence; but where the offence is, by statute, punishable by a more severe sentence if accompanied by circumstances of aggravation, such circumstances may be taken into account in passing sentence only if they have been charged in the indictment and been proved to the satisfaction of the jury or admitted by the plea of guilty. *R.* v. *Bright* [1916] 2 K. B. 441;

85 L. J. (K. B.) 1638; 80 J. P. 407; 25 Cox C. C. 540; 12 Cr. App. R. 69. Where previous convictions are taken into consideration evidence should be given as to them in the absence of admission by the prisoner. *R.* v. *Metcalfe*, 29 T. L. R. 512; 9 Cr. App. R. 7.

Where offences other than the one for which the prisoner has been convicted have been committed by him and are still untried and are admitted by him, and he desires that they should be taken into account in determining the sentence, the judge may properly take them into account if the offences are similar to the one for which the prisoner has been convicted, whether there has already been a committal for trial in another jurisdiction or not. But if in fact there has been a committal in another jurisdiction the judge should first be satisfied that the prosecution consents, and such consent should not be withheld except on good grounds. If the offences desired to be taken into consideration are dissimilar to the one of which the prisoner has been convicted, the judge should not take them into consideration, even with the consent of the prosecution, without first considering whether under all the circumstances it is proper so to do. *R.* v. *McLean* [1911] 1 K. B. 333; 80 L. J. (K. B.) 309; 22 Cox, 362; 6 Cr. App. R. 26: *R.* v. *Syers*, 73 J. P. 13; 1 Cr. App. R. 172: *R.* v. *Davies*, 7 Cr. App. R. 254: *R.* v. *Smith*, 85 J. P. 224; 15 Cr. App. R. 172.

Right to copy of record on acquittal.]—In cases of misdemeanor a party acquitted is entitled to a copy of the record. *Morrison* v. *Kelly*, 1 W. Bl. 385, and note. *See* the authorities on this subject collected, Taylor, Evid. (11th ed.), s. 1488; 2 Russ. Cr. (7th ed.) 2146: and *see Attorney-General* v. *Scully*, 4 Ontario L. R. 394, 410, where it is stated that inquiry of the attorney-general in England had elicited the reply that the fiat of the attorney-general was never asked for to enable a person acquitted to get a copy of the record of his indictment.

Discharge of prisoners.]—Every prisoner charged with or indicted for any felony, or with or for any misdemeanor, or as an accessory thereto, before any court of criminal jurisdiction in England and Wales, against whom no bill of indictment shall be found by the grand jury, or who on his or her trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be *immediately* set at large without payment of any fee or sum of money, for or in respect of such discharge, to the sheriff, gaoler or keeper of the gaol or prison, from whence he shall be so discharged and set at liberty, or to the clerks of the court, or for their appearance to the indictment or information, or for allowing them to plead thereto, or for recording the appearance or plea, or for discharging any recognizance taken by him or by any sureties for him. 55 G. 3, c. 50, ss. 4, 5, as amended by 8 & 9 Vict. c. 114. Detention of an acquitted prisoner is illegal. *Mee* v. *Cruikshank* [1902] 20 Cox, 210. Persons who disobey these directions are guilty of misdemeanor. 55 G. 3, c. 50, ss. 9, 13. As to discharge on recognizance, *see Bail* (*ante*, p. 87) and *post*, p. 259. As to discharge after endurance of punishment, *see* 61 & 62 Vict. c. 41, s. 12, *post*, p. 232.

Respite.]—The term "respite" is usually applied to postponement of the judgment or sentence of the court until a future date. *See Keen* v. *R.*, 10 Q. B. 928; 16 L. J. (N. S.) M. C. 180. This may be done when an appeal is pending to the Court of Criminal Appeal, or where the court, having regard to the nature of the offence, or the antecedents or mental or physical condition of the convict desires to defer sentence. It is usual to put the offender under recognizances to come up for judgment when called upon, coupled in some cases with an undertaking not to offend again. The offender, if he offends again, may be called up and sentenced on the first conviction, instead of being tried for the subsequent charge. *See R.* v. *Ryan*, 7 Cox, 109 (Ir.). Where a certificate is given by a King's Bench judge at assizes that the case is a fit one for appeal to the Court of Criminal Appeal, the judge acting as a judge of the Court of Criminal Appeal may, if he thinks fit, admit the appellant to bail till the hearing of the appeal; but there is no power in a court of quarter sessions to admit to bail except where the provisions of the *Crown Cases Act*, 1848, apply. *See post*, p. 340. On a conviction by verdict for a capital offence where judgment has been respited, it may be given by subsequent justices of gaol delivery for the same jurisdiction. 1 Edw. 6, c. 7, s. 5.

Reprieve.]—A reprieve is the withdrawal of the sentence for an interval of time, whereby the execution of it is suspended; and it may be granted either by the King or by the court empowered to award the execution. 4 Bl. Com. 395; 1 Hale, 368; 2 Hale, 412; 2 Hawk. c. 51, s. 8; 1 Chit. Cr. L. 758. A reprieve is grantable by the crown (*ex mandato regis*) at its mere discretion; and it is grantable by the court (*ex arbitrio judicis*) at its discretion, whenever substantial justice requires it, or (*ex necessitate legis*) *e.g.* where the prisoner is a pregnant woman under capital sentence. As to reprieve in capital cases, *see* 4 G. 4, c. 48 (*post*, p. 235); 24 & 25 Vict. c. 100, s. 2 (*post*, p. 236). The judges of assize have power of reprieve after their commission is determined; 8 Rep. Crim. L. 176; though the learned commissioners observe that the continuance of this power is said to be rather of common usage than strict right. *See* 2 Hale, 412; 4 Bl. Com. 394; 2 Hawk. c. 51, s. 8. In two cases the court is *bound* (*ex necessitate legis*) to grant a reprieve. First, where the prisoner under sentence, being a female, is pregnant. 3 Co. Inst. 17; *and see authorities last above cited.* Secondly, where the prisoner becomes insane after judgment pronounced against him. 3 Co. Inst. 4; 4 Bl. Com. 395; 1 Chit. Cr. L. 761.

Jury of matrons.]—In England where a woman is convicted and sentenced to death the clerk of the court after sentence (*R.* v. *Baynton*, 14 St. Tr. 631, 632) is to ask whether the woman has anything to say in stay of execution of the sentence. If she then alleges, or the court then or later has reason to suppose (*R.* v. *Hunt*, 2 Cox, 261) that she is pregnant, a jury of twelve matrons should be impanelled and sworn to try whether or not she is quick with child. *See* 1 Chit. Cr. L. 759. The jury may be impanelled forthwith *de mulieribus circumstantibus*, the judge first ordering that all the doors be shut, and that no one be allowed to leave the court. *R.* v. *Wycherley*, 8 C. & P. 262. If the

matrons desire the assistance of a medical man, a medical man is requested by the court to retire and examine the prisoner. When his examination is concluded the jury of matrons is recalled into court and his evidence is given in their presence and that of the prisoner. *Id.* If the jury find that the prisoner is quick with child, the court stays execution of the capital sentence on the offender until she shall be delivered of a child, or it is no longer possible in the course of nature that she should be so delivered. And *see* Encycl. Laws of England (2nd ed.), vol. ix., p. 93; Taylor, Medical Jurisprudence (7th ed.), vol. ii., p. 32. The forms of oaths to such jury of matrons are as follows:—

"*I, as forematron (or as a matron) of this jury, swear by Almighty God that I will search and try the prisoner at the bar, whether she be with child of a quick child, and thereof a true verdict give, according to my skill and understanding.*"

Unless pregnancy is pleaded by the prisoner herself, the right to a jury of matrons appears not to be absolute. *R.* v. *Hunt*, 2 Cox, 261, Erle, J.

In Ireland the jury of matrons is not now impanelled; and the court directs one or more medical men to be sworn to inquire whether the woman is with child with a quick child, and if after due inquiry they report that she is so, execution of the sentence must be stayed until the woman is delivered of a child or until it is no longer possible in the course of nature that she shall be so delivered. The expenses of the inquiry may be included in the costs of the prosecution. 39 & 40 Vict. c. 78, s. 13.

SECT. 6.

JUDGMENT AND PUNISHMENTS.

Preliminary.]—The punishments assigned by the law of England for particular indictable offences are stated in the parts of this work dealing with the offences. There are, however, certain general statutory provisions relating to sentences and punishments, which are collected here for facility of reference. Particular regard must be had to the general limitations on the punishment of children or young persons (*post*, p. 247), and to the provisions for probation of offenders (*post*, p. 259), and for sentences of reformative detention on juvenile adults (*post*, p. 254).

By whom pronounced.]—The judgment or sentence of the court is given orally by the presiding judge. By 14 H. 6, c. 1, justices sitting under a commission of *nisi prius* are empowered to give judgment, and award execution on acquittal or conviction in treason and felony. A similar provision was contained in 11 G. 4 and 1 W. 4, c. 70, s. 9 (*rep.*), as to giving judgment on trials for felony or misdemeanor, on a record of the court of King's Bench. Where, in a capital case at the assizes, judgment of death is respited, it may be given by the judges sitting on a subsequent commission of gaol delivery for the same jurisdiction. 1 Edw. 6, c. 7, s. 5. By virtue of the *Judicature Act*, 1873, s. 29, courts of assize and the Central Criminal Court are parts of the High Court of Justice. *R.* v. *Dudley*, 16 Q. B. D. 273, 560; 54 L. J. (M. C.) 32, 34; 1 Steph. Hist. Cr. L. 97: *R.* v. *Parke* [1903] 2 K. B. 432; 72 L. J. (K. B.) 839.

Where after conviction but before passing sentence the Recorder of a borough dies his successor in office may pass sentence. *R.* v. *Pepper and Platt* [1921] 3 K. B. 167; 16 Cr. App. R. 12.

Form of judgment.]—The judgment when pronounced is minuted on the indictment or in the books of the court, and a note thereof is made in the calendar of cases for trial, and signed by the judge at the conclusion of the sittings of the court. A formal conviction is not usually drawn up except where the record is made up for some special purpose, *e.g.*, for a writ of error (now abolished in England). 1 Steph. Hist. Cr. L. 309. It has been said that at common law in strictness a conviction consists of verdict, judgment and sentence. *Burgess* v. *Boetefeur*, 7 M. & G. 481; 13 L. J. (M. C.) 122; 8 Scott (N. R.) 194; and *cf.* 1 Hale, 685: *R.* v. *Kenworthy*, 1 B. & C. 711. But Co. Litt. 390 distinguishes "conviction" from "attainder" in that a man is "convicted" by verdict or confession, but not "attainted" until he has judgment, and in *Jephson* v. *Barker*, 3 Times L. R. 40, Stephen, J., held that an order made after a verdict of guilty, that the prisoner should enter into recognizances to come up for judgment when called for, was a conviction within 25 G. 2, c. 36, s. 5. For the purposes of the *Criminal Law Consolidation Acts* of 1861, and the *Criminal Appeal Act*, 1907, "conviction" means verdict or confession of guilt. *R.* v. *Blaby* [1894] 2 Q. B. 170: *R.* v. *Verney*, 73 J. P. 288; but it does not include the finding of a jury that at the time the appellant committed the act or made the omission charged in the indictment he was insane. *Felstead* v. *R.* [1914] A. C. 534; 30 T. L. R. 469, overruling *R.* v.

Ireland [1910] 1 K. B. 654; 79 L. J. K. B. 338; *see also R.* v. *Machardy* [1911] 2 K. B. 1144; 80 L. J. (K. B.) 1215.

The *form* of judgment, on conviction, is as follows:—"*Wherefore all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here, that the said* A. B., *for the said offence be imprisoned,*" etc., etc., [as the case may be]. The form in case of an acquittal (or an allowance of a plea of pardon) is—"*Whereupon all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here, that the said* A. B. *be discharged of the premises, and do depart hence without delay in this behalf.*" *See* Co. Ent. 356-390; Rast. Ent. 47, 51, etc.; 2 Hale, 392; 1 Chit. Cr. L. 719.

It is now the usual practice to enter up judgment and sentence separately on each count on which the defendant has been convicted, and not generally on the whole indictment, so that if on appeal the conviction on one or more counts is quashed, the judgment on good convictions on other counts may stand. *Castro* v. *R.*, 6 App. Cas. 229; 59 L. J. (Q. B.) 497; *Holloway* v. *R.*, 17 Q. B. 317; 2 Den. 287: and *see O'Connell* v. *R.*, 11 Cl. & F. at p. 377.

Where the judgment was that the defendant, "for the *felony*, aforesaid," should be transported for ten years, and it appeared that the indictment contained two counts, the offence charged in the first count warranting a sentence of transportation for ten years, but the other not, the judgment was held bad, "*felony*" not being *nomen collectivum*. *Campbell* v. *R.*, 11 Q. B. 799, 814; 2 Cox, 463; 17 L. J. (M. C.) 89.

But "*misdemeanor*" is *nomen collectivum*: and if an indictment for misdemeanor contains several counts, all of which are good in law, and all found by the jury to be proved, a judgment of imprisonment "for the misdemeanor aforesaid" is good. *R.* v. *Powell*, 2 B. & Ad. 75. *See Ryalls* v. *R.*, 11 Q. B. 781, 795; 18 L. J. (M. C.) 69. But if any one count be bad, a general judgment against the defendant "for his offences aforesaid" is also bad. *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1; 11 Cl. & F. 155; 1 Cox, 413; 8 Eng. Rep. 1061; *Gregory* v. *R.*, 15 Q. B. 974; 19 L. J. (Q. B.) 366. Errors of law and fact in the judgment as drawn up can be corrected by the Court of Criminal Appeal (*see post*, pp. 300 *et seq.*, and *Boaler* v. *R.*, 57 L. J. (M. C.) 85). Errors in a commitment to prison founded on the judgment may be corrected by the court of trial.

Alteration of sentence.]—A judge has the power of altering a sentence, either by reducing or increasing it, before he leaves the county on the termination of the business of the assize.

The court may, at any time during the same assizes or sessions or any adjournment thereof, vacate the judgment passed upon the defendant, before it has become matter of record, and pass another, less or even more severe (Com. Dig. Indictment (N.); Bac. Abr. Court of Sessions; 2 Salk. 606; *R.* v. *Price*, 6 East, 323, 328; *R.* v. *Leicestershire JJ.*, 1 M. & Sel. 442. When once the judgment is solemnly entered on the record, no court can make any alteration in it; but if any material defect appears on the face of it, it can be

reversed or amended on appeal (*see post*, p. 304), or amended on a case reserved. *R.* v. *Horn*, 15 Cox, 205; *R.* v. *Turner* [1904] 1 K. B. 181; 20 Cox, 540.

Commencement and termination of sentence.]—The sittings of a court of oyer and terminer or gaol delivery or quarter sessions are for most purposes contemplated in law as one day (*see Whitaker* v. *Wisbey*, 21 L. J. (N. S.) C. P. 116; 6 Cox, 109) : and the sentence runs from the first day of the sittings of the court of trial, unless otherwise ordered : *R.* v. *Wilkes*, 4 Bro. P. C. 367; 4 Burr. 2527 : *King* v. *R.*, 7 Q. B. 782; 14 L. J. (M. C.) 172, Ex. Ch. In the case of quarter sessions or adjourned sessions of the peace the sentence runs from the day when it is pronounced, unless the court otherwise orders. 21 & 22 Vict. c. 73, s. 12. Where a conviction is appealed against the operation of the sentence given by the court of trial is suspended until the appeal is heard. *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23), s. 14, sub-s. 3. And where an application for leave to appeal is finally refused or an appeal is dismissed, the Court of Criminal Appeal usually refuses to allow the time to count as part of the sentence, except where leave to appeal has been given. In successful appeals against sentence the court almost invariably allows the time to count as part of the sentence substituted by it.

The *Prison Act*, 1898 (61 & 62 Vict. c. 41), s. 12, provides that " (1) In any sentence of imprisonment passed after the commencement of this Act [12th August, 1898], the word month shall, unless the contrary is expressed, be construed as meaning calendar month " (*cf.* 52 & 53 Vict. c. 63, s. 3, as to Acts passed since 1850). " (2) A prisoner whose term of imprisonment or penal servitude expires on any Sunday, Christmas Day, or Good Friday, shall be discharged on the day next preceding." The sentence is computed by including the day on which the sentence of imprisonment begins, and excluding the numerically corresponding days in the month in which the sentence expires. If there is no such day the imprisonment, subject to the above enactment, ends on the last day of the month. *Migotti* v. *Colvill*, 4 C. P. D. 233; 48 L. J. (C. P.) 695; 14 Cox, 305. If a prisoner is detained beyond the term of imprisonment adjudged, the gaoler is liable to an action for false imprisonment. *Id.*; and *see Mee* v. *Cruikshank*, *ante*, p. 227.

Sentence for felony where convict is under previous sentence for another crime.]—" Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of *penal servitude*, the court, if empowered to pass sentence of *penal servitude*, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or *penal servitude* to which such person shall have been previously sentenced, although the aggregate term of imprisonment or *penal servitude* respectively may exceed the term for which either of those punishments could be otherwise awarded." The *Criminal Law Act*, 1827 (7 & 8 G. 4, c. 28), s. 10, as modified by the *Penal Servitude Acts*, *post*, pp. 236

et seq. It is doubtful whether the "subsequent offence" includes an offence committed before the offence for which the prisoner is undergoing sentence, but for which he is tried subsequently to that offence. *See R.* v. *Hemming*, 7 Cr. App. R. 236.

Concurrent or consecutive sentences.]—Where the defendant is convicted of several offences on different counts of the same indictment or on different indictments at the same assizes or sessions, the court as a general rule has power to direct that the sentences shall run consecutively or concurrently.

So where a defendant is charged with several offences at the same time, of the same kind, he may be sentenced to several terms of imprisonment or penal servitude, one after the conclusion of the other. *R.* v. *Rhenwick Williams*, 1 Leach, 529, 536: *R.* v. *Cutbush*, L. R. 2 Q. B. 379; 36 L. J. (M. C.) 70; 10 Cox, 489. The *Criminal Law Act*, 1827 (7 & 8 G. 4, c. 28), s. 10 (*supra*), relates only to cases where sentence is passed for *felony*, but the rule thus laid down by statute with regard to felony, also holds good at common law where sentence is passed for misdemeanor. *R.* v. *Castro*, 5 Q. B. D. 490: *Castro* v. *R.*, 6 A. C. 229; 50 L. J. (Q. B.) 497; 14 Cox, 452. Therefore, upon an indictment for misdemeanor, containing two counts for distinct offences, the defendant, if found guilty on each count, may be sentenced to imprisonment or penal servitude for two consecutive terms of punishment, one in respect of each count, although the aggregate of the punishments may exceed the punishment allowed by law for one offence. *Id.* The judges, in answer to a general question by the House of Lords whether a sentence of imprisonment to commence from and after the termination of an imprisonment to which the defendant had been before sentenced for another offence, was good in law, replied that it was good. *R.* v. *Wilkes*, 19 St. Tr. 1075, 1132. So also, where an indictment contained two counts for the misdemeanor of passing false coin, and the defendant was sentenced to two years' imprisonment, the judges held that this sentence was wrong (under the statutes then in force as to the coin), but they stated that a sentence of one year's imprisonment might have been passed for each offence, and that the commencement of the second might be postponed until the termination of the first. *R.* v. *Robinson*, 1 Mood. 413. Where an indictment for misdemeanor contained four counts, the third of which was held (on error) to be bad in substance, and the defendant, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment, of equal duration, one on each count, it was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count. *Gregory* v. *R.*, 15 Q. B. 974; 19 L. J. (Q. B.) 366.

In the case of an independent subsequent offence it appears to be doubtful whether the court can legally impose a sentence to run concurrently with a prior current sentence (*see R.* v. *Woolley*, 3 Cr. App. 57), though in practice it is frequently done. Where it is not specifically stated that the second sentence is to be consecutive to it, it is treated as being concurrent with the first sentence. *See also R.* v. *Hemming*, 7 Cr. App. R. 236.

By the *Penal Servitude Act*, 1864 (27 & 28 Vict. c. 47), s. 4, if the holder of a

licence granted under the *Penal Servitude Acts* "is convicted either by the verdict of a jury or upon his own confession of any offence for which he is indicted his licence is forthwith forfeited by virtue of such conviction." Such a person who pleads guilty, and is thereupon bound over to come up for judgment when called upon, has been "convicted" within the meaning of this section. *R.* v. *Rabjohns* [1913] 3 K. B. 171; 82 L. J. (K. B.) 994; 29 T. L. R. 614; 23 Cox, 553; 9 Cr. App. R. 33. By section 9 of the same Act, as amended by s. 3 (3) of the *Penal Servitude Act*, 1891 (54 & 55 Vict. c. 69), "where any licence granted in the form set forth in the said schedule A. (or any form lawfully substituted for it; s. 10, and 1891, s. 5) is forfeited by a conviction [on indictment of any offence], or is revoked in pursuance of any summary conviction under this Act or any other Act of Parliament, the person whose licence is revoked or forfeited shall *after undergoing* any other punishment to which he may be sentenced for the offence, in consequence of which his licence is forfeited or revoked, *further* undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted. . . ."

Having regard to these enactments the proper course in cases to which they apply is to impose the sentence for the subsequent offence without any reference to the *remanet* sentence; for the court has no power to make the new sentence and the *remanet* of the old sentence run concurrently. *R.* v. *Hamilton* [1908] 1 Cr. App. R. 87; nor can it make the new sentence follow the *remanet* of the old: *R.* v. *Smith*, *R.* v. *Wilson* [1909] 2 K. B. 756; 79 L. J. (K. B.) 4: *and see R.* v. *King* [1897] 1 Q. B. 214; 60 L. J. (Q. B.) 87; 18 Cox, 447, Hawkins, J.; but the fact that there is a *remanet* may properly be taken into consideration by the judge in determining the length of the sentence he should pass. *R.* v. *Dorrington*, 74 J. P. 392; 5 Cr. App. R. 119. *See also R.* v. *Fisher*, 5 Cr. App. R. 269: *R.* v. *Saunders*, 7 Cr. App. R. 18.

An appeal does not lie to the Court of Criminal Appeal in respect of the *remanet* of an old sentence: *R.* v. *Williams* [1909] 3 Cr. App. R. 2. Any complaint as to the illegality of compelling a prisoner to serve such *remanet* must be raised on *habeas corpus*. *Ib.*

There is now no objection to a sentence of imprisonment being made to run concurrently with a sentence of penal servitude, as while both stand the sentence of penal servitude only has effect. *R.* v. *Phillips*, 85 J. P. 188; 15 Cr. App. R. 161. A sentence of penal servitude consecutive to a sentence of imprisonment should not be passed under ordinary circumstances. *R.* v. *Jones*, 1 Cr. App. R. 196: *R.* v. *Hemming*, 7 Cr. App. 236: *R.* v. *Baumgarten*, 9 Cr. App. R. 212. And a sentence of imprisonment consecutive to a sentence of penal servitude should not be passed, as it interferes with the power to grant a licence under the *Penal Servitude Acts*. *R.* v. *Johnson*, 7 Cr. App. R. 97.

PUNISHMENTS.

Death.

By letter of the 10th June, 1903, Lord Alverstone, C.J., informed the Home Office that the judges had decided on the following form of death sentence to be used in all cases :—

"*The sentence of the Court upon you is, that you be taken from this place to a lawful prison and thence to a place of execution, and that you be there hanged by the neck until you be dead; and that your body be afterwards buried within the precincts of the prison in which you shall have been confined before your execution. And may the Lord have mercy on your soul.*"

Sentence of death may not be pronounced or recorded against a person under sixteen (8 Edw. 7, c. 67, s. 103). In the case of persons of sixteen or over judgment of death can be awarded on a conviction on indictment for four offences only : viz. treason, murder, offences against s. 2 of the *Piracy Act*, 1837 (7 W. 4 and 1 Vict. c. 88), and offences against the *Dockyards Protection Act*, 1772 (12 G. 3, c. 24). The provisions as to the execution of the sentence in cases of treason or murder are collected under *Treason* and *Murder*, *post*. The treatment in prison of persons under sentence of death is regulated by the *Local Prison Rules*, 1899 (St. R. & O., No. 322), rr. 93-95.

4 G. 4, c. 48 (*Judgment of Death Act*, 1823), s. 1.]—"Whenever any person shall be convicted of any felony *except murder* and shall by law be excluded (*sic*) the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth anything to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized to abstain from pronouncing judgment of death upon such offender, and instead of pronouncing such judgment to order the same to be entered of record; and thereupon such proper officer as aforesaid shall and may, and is hereby authorized to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before whom such offender shall have been convicted." By the *Central Criminal Court Act*, 1837 (7 W. 4 and 1 Vict. c. 77, ss. 1, 3-7), the practice of that court was assimilated to that of other criminal courts : the report to the crown on capital sentences was abolished, and the practice of recording sentence of death made the same as in other courts under 4 G. 4, c. 48.

The only felonies to which 4 G. 4, c. 48, now applies are those under the

Dockyards Protection Act, 1772 (12 G. 3, c. 24), and s. 2 of the *Piracy Act*, 1837 (7 W. 4 and 1 Vict. c. 88).

4 G. 4, c. 48, excepted murder from the case in which death might be recorded, but by the effect of 6 & 7 W. 4, c. 30, s. 2 (now *repealed* by 24 & 25 Vict. c. 95), sentence of death might from 1836 until 1861 be recorded even in cases of murder. *R.* v. *Hogg*, 2 M. & Rob. 380, Denman, C.J. The *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100, s. 2), directs that "upon every conviction for murder the court *shall pronounce* sentence of death."

As to staying execution of a sentence of death on a pregnant woman, *see ante*, p. 228.

Banishment and Expulsion.

Banishment of a British subject beyond the seas was not a lawful punishment at common law except under the obsolete procedure of abjuring the realm. *See Countess of Portland* v. *Prodgers*, 2 Vern. 104; 23 Eng. Rep. 677; 2 Hawk. c. 33, s. 137. 10 G. 4, c. 7, ss. 29, 34, provides for the banishment of certain members of Roman Catholic monastic orders. But this form of banishment seems to have been superseded by penal servitude. *See* 16 & 17 Vict. c. 99, s. 15; and 1 Russ. Cr. (7th ed.) 208.

Expulsion of aliens.]—By the *Aliens Act*, 1905 (5 Edw. 7, c. 13), s. 3, the secretary of state may if he thinks fit make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom (a) if it is certified to him by any court (including a court of summary jurisdiction) that the alien has been convicted before that court of any felony or misdemeanor or other offence for which the court has power to impose imprisonment without the option of a fine . . . and that the court recommend that an expulsion order should be made in his case either in addition to or in lieu of his sentence. The rest of the statute deals with offences not triable on indictment and with other grounds for expulsion not here material. The rest of the Act and the rules provide for the procedure, etc., relating to expulsion orders, etc.

Penal Servitude.

By the *Penal Servitude Act*, 1853 (16 & 17 Vict. c. 99), penal servitude was substituted in certain cases and under certain regulations for the punishment of transportation, as to which *see* 1 Russ. Cr. (7th ed.) 209.

(As to the meaning of the term "transportation," *see Bullock* v. *Dodds*, 2 B. & Ald. 258.)

Penal servitude can be imposed only where specifically allowed by statute, and persons under sixteen may not be sentenced to penal servitude (8 Edw. 7, c. 67, s. 102, sub-ss. 1, 2).

By the *Criminal Law Act*, 1827 (7 & 8 G. 4, c. 28), s. 8, "every person convicted of any felony, not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony;

and every person convicted of any felony, for which no punishment hath been, or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years " [*now penal servitude for not more than seven nor less than three years*; 20 & 21 Vict. c. 3, s. 2, *infra*; 54 & 55 Vict. c. 69, s. 1 (1), *infra*. 7 & 8 G. 4, c. 28, s. 8, does not provide for imprisonment with hard labour, but *see* 54 & 55 Vict. c. 69, s. 1 (2), *infra*.]

The following enactments regulating sentences of penal servitude are all that it appears necessary to set out here :—

16 & 17 Vict. c. 99 (*Penal Servitude Act*, 1853), *s.* 6—*Place and mode of confinement of offenders sentenced to penal servitude—Hard labour.*]—Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of his majesty's dominions beyond the seas, or in any port or harbour thereof, as one of his majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined.

[*As to the scope of this section*, see R. *v.* Mount, L. R. 6 P. C. 283; *and the* Colonial Prisoners Removal Acts *of* 1869 *and* 1884 (32 & 33 Vict. c. 10; 47 & 48 Vict. c. 31). *For the Orders in Council made under these Acts*, see Statutory Rules and Orders Revised (ed. 1904), vol. 2, *tit. Colonial Prisoner*, and subsequent annual vols.]

Sect. 7.—All Acts and provisions of Acts now applicable with respect to persons under sentence of transportation shall, so far as may be consistent with the express provisions of this Act, be considered to extend and be applicable to all persons under any sentence or order of penal servitude under this Act. . . . [*The rest of the section deals with the appointment of convict prisons in England.*]

Sect. 13.—*Saves the prerogative of mercy.*

Sect. 14.—Provided, also, that nothing herein contained shall interfere with or affect the authority or discretion of any court in respect of any punishment which such court may now award or pass on any offender other than transportation; but where such punishment may be awarded at the discretion of the court, instead of transportation or in addition thereto, the same may be awarded instead of or (as the case may be) in addition to the punishment substituted for transportation under this Act.

20 *&* 21 *Vict.* (*Penal Servitude Act*, 1857), *c.* 3.]—*Recites* 16 *&* 17 *Vict. c.* 99, *and* (*s.* 1) *repeals ss.* 1, 2, 3, *and* 4 *of the recited Act.*

Sect. 2.—*Penal servitude substituted for transportation.*]—" No person shall be sentenced to transportation; and any person who, if this Act and the said Act had not been passed, might have been sentenced to transportation, shall

be liable to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said Act and this Act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation." [*Transportation was provided by* 7 & 8 G. 4, c. 28, s. 8 (*ante*, p. 236).]

Sects. 3, 4.—*Conveyance of convicts beyond the seas.*]—*Appointment of places beyond the seas to which convicts may be conveyed. These sections are still in force, but the powers which they give have not been exercised.*

The treatment of convicts sentenced to penal servitude is regulated by the *Convict Prison Rules*, 1899 (Statutory Rules and Orders, 1899, No. 321); 1901 (Statutory Rules and Orders, No. 723); and 1905 (Statutory Rules and Orders, No. 75).

Sect. 6.—*Construction of statutes referring to "transportation."*]—"Where in any enactment now in force the expression 'any crime punishable with transportation,' or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude."

54 & 55 *Vict. c.* 69 (*Penal Servitude Act*, 1891), *s.* 1.—*Length of sentences of penal servitude.*]—"(1.) Where under any enactment in force when this section comes into operation [*5th August*, 1891] a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorized by the enactment." (2.) [Imprisonment in lieu of penal servitude, *vide infra.*] (3.) Repeal of 27 & 28 Vict. c. 47, s. 2.

Note.—The combined effect of 7 & 8 G. 4, c. 28, s. 8 (*ante*, p. 236), 20 & 21 Vict. c. 3, s. 2 (*supra*), and 54 & 55 Vict. c. 69, s. 1 (1) (*supra*), appears to be that where under any enactment in force on 5th August, 1891, an offence is merely declared to be *felony* and no punishment is specially provided for it, such offence remains punishable with penal servitude for any period not exceeding *seven* years; but where under any such enactment an offence is declared to be *punishable with penal servitude*, then the sentence may not exceed *five* years' penal servitude unless a greater period is authorized by the enactment. The Act of 1891 abolished the *minimum* sentence of five years' penal servitude introduced by 27 & 28 Vict. c. 47, s. 2 (*rep.*), and substituted a *minimum* sentence of three years' penal servitude, thus restoring the minimum which had been prescribed by the *Criminal Law Consolidation Acts* of 1861, except for offences under 24 & 25 Vict. c. 100, s. 61, where the minimum sentence was ten years' penal servitude. This exception was done away with by 54 & 55 Vict. c. 69, s. 1, under which the minimum sentence of penal servitude under s. 61, as for other crimes, is now three years.

It is now necessary in every case where the *Criminal Law Consolidation Acts* of 1861 prescribe a sentence of penal servitude, to read into them the provisions of 54 & 55 Vict. c. 69, s. 1 (1), *supra*. The editors have endeavoured to do this in describing the punishments for particular offences under those Acts.

IMPRISONMENT.

(a) General Statutory Provisions.

54 & 55 Vict. c. 69 (*Penal Servitude Act*, 1891), s. 1 (2): "Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, *unless such future Act otherwise provides*, award imprisonment for any term not exceeding two years with or without hard labour."

The effect of this enactment is virtually to repeal all provisions contained in Acts passed before 1891, empowering the *substitution* for transportation or penal servitude of a sentence of imprisonment for a term *exceeding* two years, *e.g.*, under 39 & 40 Vict. c. 36, s. 193 (smuggling); and in the case of Acts passed since 1891, to allow the substitution of imprisonment for penal servitude where the latter punishment only is mentioned in the later Act. The enactment does not apply to offences for which penal servitude cannot in any case be awarded. Thus it seems not as a matter of law to affect Acts which do not authorize penal servitude, but authorize imprisonment for three or more years, *e.g.*, 9 W. 3, c. 35, s. 1 (blasphemy); and it does not apply to enactments passed after 1891, fixing another term of imprisonment as an alternative to penal servitude.

8 Edw. 7, c. 67 (*Children Act*, 1908), s. 102 (1): "A child shall not be sentenced to . . . imprisonment for any offence, or committed to prison in default of payment of a fine, damages, or costs. . . . (3) A young person shall not be sentenced to imprisonment for an offence or committed to prison in default of payment of a fine, damages, or costs, unless the court certifies that the young person is of so unruly a character that he cannot be detained in a place of detention provided under this part of this Act, or that he is of so depraved a character that he is not a fit person to be so detained."

The discipline and treatment of prisoners sentenced to imprisonment for crime is regulated by the *Local Prison Rules*, 1899 (Statutory Rules and Orders, No. 322), as amended by subsequent rules.

(b) Imprisonment without Hard Labour.

Imprisonment without hard labour may be imposed for any common law misdemeanour not subject to special statutory punishment, and for any statutory misdemeanor for which no specific statutory punishment is prescribed. In cases falling within 54 & 55 Vict. c. 69, s. 1 (2) (*supra*), it may be imposed as an alternative to penal servitude. And it is also, under many statutes, a substantive or alternative punishment for felony, and for many misdemeanors.

There is not at common law any limit to the term of imprisonment without hard labour. *Castro* v. *R.*, 5 Q. B. D. 490, 509; 50 L. J. (Q. B.) 497, Bramwell, L. J.; 1 Stephen Hist. Cr. L. 490: *and see Re Forbes*, 8 New South Wales Rep. (Law), 68, and 3 St. Tr. (N. S.) 1353, Appendix H. The ordinary statutory maximum term of imprisonment is two years (*see* 54 & 55 Vict. c. 69,

s. 1 (2), *ante*, p. 239), and in practice this is not exceeded even in the case of offences to which it has not been specifically applied.

Imprisonment without hard labour was substituted in 1816 (56 G. 3, c. 138, s. 2) as a punishment for the pillory; and the latter mode of punishment was wholly abolished by 7 W. 4 and 1 Vict. c. 23 (*rep.*). *See* 1 Russ. Cr. (7th ed.) 250.

The common law rules as to imprisonment without hard labour are affected by the following statutory provisions :—

40 & 41 *Vict. c.* 21 (*Prison Act*, 1877), *s.* 40.]—" The Prison Commissioners shall see that any prisoner under sentence inflicted on conviction for sedition or seditious libel shall be treated as a misdemeanant of the first division, within the meaning of s. 67 of the *Prison Act*, 1865 (*see post*, p. 241), notwithstanding any statute, provision, or rule to the contrary."

61 & 62 *Vict. c.* 41 (*Prison Act*, 1898), *s.* 6.]—" (1.) Prisoners convicted of offences either on indictment or otherwise, and not sentenced to penal servitude or hard labour, shall be divided into three divisions.

"(2.) Where a person is convicted by any court of an offence and is sentenced to imprisonment without hard labour [or committed to prison for non-payment of a fine] the court may, if it thinks fit, having regard to the nature of the offence and the antecedents of the offender, direct that he be treated as an offender of the first division or as an offender of the second division. (*a*). If no direction is given by the court, the offender shall, subject to the provisions of this section, be treated as an offender of the third division. [*The words between square brackets have been added by* 4 & 5 *Geo.* 5, *c.* 58, *s.* 16 (2), *infra.*]

((3.) *Relates to imprisonment for default of paying debts or in lieu of distress.*)

" (4.) [*repealed by* 4 & 5 *Geo.* 5, *c.* 28, *infra.*]

" (5.) References in ss. 40 and 41 of the *Prison Act*, 1877 (*supra*, 40 & 41 Vict. c. 21), to a misdemeanant of the first division within the meaning of s. 67 of the *Prison Act*, 1865, shall be construed as references to an offender of the first division within the meaning of this section."

4 & 5 *Geo.* 5, *c.* 58 (*Criminal Justice Administration Act*, 1914), *s.* 16.]—" (1) Where imprisonment is imposed by any court in respect of the non-payment of any sum adjudged by that or any other court to be paid the imprisonment shall be without hard labour.

" Where a person convicted by or before any court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment may, in the discretion of the court, be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorize the imposition of hard labour or requires the imposition of hard labour.

" (2) If no direction is given by a court in pursuance of the powers conferred by section six of the *Prison Act*, 1898, as to the division in which an offender is to be placed, the offender shall, subject to the provisions of that section, be treated as an offender of the third division unless the visiting committee consider

(*a*) Courts of record and justices are considered by the Home Office not to have made sufficient use of this power.

the case suitable for treatment in the second division, and direct that the offender be so treated.

" Subsection (2) of that section shall be amended by the insertion after the words ' without hard labour ' of the words ' or committed to prison for non-payment of a fine.'

" (3) A court or visiting committee shall not direct an offender to be treated as an offender of the second division if his character and antecedents are such that he is likely to exercise a bad influence on first offenders.

" (4) The provisions of subsections (1) and (2) of section six of the *Prison Act*, 1898, as amended by this section, which relate to the classification of offenders sentenced to imprisonment for offences, shall apply to cases where the person is sentenced to imprisonment for failing to do or to abstain from doing any act or thing required to be done or left undone.

" (5) Subsection (3) of the same section (which requires that certain prisoners shall be placed in a separate division and treated under special rules and shall not be placed in association with criminal prisoners nor be compelled to wear prison dress unless their own clothing is unfit for use), shall extend to persons committed to prison for contempt of court, and accordingly the words ' or for contempt of court ' shall be inserted in that subsection after the words ' hard labour.' "

[*By the effect of s.* 15 (2) *of the* Prison Act, 1898 (61 & 62 Vict. c. 41), *s.* 67 *of the* Prison Act, 1865, *was repealed on May* 1, 1899, *on the coming into operation of the* Local Prison Rules (Statutory Rules and Orders), 1899, No. 322, *made under ss.* 2, 6, *of the Act of* 1898.]

By the *Local Prison Rules*, 1899 (Statutory Rules and Orders, 1899, No. 322, r. 40), a prisoner sentenced to imprisonment without hard labour shall be required to work, during such number of hours, not more than ten or less than six (exclusive of meals) in each day, as may be prescribed, unless the medical officer certifies that he is unfit for such labour; and shall be liable to punishment for neglect of work. He shall from the beginning of his sentence be employed on some useful industry for the purpose of which he may, if necessary, be associated, and he shall be entitled to such privileges as can be gained by industry with good conduct under the Progressive Stage System.

The treatment of persons sentenced to imprisonment in the first division is regulated by Part III., rr. 213 *et seq.* of the above Prison Rules, and that of persons sentenced to imprisonment in the second division by Part IV., rr. 232 *et seq.* Persons sentenced to imprisonment in the third division are dealt with under the general rules as to local prisons. (Statutory Rules and Orders, 1899, No. 322, r. 243.)

(c) *Imprisonment with Hard Labour.*

Imprisonment with hard labour can be imposed only under statutory authority. *See* under 54 & 55 Vict. c. 69, s. 1 (2) (*ante*, p. 239), or the particular enactment dealing with the offence in question, or under 4 & 5 Geo. 5, c. 58, s. 16 (1), *ante*, p. 240.

It would seem that unless the court specifies hard labour in the sentence it cannot be enforced. *R.* v. *Tyrone JJ.* [1909] 2 Ir. Rep. 763.

Imprisonment with hard labour for not over two years can be imposed *instead* of penal servitude. 54 & 55 Vict. c. 69, s. 1 (2) (*ante*, p. 239), and also for the following misdemeanors :—

3 *G.* 4, *c.* 114 (*Hard Labour Act*, 1822).]—*Recites* 56 *G.* 3, *c.* 162, *and* enacts, that " whenever any person shall be convicted of any of the offences thereafter specified and set forth : that is to say, . . . any attempt to commit felony; any riot, . . . keeping a common gaming-house, a common bawdy house, or a common ill-governed and disorderly house; . . . in each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct."

14 *& 15 Vict. c.* 100 (*Criminal Procedure Act*, 1851), *s.* 29.]—" Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; . . . any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition (*see R.* v. *Jackson*, 3 Cr. App. R. 192); it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment." This enactment does not extend to common law forgery. *R.* v. *Hamilton* [1901] 1 K. B. 740; 70 L. J. (K. B.) 480; 65 J. P. 265; 19 Cox, 675; nor to a conspiracy to contravene a statute aimed at a particular form of fraud : *R.* v. *Costello* [1910] 1 K. B. 28, 34; 79 L. J. (K. B.) 90; 74 J. P. 15.

By 4 & 5 Geo. 5, c. 58 (*Criminal Justice Administration Act*, 1914), s. 16 (1) (*ante*, p. 240), imprisonment with hard labour may be imposed for any offence, except for non-payment of a fine; and by the *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), s. 12 (1), as well as by the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 37 (4), imprisonment with or without hard labour for not more than two years may be imposed on conviction of any offence against the Act where a sentence of penal servitude may be imposed and in its stead.

The hard labour to be performed is regulated by the *Local Prison Rules*, 1899 (Statutory Rules and Orders, 1889, No. 322).

Rule 39. *Males.*]—(1) Every male prisoner, not being a juvenile offender, if sentenced to hard labour, shall, for twenty-eight days, or for the whole of his

sentence, if it is less than twenty-eight days, be employed in strict separation on hard bodily or hard manual labour, provided that no prisoner shall be so employed for more than ten or less than six hours per diem, exclusive of meals. If his sentence is more than twenty-eight days, he shall, after that period, provided his conduct and industry are good, be employed on labour of a less hard description in association if practicable, and shall be eligible for all the privileges of the Progressive Stage System. Provided that no prisoner shall be required to perform any labour of any description unless certified by the medical officer to be fit for such labour.

(2) An aged prisoner in weak health, or any prisoner suffering from physical or mental infirmity, likely to be aggravated by cellular isolation, shall be employed on such work and in such way as the medical officer may direct.

Rule 42. *Females.*]—Every female prisoner sentenced to hard labour shall be kept at labour during such number of hours, not more than ten or less than six (exclusive of meals) in each day, as may be prescribed, unless the medical officer certifies that she is unfit for such labour, regard being had to any advice or suggestions that members of the visiting committee or Discharged Prisoners' Aid Society are able to offer on the subject.

Rule 44. *Medical examination of hard labour prisoners.*]—The medical officer shall from time to time examine the prisoners sentenced to hard labour during the time of their being so employed, and shall enter in his journal the name of any prisoner whose health he thinks to be endangered by a continuance of labour, and thereupon the prisoner shall not again be employed at such labour until the medical officer certifies that he is fit for such employment.

(d) *Solitary Confinement.*

The power of courts of justice in England to impose the punishment of solitary confinement has been taken away by the repeal of the enactments conferring it: *see* 56 & 57 Vict. c. 54 (S. L. R.). For some time before 1893 solitary confinement was very rarely, if ever, imposed by a criminal court as part of its sentence. This probably arose from the fact that criminal prisoners when consigned to gaol were subjected to a confinement, which, if not in name, was in effect almost solitary. Under the *Prison Act*, 1865 (28 & 29 Vict. c. 126), s. 17, sub-s. 5:—"In a prison where criminal prisoners are confined, such prisoners shall be prevented from holding any communication with each other, either by every prisoner being kept in a separate cell by day and by night, except when he is at chapel or taking exercise, or by every prisoner being confined by night to his cell and being subjected to such superintendence during the day as will, consistently with the provisions of this Act, prevent his communicating with any other prisoner."

This enactment was *repealed* by s. 15 (2) of the *Prison Act*, 1898 (61 & 62 Vict. c. 41), on the coming into force (on May 1st, 1899) of the *Local Prison Rules*, 1899, made and approved by parliament under s. 4 of that Act, and the separate confinement of prisoners is now regulated by these rules, for which *see* Statutory Rules and Orders Revised (ed. 1904), vol. 10, *tit. Prison* (*E.*), pp. 6, 77.

Temporary Discharge for Ill-health.

3 Geo. 5, c. 4, s. 1. *Power of Secretary of State to discharge prisoners temporarily on account of their health.*]—(1) If the Secretary of State is satisfied that by reason of the condition of a prisoner's health it is undesirable to detain him in prison, but that, such condition of health being due in whole or in part to the prisoner's own conduct in prison, it is desirable that his release should be temporary and conditional only, the Secretary of State may, if he thinks fit, having regard to all the circumstances of the case, by order authorise the temporary discharge of the prisoner for such period and subject to such conditions as may be stated in the order.

(2) Any prisoner so discharged shall comply with any conditions stated in the order of temporary discharge, and shall return to prison at the expiration of the period stated in the order, or of such extended period as may be fixed by any subsequent order of the Secretary of State, and, if the prisoner fails so to comply or return, he may be arrested without warrant and taken back to prison.

(3) Where a prisoner under sentence is discharged in pursuance of an order of temporary discharge, the currency of the sentence shall be suspended from the day on which he is discharged from prison under the order to the day on which he is received back into prison, so that the former day shall be reckoned and the latter shall not be reckoned as part of the sentence.

(4) Where an order of temporary discharge is made in the case of a prisoner not under sentence, the order shall contain conditions requiring the attendance of the prisoner at any further proceedings on his case at which his presence may be required.

Sect. 2. *Savings.*]—(1) Where the prisoner is undergoing a sentence of penal servitude, the powers under this Act shall be in addition to and not in substitution for the power of granting licences under the *Penal Servitude Acts*, 1853 to 1891.

(2) Nothing in this Act shall affect the duties of the medical officer of a prison in respect of a prisoner whom the Secretary of State does not think fit to discharge under this Act.

Sect. 3. *Application to Scotland and Ireland.*]—In the application of this Act to Scotland and Ireland, references to the Secretary of State shall be construed as references to the Secretary for Scotland and the Lord Lieutenant respectively.

Sect. 4. *Short title.*]—This Act may be cited as the *Prisoners (Temporary Discharge for Ill-health) Act*, 1913.

Whipping.

Whipping was one of the ordinary common-law punishments for misdemeanors committed by persons of either sex, but is not now in practice inflicted except under statutory authority. In 1820 it was made illegal to whip females, and imprisonment was substituted. 1 G. 4, c. 57.

4 & 5 Geo. 5, c. 58 (*Criminal Justice Administration Act*, 1914), s. 36.]—(1) No person shall be sentenced to be whipped more than once for the same

offence. (2) No person shall be sentenced to be whipped otherwise than under a statutory enactment.

Adult males.]—The power of whipping males for felony given by 7 & 8 G. 4, c. 28, s. 8, was taken away by 51 & 52 Vict. c. 57 (S. L. R.), but the whipping of adult males, with no limitation as to the number of strokes, is still authorized by statute in the following cases: on conviction under the *Knackers Act*, 1786 (26 G. 3, c. 71), ss. 8, 9; on the sentence of incorrigible rogues at quarter sessions, 5 G. 4, c. 83, s. 10 (*see R.* v. *Anthony*, 1 Cr. App. R. 82): *R.* v. *Herion* [1913] 1 K. B. 284; 23 Cox, 387; 82 L. J. (K. B.) 82: *R.* v. *Fidler*, 78 J. P. 142; 9 Cr. App. R. 197; on conviction under s. 2 of the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69), as altered by the *Criminal Law Amendment Act*, 1912 (2 & 3 Geo. 5, c. 20), s. 3: *see R.* v. *O'Connor* [1913] 1 K. B. 557; 82 L. J. (K. B.) 335; under s. 7 (5) of the *Criminal Law Amendment Act*, 1912, *R.* v. *Austen* [1913] 1 K. B. 551; 23 Cox, 346; 82 L. J. (K. B.) 387; on conviction of offences against the person of the Sovereign under 5 & 6 Vict. c. 51, s. 2 (*see R.* v. *O'Connor*, 7 St. Tr. (N. S) 3 and n.). Male persons may also be whipped on conviction of offences against s. 23 (1) of the *Larceny Act*, 1916, or s. 21 of the *Offences against the Person Act*, 1861. The last two classes of offences include robbery under arms, assault under arms with intent to rob, robbery or assault with intent to rob by at least two persons, or robbery with violence; and attempting by any means whatever to choke, strangle, or suffocate any person, or any of such cases; or attempting to render any person insensible, unconscious, or incapable of resistance by any means calculated to choke, suffocate, or strangle such person with intent in any of such cases thereby to enable himself or any person to commit, or with intent in any of such cases to assist another in committing any indictable offence (26 & 27 Vict. c. 44). Whipping has been awarded for use of violence of the kind indicated, with intent to commit rape. *R.* v. *Smallbones*, Hants Winter Assizes [1898] 33 L. J. Newsp. 124. On conviction of a male person of offences under either of these sections:—"The court before whom he is convicted may, in addition to the punishment awarded by the said sections, or any part thereof, direct that the offender, if a male, be once privately whipped, subject to the following provisions: 1. That in the case of an offender whose age does not exceed sixteen years, the number of strokes at each whipping do not exceed twenty-five, and the instrument used shall be a birch rod: 2. That in the case of any other male offender the number of strokes do not exceed fifty at such whipping: 3. That in each case the court in its sentence shall specify the number of strokes to be inflicted, and the instrument to be used: provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence: provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view to his undergoing his sentence of penal servitude." 26 & 27 Vict. c. 44, s. 1 (*Garrotters Act*, 1863); 6 & 7 Geo. 5, c. 50, s. 37 (6).

Youthful male offenders.]—Males under sixteen may be sentenced to whipping on conviction under several sections of the *Larceny Act*, 1916, the

Malicious Damage Act, 1861, and the *Offences against the Person Act*, 1861, and under s. 4 of the *Criminal Law Amendment Act*, 1885. The age of the offender at the time of conviction is alone to be considered. *R.* v. *Cawthron* [1913] 3 K. B. 168; 82 L. J. (K. B.) 981; 29 T. L. R. 600. The mode of adjudging the sentences on conviction on indictment is prescribed by 24 & 25 Vict. c. 97, s. 75; 24 & 25 Vict. c. 100, s. 70; 6 & 7 Geo. 5, c. 50, s. 37 (6). As to whipping children or young persons on summary conviction for indictable offences, *see* Stone, Justices' Manual; Magistrates' Annual Practice; Douglas, Summary Jurisdiction Procedure.

Prisoners.]—Prisoners in any convict or local prison may be flogged for offences committed against prison discipline in cases falling within s. 5 of the *Prison Act*, 1898 (61 & 62 Vict. c. 41), and the *Convict Prison Rules*, 1899, rr. 82-85, and the *Local Prison Rules*, 1899, rr. 88-91, Statutory Rules and Orders Revised (ed. 1904), vol. 10, *tit. Prison* (*E.*).

Fine.

Treason and felony.]—At common law a fine was rarely, if ever, imposed on conviction of treason or felony. Its place was taken by the forfeitures which followed on conviction and attainder, abolished in 1870 (33 & 34 Vict. c. 23), s. 1, *post*, p. 264). The *Criminal Law Consolidation Acts* of 1861 do not contain any powers to inflict a fine on conviction of felony (except in the case of manslaughter), 24 & 25 Vict. c. 100, s. 5; nor is such a fine now ever inflicted without statutory authority, *e.g.*, under the *Probation of Offenders Act*, 1907, *post*, p. 260.

Misdemeanor.]—At common law the court may impose as part or the whole of a sentence for misdemeanor, a fine or ransom, *i.e.*, a pecuniary penalty, or pecuniary forfeiture. There is no general statutory limit to the amount of such fine, except the provisions of Magna Charta, 25 Edw. 1, c. 14, and the *Bill of Rights* (1 W. & M., sess. 2, c. 2), against excessive and unreasonable fines and assessments; and *see* 1 Steph. Hist. Cr. L. 490: *Re Forbes*, 8 N. S. W. Rep. (Law), 68. At common law a married woman could not be fined for misdemeanor: *R.* v. *Thomas*, cas. (K. B.) temp. Hard. 278; but since the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), there seems no reason why she should not be fined: and statutes authorising a fine are applied to married women as well as to other persons.

In the case of conviction of a person under sixteen powers are given to order the parent or guardian of the child to pay a fine instead of the child, etc. 8 Edw. 7, c. 67, s. 99 (1). As to appeal against such order, *see* s. 99 (6), *post*, p. 303.

The *Criminal Law Consolidation Acts* of 1861 all contain a discretionary power to fine for misdemeanors within the Acts, and so does the *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), s. 12 (2) (a), and the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 37 (5) (a). Reference should be made to the particular enactment creating a misdemeanor or fixing its punishment.

Recognizances.

Felony.]—A person convicted of any felony, except murder, within the *Criminal Law Consolidation Acts* of 1861 or later Acts superseding them, may, if the court think fit, be required, *in addition* to any other punishment, to enter into his own recognizances, with or without sureties, to keep the peace, and on failure to find sureties may be imprisoned for not over a year. 24 & 25 Vict. c. 97 (*Malicious Damage*), s. 73; c. 99 (*Coinage Offences*), s. 38; c. 100 (*Offences against the Person*), s. 71: *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), s. 12 (2) (b) (c) (d); *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 37 (5) (b).

Misdemeanor.]—A person convicted of any misdemeanor, whether at common law or by statute, may, *in addition to, or in substitution for* any other punishment, be required to enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a reasonable time to be specified in the order: *R.* v. *Dunn*, 12 Q. B. 1026, 1031, 1041 n. *See also R.* v. *Edgar*, 77 J. P. 356; 28 Cox, 558; and in cases within s. 5 of the *Libel Act*, 1843 (6 & 7 Vict. c. 96), *R.* v. *Trueman* [1913] 3 K. B. 164; 23 Cox, 550; 82 L. J. (K. B.) 916; 29 T. L. R. 599; and in cases within the *Criminal Law Consolidation Acts* of 1861 and later Acts superseding them (*see* the sections above quoted), may, in default of sureties, be imprisoned for not over one year. For the text of those enactments, *see* the particular titles. A married woman may be required to find sureties; 1 Russ. Cr. (7th ed.) 219. Where such an order is made, it usually prescribes imprisonment until the recognizances are entered into. Where the conditions of such recognizances are broken, the recognizance may be estreated. *See* Cr. Off. Rules, 1906, rr. 113, 115: Short and Mellor Cr. Pr. (2nd ed.) 289; and *ante*, pp. 95 *et seq.*

As to release on probation, *vide post*, p. 259.

DEALING WITH YOUTHFUL OFFENDERS.

(a) Persons under Sixteen.

8 Edw. 7, c. 67 (*Children Act*, 1908), s. 107. *Methods of dealing with children and young persons charged with offences.*]—"Where a child or young person charged with any offence is tried by any court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this or any other Act enabling the court to deal with the case, the case should be dealt with, namely, whether—

(*a*) by dismissing the charge; or

(*b*) by discharging the offender on his entering into a recognizance; or

(*c*) by so discharging the offender and placing him under the supervision of a probation officer (*see Probation of Offenders Act*, 1907, *post*, p. 260); or

(*d*) by committing the offender to the care of a relative or other fit person; or

(*e*) by sending the offender to an industrial school (*post*, p. 250); or

(*f*) by sending the offender to a reformatory school (*post*, p. 250); or

(*g*) by ordering the offender to be whipped (*ante*, p. 245); or
(*h*) by ordering the offender to pay a fine, damages, or costs; or
(*i*) by ordering the parent or guardian of the offender to pay a fine, damages, or costs (s. 99); or
(*j*) by ordering the parent or guardian of the offender to give security for his good behaviour; or
(*k*) by committing the offender in custody in a place of detention provided under this part of this Act (ss. 103, 104, 108, 109); or
(*l*) Where the offender is a young person, by sentencing him to imprisonment (*see* s. 102 (3), *infra*); or
(*m*) by dealing with the case in any other manner in which it may be legally dealt with (*see* s. 106, *post*):

Provided that nothing in this section shall be construed as authorising the court to deal with any case in any manner in which it could not deal with the case apart from this section." [*This section merely enumerates the legal modes of dealing with young persons prescribed by other enactments.*]

Sect. 131.—*Definition of child and young person.*]—"For the purposes of this Act, unless the context otherwise requires, the expression 'child' means a person under the age of fourteen years, and the expression 'young person' means a person who is fourteen years or upwards, and under the age of sixteen years." [*A person who at the time of trial is more than sixteen years old is not a "young person" within the meaning of this section, though he was under sixteen at the time of the commission of the offence:* R. *v.* Fitt [1919] 2 I. R. 35.]

Sect. 102.—*Restrictions on punishment of children and young persons.*]—(1) A child shall not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs.

(2) A young person shall not be sentenced to penal servitude for any offence.

(3) A young person shall not be sentenced to imprisonment for an offence or committed to prison in default of payment of a fine, damages, or costs, unless the court certifies that the young person is of so unruly a character that he cannot be detained in a place of detention provided under this part of this Act [s. 108], or that he is of so depraved a character that he is not a fit person to be so detained.

[*Sub-s.* (1) *of this section does not abolish the power to inflict whipping in addition to imprisonment which is given by the provisions of some other statute, because a sentence of imprisonment may not now be passed, but it merely substitutes a different form of detention. Where a sentence of whipping is imposed, it is the duty of the sheriff to carry out the order, and he may appoint a deputy for that purpose.* R. *v.* Lydford [1914] 2 K. B. 378; 83 L. J. (K. B.) 589; 78 J. P. 213; 30 T. L. R. 349; 10 Cr. App. R. 62.]

For an instance under sub-s. (3), *see* R. v. *Bradford*, 76 J. P. 46; 22 Cox, 627. There must be evidence upon which the court can certify under the sub-section. *R.* v. *Foster*, 12 Cr. App. R. 164.

Sect. 103.—*Abolition of death sentence in case of children and young persons.*]

—Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the court shall sentence the child or young person to be detained during his Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the secretary of state may direct, and whilst so detained shall be deemed to be in legal custody. [*Sentence of death may be pronounced on a person who is more than sixteen years of age at the time of trial:* R. *v.* Fitt [1919] 2 I. R. 35.]

Sect. 104.—*Detention in the case of certain crimes committed by children or young persons.*]—Where a child or young person is convicted on indictment of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, and the court is of opinion that no punishment which under the provisions of this Act it is authorized to inflict is sufficient, the court may sentence the offender to be detained for such period as may be specified in the sentence; and where such a sentence is passed the child or young person shall, during that period, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the secretary of state may direct, and whilst so detained shall be deemed to be in legal custody.

Sect. 105.—*Provisions as to discharge of children and young persons detained in accordance with directions of secretary of state.*]—(1) A person in detention pursuant to the directions of the secretary of state under the last two foregoing sections of this Act may, at any time, be discharged by the secretary of state on licence.

(2) A licence may be in such form and may contain such conditions as the secretary of state may direct.

(3) A licence may at any time be revoked or varied by the secretary of state, and where a licence has been revoked the person to whom the licence related shall return to such place as the secretary of state may direct, and if he fails to do so he may be apprehended without warrant and taken to that place.

Sect. 106.—*Substitution of custody in a place of detention for imprisonment.*] —Where a child or young person is convicted of an offence punishable in the case of an adult with penal servitude or imprisonment, or would if he were an adult be liable to be imprisoned in default of payment of any fine, damages, or costs, and the court considers that none of the other methods in which the case may legally be dealt with is suitable, the court may, in lieu of sentencing him to imprisonment or committing him to prison, order that he be committed to custody in a place of detention provided under this part of this Act and named in the order for such term as may be specified in the order, not exceeding the term for which he might, but for this part of this Act, be sentenced to imprisonment or committed to prison, nor in any case exceeding one month.

Sect. 108.—[*Obligation of the police authority to provide* (after 1st Jan., 1914), *places of detention for every petty sessional division within the police district.*]

Sect. 109.—*Provisions as to custody of children and young persons in places of detention.*]—(1) The order or judgment in pursuance of which a child or young person is committed to custody in a place of detention provided under

this part of this Act shall be delivered with the child or young person to the person in charge of the place of detention and shall be a sufficient authority for his detention in that place in accordance with the tenour thereof.

(2) A child or young person whilst so detained and whilst being conveyed to and from the place of detention shall be deemed to be in legal custody, and if he escapes may be apprehended without warrant and brought back to the place of detention in which he was detained.

(3) [*Power of secretary of state as to inspection of places of detention and classification, etc., of persons detained.*]

Sect. 110.—(1) *Expenses of maintenance of child or young person to be defrayed out of police fund of the police authority with contributions out of money provided by parliament, subject to regulations of secretary of state approved by the Treasury.*]

Reformatories and Industrial Schools.

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 57.—*Commitment of offenders between twelve and sixteen years of age to reformatory schools.*]—(1) Where a youthful offender, who in the opinion of the court before which he is charged is twelve years of age or upwards but less than sixteen years of age, is convicted, whether on indictment or by a petty sessional court, of an offence punishable in the case of an adult with penal servitude or imprisonment, the court may, in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a certified reformatory school. [*This re-enacts* 57 *&* 58 *Vict. c.* 48, *s.* 1.]

Provided that where the offender is ordered to be sent to a certified reformatory school he shall not in addition be sentenced to imprisonment. [*Vide* 8 Edw. 7, c. 67, ss. 103, 106, 107, *ante*, pp. 247 *et seq.*

(2) Where such an order has been made in respect of a youthful offender of the age of fourteen years or upwards, and no certified reformatory school can be found the managers of which are willing to receive him, the secretary of state may order the offender to be brought before the court which made the order or any court having the like jurisdiction, and that court may in lieu of the detention order make such order or pass such sentence as the court may determine, so however that the order or sentence shall be such as might have been originally made or passed in respect of the offence.

Sect. 58.—*Power of court of assize or quarter sessions as to persons under twelve.*]—(2) Where a child apparently under the age of twelve years is charged before a court of assize or quarter sessions or a petty sessional court with an offence punishable in the case of an adult by penal servitude or a less punishment, the court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to a certified industrial school. [*This subsection re-enacts the substance of* 29 *&* 30 *Vict. c.* 118, *s.* 5, *and* 1 *Edw.* 7, *c.* 20, *s.* 5. "*An offence punishable . . . by penal servitude or a less imprisonment*" *means an offence punishable with penal servitude or an offence punishable with less than penal servitude.* Tydeman *v.* Thrower [1914] 2 K. B. 494; 83 L. J. (K. B.) 814.]

(7) Where under this section a court is empowered to order a child to be sent to a certified industrial school the court, in lieu of ordering him to be so sent, may in accordance with the provisions of Part II. of this Act make an order for the committal of the child to the care of a relative or other fit person named by the court, and the provisions of that Part shall, so far as applicable, apply as if the order were an order under that Part.

Sect. 60.—*Power in such cases to place young persons under supervision of probation officer.*]—Where under the provisions of this Part of this Act an order is made for the committal of a child or young person to the care of a relative or other fit person named by the court, the court may in addition to such order make an order under the *Probation of Offenders Act*, 1907 [*post*, p. 260], that the child or young person be placed under the supervision of a probation officer: Provided that the recognizance into which the child, if not charged with an offence, or the young person is required to enter, shall bind him to appear and submit to the further order of the court.

Sect. 61.—*Power to defer operation of order.*]—An order of a court ordering a youthful offender or child to be sent to and detained in a certified school (in this Act referred to as a detention order) may, if the court think fit, be made to take effect either immediately or at any later date specified therein, regard being had to the age or health of the youthful offender or child.

Sect. 62.—*Choice of school.*]—(1) The school to which a youthful offender or child is to be sent under a detention order shall be such school as may be specified in the order, being some certified school (whether situate within the jurisdiction of the court making the order or not) the managers of which are willing to receive the youthful offender or child:

Provided that, if it is found impossible to specify the school in the detention order, the school shall, subject to the provisions of this Act with respect to the determination of the place of residence of a youthful offender or child, be such as a justice having jurisdiction in the place where the court which made the order sat may by endorsement on the detention order direct.

(2) Where the court is satisfied that a youthful offender or child is, by reason of mental or physical defect, incapable of receiving proper benefit from industrial training in an ordinary certified school, but is not incapable by reason of such defect of receiving benefit from industrial training in a certified school where special provision is made for the training of youthful offenders or children suffering from such defect, the detention order (if any) shall be for detention in a school where such provision is made.

Sect. 63.—*Temporary detention until sent to certified school.*]—If—

(*a*) a detention order is made but is not to take effect immediately; or

(*b*) at the time specified for the order to take effect the youthful offender or child is unfit to be sent to a certified school; or,

(*c*) the school to which the youthful offender or child is to be sent cannot be ascertained until inquiry has been made,

the court may make an order committing him either to custody in any place to which he might be committed on remand under Part V. of this Act [s. 97], or to the custody of a relative or other fit person to whose care he might be committed under Part II. of this Act, and he shall be kept in that custody

accordingly until he is sent to a certified school in pursuance of the detention order.

Sect. 64.—*Conveyance to school.*]—(1) The person by whom any youthful offender or child ordered to be sent to a certified school is detained shall at the appointed time deliver him into the custody of the constable or other person responsible for his conveyance to school, who shall deliver him to the superintendent or other person in charge of the school in which he is to be detained, together with the order or other document in pursuance of which the offender or child was detained and is sent to the school.

(2) The detention order in pursuance of which the youthful offender or child is sent to a certified school shall be a sufficient authority for his conveyance to and detention in the school or any other school to which he is transferred under this part of this Act.

Sect. 65.—*Period of Detention.*]—The detention order shall specify the time for which the youthful offender or child is to be detained in the school, being—

(*a*) in the case of a youthful offender sent to a reformatory school, not less than three and not more than five years, but not in any case extending beyond the time when the younthful offender will, in the opinion of the court, attain the age of nineteen years; and

(*b*) in the case of a child sent to an industrial school, such time as to the court may seem proper for the teaching and training of the child, but not in any case extending beyond the time when the child will, in the opinion of the court, attain the age of sixteen years.

Sect. 66.—*Provision as to religious persuasion.*]—(1) The court or justice, in determining the certified school to which a youthful offender or child is to be sent, shall endeavour to ascertain the religious persuasion to which the offender or child belongs, and the detention order shall, where practicable, specify the religious persuasion to which the offender or child appears to belong, and a school conducted in accordance with that persuasion shall, where practicable, be selected.

Sub-ss. (2), (3).—[*Deal with visits by a member of the religious persuasions specified in the order, and for transfer of the youthful offender to a school of his own religious persuasion, in the case of courts of assizes or quarter sessions by order of a secretary of state.*]

Sect. 67.—[*Placing youthful offenders out on licence.*]

Sect. 68.—[*Supervision of youthful offenders and children after expiration of sentence of detention.*]

Sect. 69.—[*Discharge of youthful offenders from certified schools and transfer to other such schools.*]

Sect. 70.—[*Apprenticeship.*]

Sect. 71.—[*Penalties for refusing to conform to rules of school.*]

Sect. 72.—[*Escaping from schools.*]

Sect. 75.—*Contributions by parents.*]—(1) The parent, or other person liable to maintain a youthful offender or child ordered to be sent to and detained in a certified school shall, if able to do so, contribute to his maintenance therein a sum not exceeding such sum as may be declared by order in council to represent approximately the average cost of maintenance of youthful offenders or children

in the class of school to which such school belongs in the locality in which such school is situate.

(2)—(*a*) The court by which a detention order (*vide ante*, p. 249) is made shall at the time of making that order, unless it considers that it is not in possession of the necessary information; . . . make an order on such parent or other person for

the payment to the chief inspector of such weekly sum, not exceeding such sum as aforesaid, as having regard to the liability of the parent or other person seems reasonable during the whole or any part of the time for which the offender or child is liable to be detained in the school :

Provided that the court making the detention order, if a court of assize or court of quarter sessions, may, of it thinks fit, remit the case to a court of summary jurisdiction for the place where the offender or child was committed for trial, for the purpose of making an order under this section, and upon the case being so remitted any such court of summary jurisdiction shall have power to make any such order under this section as the court which made the detention order might have made.

(3) Every such order may specify the time during which the payment is to be made, or may direct the payment to be made until further order, and shall be enforceable as an order of affiliation.

(4) Any order made under this section may, on application being made either by the person on whom the order is made or by or at the instance of the chief inspector and on fourteen days' notice of such application being given to the chief inspector or person on whom the order was made, be varied by any court which would have had power to make the order.

(5) An order made under this section shall be binding on the person on whom it is made :

Provided that if that person was not summoned to attend the sitting of the court at which the order was made, the order shall be served on him in manner prescribed by rules of court, and shall be binding on him unless he makes an application against it within the time prescribed by rules of court to the court by which the order was made or any court of like jurisdiction on the ground either that he is not liable to maintain the offender or child, or that he is unable to contribute the sum specified in the order, and on any such application being made the court may confirm the order with or without modifications or may rescind it. . . .

(10) Where there is some person, other than the parent, liable to maintain a youthful offender or child, an order under this section may be made on that person notwithstanding that there may be also a parent.

(11) Any court making an order under this section for contribution by a parent or other such person may, in any case where there is any pension or income payable to such parent or other person and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, further order that such part as the court may see fit of the pension or income be attached and be paid to the person named by the court. Such further order shall be an authority to the person by whom such pension or other income is payable to make the payment so ordered, and the

receipt of the person to whom the payment is ordered to be made shall be a good discharge to such first-named person.

Sect. 76.—[*Provision for expenses of conveyance to certified reformatory and of clothing the offender to fit him for admission.*]

Reformation of Young Offenders.

(*b*) *Juvenile Adults.*

8 *Edw.* 7, *c.* 59 (*Prevention of Crime Act*, 1908), *s.* 1.—*Power of court to pass sentence of detention in Borstal Institution.*]—(1) Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the court—

(*a*) that the person is not less than sixteen nor more than twenty-one years of age; and

(*b*) that, by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime;

it shall be lawful for the court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal Institution for a term of not less than *two years* not more than three years: [*The minimum term of one year has been increased to two years by* 4 *&* 5 *Geo.* 5, *c.* 58, *s.* 11 (1).]

Provided that, before passing such a sentence, the court shall consider any report or representations which may be made to it by or on behalf of the prison commissioners as to the suitability of the case for treatment in a Borstal Institution, and shall be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid. [*The court is not bound by the report of the commissioners.* R. *v.* Watkins, 74 J. P. 382. *It is to be noted that no provision is made for specifying the age of the offender in the indictment, nor for any finding on the subject by the jury, and that the court, subject to the statutory conditions, is to decide whether the Act should be applied, and to ascertain whether the offender falls within its scope. Where it appears after conviction that the person sentenced to Borstal is over twenty-one the Court of Criminal Appeal may alter the sentence.* R. *v.* McCann, 6 Cr. App. R. 115.]

(2) The secretary of state may by order direct that this section shall extend to persons apparently under such age not exceeding the age of twenty-three as may be specified in the order, and upon such an order being made this section shall, whilst the order is in force, have effect as if the specified age were substituted for "twenty-one":

Provided that such an order shall not be made until a draft thereof has lain before each House of Parliament for not less than thirty days during the session of Parliament, and if either House, before the expiration of that period, presents an address to his Majesty against the draft or any part thereof, no further

proceedings shall be taken thereon, but without prejudice to the making of any new draft order.

Sect. 2.—*Application to reformatory school offences.*]—Where a youthful offender sentenced to detention in a reformatory school is convicted under any Act before a court of summary jurisdiction of the offence of committing a breach of the rules of the school, or of inciting to such a breach, or of escaping from such a school, and the court might under that Act sentence the offender to imprisonment, the court may, in lieu of sentencing him to imprisonment, sentence him to detention in a Borstal Institution for a term not less than *two years* not more than three years, and in such case the sentence shall supersede the sentence of detention in a reformatory school. [*The minimum term of one year has been increased to two years by 4 & 5 Geo. 5, c. 58, s. 11 (1).*]

Sect. 3.—*Power to transfer from prison to Borstal Institution.*]—The secretary of state may, if satisfied that a person undergoing penal servitude or imprisoned in consequence of a sentence passed either before or after the passing of this Act, being within the limits of age within which persons may be detained in a Borstal Institution, might with advantage be detained in a Borstal Institution, authorise the prison commissioners to transfer him from prison to a Borstal Institution, there to serve the whole or any part of the unexpired residue of his sentence, and whilst detained in, or placed out on licence from, such an institution, this part of this Act shall apply to him as if he had been originally sentenced to detention in a Borstal Institution.

Sect. 4.—*Establishment of Borstal Institutions.*]—(1) For the purposes of this part of this Act the secretary of state may establish Borstal Institutions, that is to say, places in which young offenders whilst detained may be given such industrial training and other instruction, and be subjected to such disciplinary and moral influences as will conduce to their reformation and the prevention of crime, and for that purpose may, with the approval of the Treasury, authorise the prison commissioners either to acquire any land or to erect or acquire any building or to appropriate the whole or any part of any land or building vested in them or under their control, and any expenses incurred under this section shall be paid out of moneys provided by parliament.

(2) The secretary of state may make regulations for the rule and management of any Borstal Institution, and the constitution of a visiting committee thereof, and for the classification, treatment, and employment and control of persons sent to it in pursuance of this part of this Act, and for their temporary detention until arrangements can be made for sending them to the institution, and, subject to any adaptations, alterations, and exceptions made by such regulations, the *Prison Acts*, 1865 to 1898 (including the penal provisions thereof), and the rules thereunder, shall apply in the case of every such institution as if it were a prison. [*Regulations were made under this section on 23rd June, 1909, by the secretary of State for England* (Statutory Rules and Orders, 1909, No. 724), *and on 6th October, 1909, by the lord lieutenant for Ireland* (Statutory Rules and Orders, 1909, No. 1371); *and see Special Rules of the 24th January*, 1902 (Statutory Rules and Orders, 1902, No. 502).]

Sect. 5.—*Power to release on licence.*]—(1) Subject to regulations by the secretary of state, the prison commissioners may at any time after the expira-

tion of six months, or, in the case of a female, three months, from the commencement of the term of detention, if satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, by licence permit him to be discharged from the Borstal Institution on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case. [*The regulations of 23rd June*, 1909, supra, *provide for the forms of licences and revocations, and as to the conditions to be satisfied before discharge or licence is granted.*]

(2) A licence under this section shall be in force until the term for which the offender was sentenced to detention has expired, unless sooner revoked or forfeited.

(3) Subject to regulations by the secretary of state, a licence under this section may be revoked at any time by the prison commissioners, and where a licence has been revoked the person to whom the licence related shall return to the Borstal Institution, and, if he fails to do so, may be apprehended without warrant and taken to the institution.

(4) If a person absent from a Borstal Institution under such a licence escapes from the supervision of the society or person in whose charge he is placed, or commits any breach of the conditions contained in the licence, he shall be considered thereby to have forfeited the licence.

(5) A court of summary jurisdiction for the place where the Borstal Institution from which a person has been placed out on licence is situate or where such a person is found may, on information on oath that the licence has been forfeited under this section, issue a warrant for his apprehension, and he shall, on apprehension, be brought before a court of summary jurisdiction, which, if satisfied that the licence has been forfeited, may order him to be remitted to the Borstal Institution, and may commit him to any prison within the jurisdiction of the court until he can conveniently be removed to the institution.

(6) The time during which a person is absent from a Borstal Institution under such a licence shall be treated as part of the time of his detention in the institution : Provided that where that person has failed to return to the institution on the licence being forfeited or revoked, the time which elapses after his failure so to return shall be excluded in computing the time during which he is to be detained in the institution.

(7) A licence under this section shall be in such form and shall contain such conditions as may be prescribed by regulations made by the secretary of state.

Sect. 6.—[*Supervision by prison commissioners after expiration of term of sentence to detention in Borstal Institution: amended by 4 & 5 Geo. 5, c. 58, s. 11 (2) (3).*]

Sect. 7.—*Transfer of incorrigibles, etc., to prison.*]—Where a person detained in a Borstal Institution is reported to the secretary of state by the visiting committee of such institution to be incorrigible, or to be exercising a bad influence on the other inmates of the institution, the secretary of state may commute the unexpired residue of the term of detention to such term of imprisonment, with or without hard labour, as the secretary of state may determine, but in no case exceeding such unexpired residue.

Sect. 8.—[*Treasury contributions towards expenses of societies assisting, etc., persons discharged from Borstal Institutions.*]

Sect. 9.—[*Removal from one part of the United Kingdom to another.*]

[*Sections* 17, 18 *apply ss.* 1-9 *to Scotland and Ireland, with modifications as to the authorities for making rules and administering the Act.*]

4 & 5 Geo. 5, c. 58 (*Criminal Justice Administration Act*, 1914), s. 10.—*Power to send youthful delinquents to Borstal Institutions.*]—(1) Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and—

(*a*) it appears to the court that the offender is not less than sixteen nor more than twenty-one years of age; and

(*b*) it is proved that the offender has previously been convicted of any offence or, that having been previously discharged on probation, he failed to observe a condition of his recognizance; and

(*c*) it appears to the court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime,

it shall be lawful for the court, in lieu of passing sentence, to commit the offender to prison until the next quarter sessions, and the court of quarter sessions shall inquire into the circumstances of the case, and, if it appears to the court that the offender is of such age as aforesaid and that for any such reason as aforesaid it is expedient that the offender should be subject to such detention as aforesaid, shall pass such sentence of detention in a Borstal Institution as is authorised by Part I. of the *Prevention of Crime Act*, 1908, as amended by this Act; otherwise the court shall deal with the case in any way in which the court of summary jurisdiction might have dealt with it.

(2) A court of summary jurisdiction or court of quarter sessions, before dealing with any case under this section, shall consider any report or representations which may be made to it by or on behalf of the prison commissioners as to the suitability of the offender for such detention as aforesaid, and a court of summary jurisdiction shall, where necessary, adjourn the case for the purpose of giving an opportunity for such a report or representations being made.

(3) Where a person is committed to prison under this section, his treatment in prison shall, so far as practicable, be similar to that in Borstal Institutions, or he may, if the secretary of state so directs, be transferred to a Borstal Institution.

(4) The *Costs in Criminal Cases Act*, 1908, shall apply in the case of a person committed to prison by a court of summary jurisdiction under this section as if that person were committed for trial for an indictable offence. [*See post*, pp. 267 *et seq.*]

(5) A person sentenced by a court of quarter sessions under this section to detention in a Borstal Institution may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment, and the pro-

visions of the *Criminal Appeal Act*, 1907, shall apply accordingly. [*See post*, pp. 300 *et seq.*]

(6) This section shall come into operation on the first day of September nineteen hundred and fifteen.

Section 11.—*Amendment and application of Part I. of the Prevention of Crime Act*, 1908 (8 *Edw.* 7, *c.* 59).]—(1) The term for which a person may be sentenced to detention in a Borstal Institution under section one or section two of the *Prevention of Crime Act*, 1908, shall not be less than two years, and accordingly "two years" shall be substituted for "one year" in subsection (1) of section one and in section two respectively of that Act.

[*Sub-ss.* (2) *and* (3) *enact amendments of s.* 6 *of the Prevention of Crime Act*, 1908.]

(4) The provisions of Part I. of the *Prevention of Crime Act*, 1908, as so amended, shall apply to persons sentenced to detention in a Borstal Institution under this Act in like manner as they apply to persons sentenced under that Part of that Act.

Punishment of habitual criminals or for offences committed after previous conviction.]—*Vide post, tit. Habitual Criminals.*

Dealing with habitual drunkards.]—*Vide post, tit. Habitual Drunkards.*

Dealing with Defectives.

3 & 4 Geo. 5, c. 28 (*Mental Deficiency Act*, 1913), s. 1.—*Definition of defectives.*]—The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act :—

(*a*) Idiots; that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers;

(*b*) Imbeciles; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so;

(*c*) Feeble-minded persons; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools;

(*d*) Moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.

Sect. 8.—*Procedure in cases of persons guilty of offences, etc.*]—(1) On the conviction by a court of competent jurisdiction of any person of any criminal

offence punishable in the case of an adult with penal servitude or imprisonment, or on a child brought before a court under section fifty-eight of the *Children Act*, 1908, being found liable to be sent to an industrial school, the Court, if satisfied on medical evidence that he is a defective within the meaning of this Act, may either—

(*a*) postpone passing sentence or making an order for committal to an industrial school, and direct that a petition be presented to a judicial authority under this Act with a view to obtaining an order that he be sent to an institution or placed under guardianship; or

(*b*) in lieu of passing sentence or making an order for committal to an industrial school, itself make any order which if a petition had been duly presented under this Act the judicial authority might have made, which order shall have the like effect as if it had been made by a judicial authority on a petition under this Act :

Provided that, if the court is a court of summary jurisdiction and the case is one which the court has power to deal with summarily, the court, if it finds that the charge is proved, may give such directions or make such order as aforesaid without proceeding to a conviction, and such a person shall for the purposes of this Act be deemed to be a person found guilty of an offence.

(2) The court may act either on the evidence given during the trial or other proceedings, or may call for further medical or other evidence.

(3) Where the court so directs a petition to be presented against a person, it may order him to be detained in an institution for defectives or in a place of safety for such time as is required for the presentation of the petition and the adjudication thereof.

(4) Where it appears to any court of summary jurisdiction by which a person charged with an offence is remanded or committed for trial that such person is a defective, the court may order that pending the further hearing or trial he shall be detained in an institution for defectives, or be placed under the guardianship of any person on that person entering into a recognizance for his appearance.

(5) Where it appears to the police authority that any person charged with an offence is a defective, they shall communicate with the local authority, and it shall be the duty of the police authority to bring before the court such evidence as to his mental condition as may be available :

Provided that, where it is intended to bring such evidence before the court, the police authority shall give notice of the intention to the person charged, and to his parent or guardian, if known.

Postponing or Mitigating Punishment; and Probation.

Binding over to come up for judgment.]—Instead of imposing any of the punishments above described the court may, except in the case of murder, require the convicted person to enter into recognizances with or without sureties to come up for judgment when called upon.

This course may be adopted (1) when a case is reserved (*a*) or an appeal is

(*a*) *See R. v. Hamilton* [1899] 12 Manitoba, 507.

pending (*vide post*, p. 300); (2) in cases within the *Probation of Offenders Act*, 1907 (*infra*), or in any other case where the circumstances of the case make such a course expedient in the interests of justice. It is not unusual also to require the defendant to enter into recognizances in the meantime to keep the peace and be of good behaviour.

It is said that at common law an order of this kind is a substitute for punishment by stay of judgment, and is not a judgment of the court (*Burgess* v. *Boetefeur*, *ante*, p. 230); but there is authority for holding that even when judgment has not been actually given, there is a conviction (*vide ante*, p. 230).

Where no time is specified for coming up for judgment, and it is proposed to bring the defendant up for judgment, a notice must be given to him and to his bail, which in the King's Bench Division is a four days' notice if the defendant is not under recognizance to appear to receive sentence. Cr. Off. Rules, 1906, r. 166: *R.* v. *Chichester*, 17 Q. B. 504 n.: *R.* v. *Williams*, 18 W. R. 806; Short and Mellor, Cr. Pr. (2nd ed.) 126, 553. If he does not appear, a *capias* is issued, and if he cannot be found, proceedings for outlawry may be taken. The recognizance may also be estreated by order of the court. *See* Short and Mellor Cr. Pr. (2nd ed.) 127, 559. In a Canadian case, *R.* v. *Young* [1901] 2 Ontario L. R. 228, it was held that it is for the crown and not for a private prosecutor to take action in such cases.

[7 *Edw.* 7, *c.* 17 (*Probation of Offenders Act*, 1907), *s.* 1, *sub-s.* 1, *relates to courts of summary jurisdiction.*]

Sub-s. (2) Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order. [*Such court has inherent power subsequently to pass sentence. R.* v. *Spratling* [1911] 1 K. B. 77; 80 L. J. (K. B.) 176; 22 Cox, 348; 27 T. L. R. 31; 75 J. P. 39.]

(3) The court may, in addition to any such order, order the offender to pay such damages for injury or compensation for loss (not exceeding in the case of a court of summary jurisdiction ten pounds, or, if a higher limit is fixed by any enactment relating to the offence, that higher limit) and to pay such costs of the proceedings as the court thinks reasonable. [*Rest of sub-section repealed by* 8 *Edw.* 7, *c.* 67, *s.* 134, *and replaced by s.* 99 *of that Act.*]

(4) Where an order under this section is made by a court of summary jurisdiction, the order shall, for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with such restitution or delivery, have the like effect as a conviction.

Sect. 2.—*Probation orders and conditions of recognizances.*]—(1) A recog-

nizance ordered to be entered into under this Act shall, if the court so order, contain a condition that the offender be under the supervision of such person as may be named in the order during the period specified in the order and such other conditions for securing such supervision as may be specified in the order, and an order requiring the insertion of such conditions as aforesaid in the recognizances is in this Act referred to as a probation order.

(2) A recognizance under this Act may contain such additional conditions with respect to residence, abstention from intoxicating liquor, and any other matters, as the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or the commission of other offences. [*This sub-s.* (2) *has been substituted for the original sub-s.* (2) *of s.* 2 *by* 4 *& 5 Geo.* 5, *c.* 58, *s.* 8, *thus getting rid of the decision in* R. *v.* Davies [1909] 1 K. B. 892; 78 L. J. K. B. 363.]

(3) The court by which a probation order is made shall furnish to the offender a notice in writing stating in simple terms the conditions he is required to observe. [*By* 8 *Edw.* 7, *c.* 67, *ss.* 58, 59, 60 *there is power to apply this section to persons apparently under fourteen, who might be sent to a certified industrial school* (*vide ante*, p. 250).]

Sect. 3.—*Probation officers.*]—(1) There may be appointed as probation officer or officers for a petty sessional division such person or persons of either sex as the authority having power to appoint a clerk to the justices of that division may determine, and a probation officer when acting under a probation order shall be subject to the control of petty sessional courts for the division for which he is so appointed.

(2) There shall be appointed, where circumstances permit, special probation officers, to be called children's probation officers, who shall, in the absence of any reasons to the contrary, be named in a probation order made in the case of an offender under the age of sixteen.

(3) The person named in any probation order shall,—

(*a*) where the court making the order is a court of summary jurisdiction, be selected from amongst the probation officers for the petty sessional division in or for which the court acts; or

(*b*) where the court making the order is a court of assize or a court of quarter sessions, be selected from amongst the probation officers for the petty sessional division from which the person charged was committed for trial:

Provided that the person so named may, if the court considers it expedient on account of the place of residence of the offender, or for any other special reason, be a probation officer for some other petty sessional division, and may, if the court considers that the special circumstances of the case render it desirable, be a person who has not been appointed to be probation officer for any petty sessional division.

(4) A probation officer appointed for a petty sessional division may be paid such salary as the authority having the control of the fund out of which the salary of the clerk to the justices of that petty sessional division is paid may determine, and if not so paid by salary may receive such remuneration for acting under a probation order as the court making the order thinks fit, not

exceeding such remuneration as may be allowed by the regulations of such authority as aforesaid, and may in either case be paid such out-of-pocket expenses as may be allowed under such regulations as aforesaid, and the salary or remuneration and expenses shall be paid by that authority out of the said funds.

(5) A person named in a probation order not being a probation officer for a petty sessional division may be paid such remuneration and out-of-pocket expenses out of such fund as the court making the probation order may direct, not exceeding such as may be allowed under the regulations of the authority having control of the fund out of which the remuneration is directed to be paid.

(6) The person named in a probation order may at any time be relieved of his duties, and in any such case or in case of the death of the person so named, another person may be substituted by the court before which the offender is bound by his recognizance to appear for conviction or sentence, or, if he be a probation officer for a petty sessional division, by a court to whose control that officer is subject.

(7) In the application of this Act to the City of London and the metropolitan police court district, the city and each division of that district shall be deemed to be a petty sessional division.

Sect. 4.—*Duties of probation officers.*]—It shall be the duty of a probation officer, subject to the directions of the court—

(*a*) to visit or receive reports from the persons under supervision at such reasonable intervals as may be specified in the probation order or, subject thereto, as the probation officer may think fit;

(*b*) to see that he observes the conditions of his recognizance;

(*c*) to report to the court as to his behaviour;

(*d*) to advise, assist, and befriend him, and, when necessary, to endeavour to find him suitable employment.

Sect. 5.—*Variation of terms and conditions of probation.*]—The court before which any person is bound by a recognizance under this Act to appear for conviction and sentence or for sentence—

(*a*) may at any time if it appears to it, upon the application of the probation officer, that it is expedient that the terms or conditions of the recognizance should be varied, summon the person bound by the recognizance to appear before it, and, if he fails to show cause why such variation should not be made, vary the terms of the recognizance by extending or diminishing the duration thereof (so, however, that it shall not exceed three years from the date of the original order), or by altering the conditions thereof, or by inserting additional conditions; or

(*b*) may on application being made by the probation officer, and on being satisfied that the conduct of the person bound by the recognizance has been such as to make it unnecessary that he any longer be under supervision, discharge the recognizance.

[*This section has been substituted for the original s. 5 by 4 & 5 Geo. 5, c. 58, s. 9.*]

Sect. 6.—*Provision in case of offender failing to observe conditions of release.*]

—(1) If the court before which an offender is bound by his recognizance under this Act to appear for conviction or sentence, or any court of summary jurisdiction is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension, or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such court and at such time as may be specified in the summons.

(2) The offender, when apprehended, shall, if not brought forthwith before the court before which he is bound by his recognizance to appear for conviction or sentence, be brought before a court of summary jurisdiction.

(3) The court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid, may, if it is not the court before which he is bound by his recognizance to appear for conviction or sentence, remand him to custody or on bail until he can be brought before the last-mentioned court.

(4) An offender so remanded to custody may be committed during remand to any prison to which the court having power to convict or sentence him has power to commit prisoners. . . [*Rest of sub-section repealed by* 8 *Edw.* 7, *c.* 67, *s.* 134, *and replaced by s.* 97 *of that Act.*]

(5) A court before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence or, if the case was one in which the court in the first instance might, under s. 15 of the *Industrial Schools Act*, 1866 [29 & 30 Vict. c. 118], have ordered the offender to be sent to a certified industrial school, and the offender is still apparently under the age of twelve years, make such an order. [*See R.* v. *Spratling* [1911] 1 K. B. 77; 80 L. J. (K. B.) 176; 22 Cox, 348. *Section* 15 *of the* Industrial Schools Act, 1866, *is repealed by* 8 Edw. 7, *c.* 67, *s.* 134, *and replaced by s.* 58 (2) *of that Act; ante*, p. 250.]

Sect. 7.—*Power to make rules.*]—The secretary of state may make rules for carrying this Act into effect, and in particular for prescribing such matters incidental to the appointment, resignation, and removal of probation officers, and the performance of their duties, and the reports to be made by them, as may appear necessary. [*Rules were made under this section on* 27*th Nov.*, 1907 (*Statutory Rules and Orders*, 1907, *No.* 429).]

Sect. 8.—[*Adaptation to Scotland.*]

Sect. 9.—[*Adaptation to Ireland.*]

Sect. 10.—*Short title and repeal.*]—(1) This Act may be cited as the *Probation of Offenders Act*, 1907.

(2) The enactments mentioned in the schedule to this Act shall be repealed to the extent specified in the third column of that schedule [viz., 42 & 43 Vict. c. 49, s. 16; 50 & 51 Vict. c. 25; 1 Edw. 7, c. 20, s. 12.]

(3) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

CONDITIONAL PARDONS, OR COMMUTATION OF SENTENCE.

7 & 8 *G.* 4, *c.* 28 (*Criminal Law Act*, 1827), *s.* 13.]—"Where the King's Majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender as to the felony for which such pardon shall be so granted: Provided always that no free pardon nor any such discharge in consequence thereof, nor any conditional pardon, or the performance of the condition thereof in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon." *Cf.* 9 G. 4, c. 54, s. 39 (I.). [*Where after sentence of death a pardon is granted conditional on imprisonment for a term, the procedure for giving effect to the condition is prescribed by* 11 *G.* 4 *and* 1 *W.* 4, *c.* 39, *s.* 7, *and where after sentence of death a pardon is granted conditional on penal servitude, the enforcement of the condition is regulated by* 16 & 17 *Vict. c.* 99, *s.* 5. *As to the effect of pardon, see* R. *v.* Beacall, 1 C. & P. 456 n.; 1 Russ. Cr. (7th ed.) 252.]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 84.—*Power to send offenders conditionally pardoned to reformatory schools.*]—Where a youthful offender has been sentenced to imprisonment or penal servitude, and has been pardoned by his Majesty on condition of his placing himself under the care of some charitable institution for the reception and reformation of youthful offenders, the secretary of state may direct him, if under the age of sixteen years, to be sent to a certified reformatory school, the managers of which consent to receive him, for a period of not less than three and not more than five years, but not in any case extending beyond the time when he will in the opinion of the secretary of state attain the age of nineteen years; and thereupon the offender shall be subject to all the provisions of this part of this Act (*vide ante*, p. 250) as if he had been originally sentenced to detention in a certified reformatory school.

FORFEITURES AND DISQUALIFICATIONS CONSEQUENT ON CONVICTION.

33 & 34 *Vict. c.* 23 (*Forfeiture Act*, 1870), *s.* 1.]—"No confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture (*which word by s.* 5 *of the same statute does not include any fine or penalty imposed on any convict by virtue of his sentence*), or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry." [*The Act also contains provisions with reference to the property of convicts*, i.e., *persons* "against whom judgment of death, or of penal servitude, shall have been pronounced or recorded by any court of competent jurisdiction in England,

Wales, or Ireland, upon any charge of treason or felony" (s. 6). A convict cannot bring an action or alienate his property or make a contract (s. 8). *The object of these provisions appears to be to provide for the payment out of such property of all just claims upon it, and while placing it out of the power of the convict, during the continuance of his sentence, to provide for its management and to secure its eventual return to himself or to his representatives.* *See* Carr *v.* Anderson [1903] 1 Ch. 90; 2 Ch. 279; 72 L. J. Ch. 50 : Re Gaskell & Walters' Contract [1906] 2 Ch. 1; 75 L. J. Ch. 503.]

Sect. 2.—*Effect of conviction for treason or felony on capacity for holding office, etc., and exercising certain civil rights.*]—"If any person hereafter (i.e., *after 4th July*, 1870) convicted of *treason or felony, for which he shall be sentenced to death, or penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months*, shall at the time of such conviction hold any military or naval office, or any civil office under the crown or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or be entitled to any pension or superannuation allowance, payable by the public, or out of any public fund, such office, benefice, employment, or place, shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person shall receive a free pardon from his Majesty, within two months after such conviction, or before the filling up of such office, benefice, employment or place, if given at a later period; and such person shall become and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from his Majesty) shall continue thenceforth incapable of holding any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or of being elected or sitting or voting as a member of either house of parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland." [*Many other disqualifications for particular offices are created by conviction of crime.* *See* Official Index to Statutes (ed. 1910), *tit. Disqualification.* *As to what is "crime," see Conybeare* v. *London School Board* [1891] 1 Q. B. 118.]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 100.]—"The conviction of a child or young person shall not be regarded as a conviction of felony for the purposes of any disqualification attaching to felony." ["*Child*" *means a person under the age of fourteen, and* "*young person*" *means a person who is fourteen years of age or upwards and under sixteen.* 8 *Edw.* 7, *c.* 67, *s.* 131, *ante*, p. 248.]

9 *G.* 4, *c* 32 (*Civil Rights of Convicts Act*, 1828), *s.* 3.—*Effect of endurance of punishment for felony.*]—"And whereas it is expedient to prevent all doubts, respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged: Be it therefore enacted that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effect and consequences as a pardon under

the great seal as to the felony whereof the offender was convicted. Provided always that nothing herein contained nor the enduring of such punishment shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony." [*See ante*, p. 164, and *Hay* v. *Tower Division JJ.*, 24 Q. B. D. 561; 59 L. J. (M. C.) 79.]

CHAPTER VI.

COSTS AND REWARDS.

SECT. 1.

COSTS PAYABLE OUT OF LOCAL FUNDS.

Former Law.

AT common law the crown neither pays nor receives costs : and all the provisions as to payment of costs in criminal cases rest upon statute. *See* Short and Mellor, Cr. Pr. (2nd ed.) 389. 25 G. 2, c. 36, and 27 G. 2, c. 3, authorized payment out of the county rates of the costs of prosecution for felony in the event of conviction. 18 G. 3, c. 19, extended the power to award costs to cases of acquittal where the prosecution was properly instituted, and to witnesses attending on recognizance or *subpœna* : and *see* 58 G. 3, c. 70. These Acts were repealed and consolidated by 7 G. 4, c. 64, ss. 22-25, on which sections, as subsequently amended, the law as to costs in criminal cases in England rested until their repeal by the *Costs in Criminal Cases Act*, 1908, *infra*. For the history of this subject, *see* Parl. Pap. 1903, C. 1650, 1651.

Present Law.

8 *Edw.* 7, *c.* 15 (*Costs in Criminal Cases Act*, 1908), *s.* 1.]—(1) The following courts, namely,—

(*a*) a court of assize (*a*) or a court of quarter sessions (*b*) before which any indictable offence is prosecuted or tried, and

(*a*) *I.e.*, a court of assize, a court of oyer and terminer and a court of gaol delivery, including the Central Criminal Court (52 & 53 Vict. c. 63, s. 13 (4)).

(*b*) Meaning the justices of any county, riding, parts, division, or liberty of a county, or of any county of a city or county of a town in general or quarter sessions assembled, and includes the court of quarter sessions of a municipal borough having a separate court of quarter sessions (52 & 53 Vict. c. 63, s. 13 (14)).

(*b*) a court of summary jurisdiction by which an indictable offence is dealt with summarily under the *Summary Jurisdiction Acts*, and

(*c*) any justice or justices before whom a charge not dealt with summarily is made against any person for an indictable offence (in this Act referred to as the examining justices),

may on any such proceedings by order direct the payment of the costs of the prosecution or defence or both in accordance with the provisions of this Act out of the funds of the county or county borough out of which they are payable under this Act (in this Act referred to as local funds).

(2) The costs which may be so directed to be paid are such sums as, subject to the regulations of the secretary of state under this Act, appear to the court reasonably sufficient to compensate the prosecutor for the expenses properly incurred by him in carrying on the prosecution, and to compensate any person properly attending to give evidence for the prosecution or defence, or called to give evidence at the instance of the court, for the expense, trouble, or loss of time properly incurred in or incidental to the attendance and giving of evidence, and the amount of any costs so directed to be paid shall be ascertained as soon as practicable by the proper officer of the court. [*Under the repealed Acts the extra cost of a writ of* subpœna *was allowed in the case of an infant, whose recognizances could not be estreated*: R. *v.* Smith, 17 Cox, 601. *The cost of any copy of the indictment supplied to an accused person is to be treated as part of the costs of the prosecution under this section.* 5 & 6 Geo. 5, c. 90, r. 13 (2), ante, p. 78. *There is discretion in the court to allow costs on a higher scale than that usually allowed, but such an order will only be made where there are exceptional circumstances.* R. *v.* Studds, 75 J. P. 248.]

(3) Where it has been certified that a prisoner ought to have legal aid under the *Poor Prisoners Defence Act*, 1903 (3 Edw. 7, c. 38), the costs which may be directed to be paid under this section shall, subject to the regulations of the secretary of state under this Act, include the fees of solicitor and counsel, the costs of a copy of the depositions, and any other expenses properly incurred in carrying on the defence. [*This re-enacts* 3 Edw. 7, c. 38, s. 1 (2).]

(4) No expenses to witnesses, whether for the prosecution or defence shall be allowed at a court of assize or quarter sessions before which an indictable offence is prosecuted or tried, if such witnesses are witnesses to character only, unless the court shall otherwise order. [*The provisions of the* Inebriates Act, 1899 (62 & 63 Vict. c. 35), *as to costs are not repealed, but are adapted to the present Act* (sect. 9 (6), *post*, p. 271.]

Sect. 2.—*Payment of costs directed to be paid at assizes or quarter sessions.*]—As soon as the amount due to any person in respect of costs directed by a court of assize or a court of quarter sessions to be paid out of local funds has been ascertained, the proper officer shall make out and deliver to that person, or to any person who appears to the proper officer to be acting on behalf of that person, an order upon the treasurer of the county or borough out of the funds of which the costs are payable under this Act for the payment of that amount.

Sect 3.—*Payment of costs directed to be paid by court of summary jurisdiction or examining justices.*]—(1) As soon as the amount due to any person

in respect of costs directed by a court of summary jurisdiction or by examining justices to be paid out of local funds has been ascertained, the proper officer—

(*a*) shall pay to that person the amount due forthwith, if the amount is due for travelling or personal expenses in respect of his attendance to give evidence; and

(*b*) so far as the amount is not due in respect of attendance to give evidence, shall forward a certificate of the amount in the case of a committal to the proper officer of the court to which the defendant is committed, and in any other case to the clerk of the peace of the county or place for which the court or justices act.

(2) Any amount so paid by the proper officer to any person in respect of his attendance to give evidence shall be reimbursed to that officer by the treasurer of the county or borough out of the funds of which that sum is payable under this Act, and the treasurer shall be allowed any amount so reimbursed in his account.

(3) The certificate so forwarded shall be laid in the case of a certificate forwarded to the officer of the court to which the defendant is committed before that court, and in the case of a certificate forwarded to the clerk of the peace before the next court of quarter sessions, and in either case the court shall consider the certificate and cause an order to be made on the treasurer of the county or borough out of the funds of which the amount is payable for the payment of the amount so certified, or of any less amount which the court considers should have been allowed in the circumstances under this Act.

Where a certificate is forwarded to the officer of a court to which a defendant is committed for trial, the officer shall when practicable include the amount payable in respect of the costs so certified in the order for payment of any costs directed to be paid by the court to which the defendant is committed for trial.

Sect. 4.—*Definition of local funds and procedure for payment of orders on local funds.*]—(1) Costs in the case of offences committed or supposed to have been committed in a county borough, whether the court directing the payment is held in the borough or not, are payable under this Act out of the borough fund or borough rate of the county borough, and costs in the case of other offences are payable under this Act out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed. [*Under the repealed Acts the costs fell on boroughs which did not contribute to the county rate.* R. *v.* Brown, 19 Cox, 33. *Under this Act all boroughs except county boroughs are treated as part of the county to which they belong, and this change in the law gets rid of the controversies dealt with in* Re Kent County Council [1891] 1 Q. B. 389; 60 L. J. (Q. B.) 314: Mayor, etc., of Thetford *v.* Norfolk County Council [1898] 2 Q. B. 468; 67 L. J. Q. B. 907. *Where a person is prosecuted in one county for bigamy committed in another county, costs are payable out of the county fund of the county where the offence was committed.* R. *v.* London County Council, ex parte Keys [1914] 3 K. B. 310; 83 L. J. (K. B.) 1381; 78 J. P. 302; 30 T. L. R. 504.]

For the purposes of this provision, offences committed within the jurisdiction of the admiralty of England shall be deemed to have been committed in the

place where the offender is prosecuted or tried, or, where the offender is tried at the Central Criminal Court, in the county of London; but any costs paid in the case of those offences out of the funds of any county or county borough shall be repaid out of moneys provided by parliament. [*This re-enacts* 57 & 58 *Vict. c.* 60, *s.* 701.]

(2) The treasurer of any county or county borough on whom an order is made for payment of any sum on account of costs under this Act shall, upon sight of the order, pay out of the county fund or borough fund or rate, as the case may be, to the person named therein or his duly authorised agent the sum specified in the order, and shall be allowed the sum in his accounts.

(3) The council of every county and of every county borough shall cause their treasurer, or some other person on his behalf, to attend at every court of assize or quarter sessions at which any indictable offence in respect of which an order can be made under this Act on the treasurer is to be tried for the purpose of paying any orders so made, and to remain in attendance for that purpose during the sitting of the court, or until such hour as the court shall direct.

(4) For the purpose of meeting any change in the financial relations between any counties and boroughs which may arise by virtue of the provisions of this Act as to the payment of any costs allowed under this Act, any necessary equitable adjustment may be made by agreement between the councils of the counties or boroughs concerned, or, in default of agreement, by the Local Government Board.

The board may at their option determine the matter as arbitrators or otherwise, and, if they elect to determine the matter as arbitrators, the provisions of the *Regulation of Railways Act*, 1868 (31 & 32 Vict. c. 119), respecting arbitrations by the Board of Trade, and the enactments amending those provisions, shall apply as if they were herein re-enacted and in terms made applicable to the Local Government Board and the determination of matters under this subsection.

For the purpose of this subsection the Local Government Board may hold any local inquiry, and sub-ss. 1 and 5 of s. 87 of the *Local Government Act*, 1888 (51 & 52 Vict. c. 41), shall apply accordingly.

Sect. 5.—*Power to make regulations as to scales of costs, etc.*]—A secretary of state may make regulations generally for carrying into effect this Act and in particular with respect to the following matters, namely :—

(*a*) the rates or scales of payment of any costs which are payable out of local funds under this Act and the conditions under which any such costs may be allowed; and

(*b*) the manner in which an officer of the court making any payment on account of costs to any person in respect of his attendance to give evidence is to be reimbursed out of local funds; and

(*c*) the form of orders, certificates, and notices under this Act, and the furnishing of information when certificates are forwarded under this Act by officers of courts of summary jurisdiction or of examining justices.

(For s. 6, *vide post*, p. 284.)

Sect. 7.—*Power as to costs where person committed for trial is not ultimately*

tried.]—Where a person has been committed for trial for an indictable offence and is not ultimately tried, the court to which he is committed shall have power to direct or order payment of costs under this Act in the same manner as if the defendant had been tried and acquitted.

Sect. 8.—*Saving.*]—Nothing in this Act shall affect the operation of any enactment for the time being in force which provides for the payment of the costs of the prosecution or defence of an indictable offence out of any assets, money, or fund other than local funds, or by any person other than the prosecutor or defendant.

Sect. 9.—*Interpretation, etc.*]—(1) In this Act the expression "indictable offence" includes any offence punishable on summary conviction when that offence is under the *Summary Jurisdiction Acts* deemed to be as respects the person charged an indictable offence, and the expression "prosecutor" includes any person who appears to the court to be a person at whose instance the prosecution has been instituted, or under whose conduct the prosecution is at any time carried on.

(2) Any reference in this Act to a person committed for trial shall include a reference to a person whom a prosecutor is bound over to prosecute under the *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17, *ante*, p. 67), and any reference to the court to which a person is committed shall in such a case be construed as a reference to the court at which the prosecutor is so bound over to prosecute.

(3) This Act shall not apply in the case of an offence in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, and costs in any such case may be allowed as in civil proceedings as if the prosecutor or defendant were plaintiff or defendant in any such proceedings.

(4) This Act shall apply in a case of a person committed as an incorrigible rogue under the *Vagrancy Act*, 1824 (5 G. 4, c. 83), as if that person were committed for trial for an indictable offence, and in the case of any appeal under that Act as if the hearing of the appeal by the court of quarter sessions were the trial of an indictable offence.

(5) For the purpose of s. 13 of the *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23) (which relates to the costs of appeal), the hearing of a case stated under the *Crown Cases Act*, 1848 (11 & 12 Vict. c. 78), shall be deemed to be an appeal, and the person in relation to whose conviction the case is stated shall be deemed to be an appellant, and the provisions of this Act giving power to direct the payment of the costs of the prosecution and defence shall not apply to the hearing of any case so stated.

(6) A reference to the payment of costs out of local funds under this Act shall be substituted for any reference to the payment of expenses in the case of an indictment for felony, or in cases of felony, or in the case of a misdemeanor under the *Criminal Law Act*, 1826 (7 G. 4, c. 64), or any like reference in s. 1 of the *Inebriates Act*, 1899 (62 & 63 Vict. c. 35), or in s. 13 of the *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23), or in any other enactment. (*a*)

(*a*) *E.g.*, 19 & 20 Vict. c. 16, s. 13: 25 & 26 Vict. c. 65, s. 11: 41 & 42 Vict. c. 77, s. 10: 46 & 47 Vict. c. 22, s. 17: 57 & 58 Vict. c. 60, s. 701: 8 Edw. 7, c. 3, s. 2 (4), (5).

Sect. 10.—*Repeals, short title, context and commencement.*]—(1) The enactments specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule :

Provided that, without prejudice to the general application of s. 38 of the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), with regard to the effect of repeals (*ante*, p. 8),—

(*a*) any regulations made by a secretary of state under s. 5 of the *Criminal Justice Administration Act*, 1851 (14 & 15 Vict. c. 55) (*vide infra*), shall continue to have effect as if they had been made under the powers given by this Act; and (*b*) Where, in determining the amount of any fees to be paid to counsel or solicitors or any other matter which may be, but is not at the time of the passing of this Act, regulated by regulations made by the secretary of state, regard is had under the practice as existing at the time of the passing of this Act to any rates or scales of payment authorised by a court of quarter sessions, those rates and scales of payment shall have effect as if they were contained in regulations made by the secretary of state under this Act (*vide post*, pp. 276, 280); and (*c*) The repeal of any enactment which imposes an obligation to pay a fee to any officer shall not affect the salary paid in lieu of fees to any person who is such an officer at the time of the passing of this Act.

(2) *Commencement* (1st January, 1909).

(3) This Act may be cited as the *Costs in Criminal Cases Act*, 1908.

(4) This Act shall not extend to Scotland or Ireland.

REGULATIONS MADE BY THE SECRETARY OF STATE, DATED JUNE 14, 1904, GOVERNING THE ALLOWANCES PAYABLE TO PROSECUTORS AND WITNESSES IN CRIMINAL PROSECUTIONS. (STATUTORY RULES AND ORDERS, 1904, No. 1219, LEGAL SERIES No. 9.) AS AMENDED BY THE WITNESSES' ALLOWANCES ORDER, 1920, DATED MARCH 1, 1920. (STATUTORY RULES AND ORDERS, 1920, No. 354 —L. 6.)

In pursuance of the powers vested in me by s. 5 of the *Criminal Justice Administration Act*, 1851 (14 & 15 Vict. c. 55), I hereby make the following regulations :—(*a*).

1. *Witnesses giving Professional Evidence.*

There may be allowed to practising members of the legal and medical professions, for attending to give professional evidence, but not otherwise, allowance not exceeding the sums stated in the following scale :—

For attending to give evidence in the town or place where the witness resides or practises—

If the witness attends to give evidence in one case only, not more than one and a half guineas per diem;

(*a*) These regulations are kept in force by s. 10 (1), *supra*, until new regulations are made under s. 5, *ante*, p. 270. They have now been amended by the Witnesses' Allowances Order, March 1, 1920.

If the witness gives evidence on the same day in two or more separate and distinct cases, not more than three guineas;

For attending to give evidence elsewhere than in any town or place where the witness resides or practises, whether in one or more cases, not more than three guineas per diem.

In this regulation "town" means municipal borough or urban district; and "place" means within a radius of three miles from the court at which the witness attends to give evidence.

No allowance may be given under this regulation to the solicitor for the prosecution, except that, if such solicitor gives professional evidence which, in the opinion of the court, was necessary and saved the attendance of another witness, a fee of 10*s.* may be allowed.

2. *Expert Witnesses and Interpreters.*

There may be allowed (a) to expert witnesses such allowances for attending to give expert evidence as the court may consider reasonable, including, where necessary, an allowance for qualifying to give evidence, and (b) to persons employed as interpreters, such allowances as the court may consider reasonable.

3. *Police Officers.*

There may be allowed to police officers :—

When attending as prosecutors or witnesses at courts situate within the area of their own police authority, no allowance other than travelling allowances as provided in Regulation 8.

When attending as prosecutors or witnesses at courts situate outside the area of their own police authority—

(a) In the case of constables and sergeants, a sum not exceeding—

For the day . . . . . 6*s.*
For the night . . . . . 6*s.*

(b) In the case of inspectors, a sum not exceeding—

For the day . . . . . 7*s.* 6*d.*
For the night . . . . . 7*s.* 6*d.*

(c) In the case of superintendents and chief constables, a sum not exceeding—

For the day . . . . . 10*s.* 6*d.*
For the night . . . . . 7*s.* 6*d.*

For the purposes of this regulation, any court at which cases arising in the area of any police authority or part thereof are ordinarily heard or tried shall be deemed, so far as regards such cases, to be situate within that area.

4. *Prison Warders.*

There may be allowed to prison warders attending as prosecutors or witnesses or in charge of a prisoner produced to give evidence, a sum not exceeding that allowed them when absent from home on duty by the Regulations of the Prison

Department for the time being in force. The allowances in force at the present time are :—

	Day and Night,			Night only,
Chief warders . . .	10*s.*	Breakfast . 2*s.*	6*s.* 6*d.*	3*s.* 6*d.*
		Dinner . 3*s.*		
		Supper 1*s.* 6*d.*		
	Day and Night,			Night only,
Principal warders and warders,	8*s.*	Breakfast, 1*s.* 6*d.*	5*s.* 6*d.*	2*s.* 6*d.*
		Dinner 2*s.* 6*d.*		
		Supper 1*s.* 6*d.*		

For a prisoner so produced in the custody of warders, such sum for subsistence as the warders have been authorized to spend, and has been actually expended, on his behalf.

5. *Ordinary Witnesses.*

There may be allowed to witnesses, other than those hereinbefore mentioned, allowances not exceeding 14*s.* for the day and 10*s.* for the night :

Provided that the day allowance to the under-mentioned classes of witnesses, *when they are not necessarily detained from home for a night*, shall not, except for special reasons allowed by the court, exceed the following rates :—

(1) For children the allowance shall not exceed 2*s.* per diem ;

(2) For persons of the pauper or vagrant class the allowance shall not exceed 2*s.* per diem ;

(3) For other persons *who do not lose wages, earnings, or income by attendance*, the allowance shall not exceed 5*s.* per diem ;

(4) For persons in the service of an employer *who loses wages by attendance*, the allowance shall not exceed the following rates, except on the production of a certificate from the employer showing that the wages so lost are in excess of such rates :—

	s.	*d.*	
For agricultural labourers, unskilled labourers, and others similarly employed . . .	7	0	per diem.
For artisans, mechanics, and others similarly employed	10	0	,,
For clerks, shop assistants, and others similarly employed	10	0	,,

Provided also that no night allowance, within the above-mentioned limit of 10*s.*, shall exceed the expense reasonably incurred by the witness.

6. *Seamen.*

Where seamen have been detained on shore for the purpose of giving evidence in a criminal prosecution, the amount actually and reasonably incurred for their maintenance during their detention may be allowed in addition to any allowances made under the foregoing rule.

7. *General Regulation.*

No full day allowance under Regulations 1, 3, and 5 shall be paid unless the witness is necessarily detained away from his home, or place of business or employment, for at least four hours for the purpose of giving evidence.

If the time during which the witness is necessarily detained away from his home, or place of business or employment, be less than four hours, he shall receive not more than one-half of the allowance which he would have received had he been detained for the full day:

Provided that this regulation shall not apply (1) where the full day allowance is not more than 2*s*.; and (2) where the court is satisfied that a witness, though absent for less than four hours, necessarily loses, in consequence of his attendance, his whole day's wages.

No night allowance under Regulations 3, 4, and 5 shall be paid unless the witness in order to give evidence is necessarily detained away from home for the night.

There may be allowed to any prosecutor or other person who, in the opinion of the court, necessarily attends for the purpose of the prosecution otherwise than as a witness, the same allowance, including travelling allowance, as to an ordinary witness.

8. *Travelling Allowances.*

For attending court from a distance of over two miles there may be allowed:—

(1) To witnesses travelling by railway or other public conveyance, the fare actually paid. Railway fares, except for special reasons allowed by the court, shall be 3rd class; and if return tickets are available, only return rates shall be allowed. In the case of police witnesses, the reduced rates under the *Cheap Trains Act*, 1883 (46 & 47 Vict. c. 34), shall not be exceeded, except where the single fare is less than 1*s*., or for special reasons allowed by the Court.

(2) Where no railway or other public conveyance is available, and one or more witnesses necessarily travel by a hired vehicle, the sum actually paid for the hire of such vehicle, not exceeding 1*s*. 6*d*. a mile each way: provided that, where two or more witnesses attend from the same place, the total allowance shall not exceed 1*s*. 6*d*. a mile each way, unless the court is satisfied that it was reasonably necessary to hire more than one vehicle.

(3) To each witness travelling on foot or by a private conveyance, where no railway or other public conveyance is available, a sum not to exceed 3*d*. a mile each way.

Allowances made under (2) and (3) shall be made separately as mileage.

For the conveyance of witnesses suffering from serious illness, or for the carriage of heavy exhibits, sums in excess of the above rates may be allowed if the court is satisfied that the expense incurred was reasonably necessary.

Warders in charge of prisoners produced to give evidence may be allowed the cost of travelling by such means of conveyance as the governor of the prison may have directed.

9. *Form of Certificate.*

Revoked by regulations of November 28, 1908, *infra*.

10. *Date of Commencement* (1 *July*, 1904).

Given under my hand at Whitehall this 14th day of June, 1904.

A. Akers-Douglas,
One of His Majesty's Principal
Secretaries of State.

REGULATIONS, DATED NOVEMBER 28, 1908, MADE BY THE SECRETARY OF STATE UNDER SECTION 5 OF THE COSTS IN CRIMINAL CASES ACT, 1908 (8 EDW. 7, c. 15). (STATUTORY RULES AND ORDERS, 1908, No. 1001, LEGAL SERIES 34.)

In pursuance of the power vested in me by Section 5 of the *Costs in Criminal Cases Act*, 1908 (8 Edw. 7, c. 15), I hereby make the following regulations :—

1. Forms A, B, C, and D in the Schedule hereto, or forms to the like effect, with such variations as circumstances may require, shall be used by examining justices and courts of summary jurisdiction for the purposes of section 3 of this Act.

2. The profession, trade or occupation of each prosecutor, witness or other person, or the fact that he is without employment or occupation, must be stated in each of the forms; and the reason for which each sum is allowed must be stated in the certificates in Forms B and D.

3. (*a*) The justices' clerk, as the proper officer of the court for the purposes of section 3, shall pay any allowance included in any order in Form A or Form C to the person named in the order or to any person duly authorized to act on his behalf and shall cause the person to whom the payment is made to acknowledge the receipt of the same by affixing his signature in the right-hand margin of the order or to a memorandum which must show the sum paid and must be attached to the order.

4. (*a*) On presentation of the order in Form A or Form C with the receipts of the persons to whom the allowances have been paid, the amount thereof shall be re-imbursed to the justices' clerk by the treasurer of the county or county borough named in the order :

Provided that such re-imbursement, in lieu of being made on the presentation of each order, may be made at such intervals as the council of the county or county borough may direct so that the times fixed be such that the amount to be re-imbursed may be charged in the justices' clerk's account of fines and fees.

5. For fees payable by the prosecutor to the justices' clerk or the clerk of the peace which may be allowed by the examining justices or court of summary jurisdiction as part of the costs payable out of local funds, it shall not be necessary to use Forms B or D, but such fees may be entered in a book or schedule and certified in any convenient form.

(*a*) Modified as to certain police courts by regulation of December 16, 1908, *post*, p. 280.

6. The term "personal expenses" means expenses allowed in pursuance of regulations 1, 3, 4, and 5 of the regulations made by the secretary of state on the fourteenth day of June, 1904.

7. Regulation 9 and Appendices A and B of the regulations made by the secretary of state on the 14th day of June, 1904, as to the allowances payable to prosecutors and witnesses in criminal cases are hereby revoked.

Given under my hand at Whitehall, this 28th day of November, 1908.

H. J. Gladstone,
One of His Majesty's Principal Secretaries of State.

Schedule.

FORM A.

Order of Examining Justices for the Payment of Travelling and Personal Expenses, in a case dealt with under the Indictable Offences Act, 1848.

In the [County of Petty Sessional Division of].

A.B. having been examined before on a charge of and committed for trial at Assizes [*or* at Quarter Sessions] [*or* which charge has been dismissed]; it is hereby ordered that the undermentioned persons shall be paid, for their travelling and personal expenses in respect of their attendance to give evidence on the said charge, allowances out of the funds of the [County] of , as follows :—

	£	s.	d.
To C.D. [*state profession, trade, or occupation*] the prosecutor, residing at , for his attendance here half-day day and night . . .			
For travelling : mileage miles at per mile; fares . . .			
To E.F. [*state profession, trade, or occupation*] a witness residing at , for his attendance here half-day day and night . . .			
For travelling : mileage miles at per mile; fares . . .			

Dated this day of , one thousand nine hundred and .

J.P.
Justice of the Peace for the [County] aforesaid.

N.B.—When the several sums specified in this order have been paid by the justices' clerk to the persons named, the order with their receipts should be forwarded by the justices' clerk in support of his claim for re-imbursement to the treasurer of the county or county borough out of the funds of which they are payable.

FORM B.

Certificate of Examining Justices as to Costs of Prosecution, other than Travelling and Personal Expenses, in a case dealt with under the Indictable Offences Act, 1848.

In the [County of Petty Sessional Division of].

A.B. having been examined before on a charge of and committed for trial at Assizes [*or* at Quarter Sessions] [*or* which charge has been dismissed]; it is hereby certified that the undermentioned amounts are due to the prosecutor C.D. [*state profession, trade, or occupation*], residing at , for expenses properly incurred by him in carrying on the prosecution, viz. :—

	£	s.	d.
For			
For			
For			

[*State why the sum or the several sums are allowed.*]

and that the undermentioned sums are due to the undermentioned persons for their expense, trouble, and loss of time properly incurred in or incidental to attendance and giving evidence as to the said charge :—

	£	s.	d.
To E.F. [*state profession, trade, or occupation*] [*state whether expert witness, interpreter, &c.*] residing at , for [*state why the sum or the several sums are allowed*]			
To G.H. [*state profession, trade, or occupation*] [*state whether expert witness, interpreter, &c.*] residing at , for [*state why the sum or the several sums are allowed*]			

It is further certified that the foregoing sums do not include any travelling or personal expenses paid to any person in pursuance of Section 3 (1) (*a*) of the *Costs in Criminal Cases Act*, 1908.

Dated this day of , one thousand nine hundred and .

J.P.

Justice of the Peace for the [County] aforesaid.

N.B.—This certificate is to be forwarded, if the person charged is committed for trial, to the Clerk of Assize or the Clerk of the Peace, with the depositions, or if the charge is dismissed, to the Clerk of the Peace before the next Court of Quarter Sessions.

FORM C.

Order of Court of Summary Jurisdiction for the Payment of Travelling and Personal Expenses in the case of an Indictable Offence dealt with summarily.

In the [County of Petty Sessional Division of].

Before the Court of Summary Jurisdiction sitting at .

A.B. [an adult, young person, *or* child] having been charged for that he did [*state substance of charge*], and the above Court having, in pursuance of its statutory jurisdiction, dealt with the case summarily, on the day of , and convicted the said A.B. [*or* dismissed the said charge]; it is hereby ordered that the undermentioned persons shall be paid for their travelling and personal expenses in respect of their attendance to give evidence on the said charge allowances out of the funds of the [County] of , as follows :—

£ s. d.

To C.D. [*state profession, trade, or occupation*] the prosecutor, residing at , for his attendance here half-day day and night . . .
For travelling : mileage miles at per mile; fares . . .
To E.F. [*state profcssion, trade, or occupation*] a witness residing at , for his attendance here half-day day and night . . .
For travelling : mileage miles at per mile; fares . . .
Dated this day , one thousand nine hundred and .

J.P.

Justice of the Peace for the [County] aforesaid.

N.B.—When the several sums specified in this order have been paid by the justices' clerk to the persons named, the order with their receipts should be forwarded by the justices' clerk in support of his claim for re-imbursement to the treasurer of the county or county borough out of the funds of which they are payable.

FORM D.

Certificate of Court of Summary Jurisdiction as to Costs of Prosecution, other than Travelling and Personal Expenses, in the case of an Indictable Offence dealt with summarily.

In the [County of Petty Sessional Division of].
Before the Court of Summary Jurisdiction sitting at .

A.B. [an adult, young person, *or* child] having been charged for that he did [*state substance and offence*], and the above Court having, in pursuance of its statutory jurisdiction, dealt with the case summarily, on the day of , and convicted the said A.B. [*or* dismissed the said charge]; it is hereby certified that the undermentioned amounts are due to the prosecutor C.D. [*state profession, trade, or occupation*] residing at , for expenses properly incurred by him in carrying on the prosecution, viz. :—

£ s. d.

For
For } [*State why the sum or the several sums are allowed.*]
For

and that the undermentioned sums are due to the undermentioned persons for their expense, trouble, and loss of time properly incurred in or incidental to attendance and giving evidence on the said charge :—

£ s. d.

To E.F. [*state profession, trade, or occupation*] [*state whether expert witness, interpreter, &c.*] residing at , for [*state why the sum or the several sums are allowed*] . . . . . .
To G.H. [*state profession, trade, or occupation*] [*state whether expert witness, interpreter, &c.*] residing at , for [*state why the sum or the several sums are allowed*] . . . . . .

It is further certified that the foregoing sums do not include any travelling or personal expenses paid to any person in pursuance of Section 3 (1) (*a*) of the *Costs in Criminal Cases Act*, 1908.

Dated this day of , one thousand nine hundred and .

J.P.

Justice of the Peace for the [County] aforesaid.

N.B.—This certificate is to be forwarded by the Justices' Clerk to the Clerk of the Peace before the next Court of Quarter Sessions.

REGULATIONS, DATED DECEMBER 16, 1908, MADE BY THE SECRETARY OF STATE UNDER SECTION 5 OF THE COSTS IN CRIMINAL CASES ACT, 1908 (8 EDW. 7, C. 15). (STATUTORY RULES AND ORDERS, 1908, No. 1235, LEGAL SERIES 40.)

In pursuance of the power vested in me by s. 5 of the *Costs in Criminal Cases Act*, 1908 (8 Edw. 7, c. 15), I hereby make the following regulations :—

1. Regulation 3 of the regulations dated 28th November, 1908, shall in the police courts of the metropolis and of Chatham and Sheerness apply only to the payment of allowances to those persons who by order of the magistrate are paid before the case is disposed of and to those persons who are in attendance at the termination of the proceedings and who receive payment at the court on the same day. The payment of allowances to other persons shall be made by the receiver for the metropolitan police district, who shall be the proper officer for that purpose; and the receipt of the person to whom payment is so made or, where payment of a sum less than two pounds is made by money order or postal order, the discharged money order or postal order shall be attached to the magistrate's order.

2. Regulation 4 of the said regulations shall in its application to the said police courts be modified so that the Order in Form A or Form C with the receipts of the persons to whom the allowances have been paid or the discharged money orders or postal orders shall be presented by the receiver monthly to the treasurer of the county or county borough named in the Order, and re-imbursement shall be made to the receiver by such treasurer accordingly.

Given under my hand at Whitehall, this 16th day of December, 1908.

H. J. Gladstone,
One of His Majesty's Principal
Secretaries of State.

Counsel and solicitors.]—The regulations above printed do not make specific provision for the fees to be paid to counsel or solicitors for the prosecution, and these fees stand in a somewhat anomalous position. Under s. 26 of 7 G. 4, c. 64, county and borough quarter sessions had power to make and alter regulations as to the rate of costs. That section was repealed by 14 & 15 Vict. c. 55, s. 4, with a proviso that the regulations in force on August 1, 1851, should remain in force until revoked, or until regulations in relation to the matter thereof were made by the secretary of state. The secretary of state has never made any regulations as to the fees of solicitors and counsel, and county and borough justices have from time to time varied their rules as to such fees.

A return of the practice of county sessions is printed in Parl. Pap., 1903, C. 1651, p. 154. As to borough sessions and assizes, no returns are available. The result is that counsel's and solicitor's fees were until 1908 regulated by scales framed in the different jurisdictions under the Act of 1826 (Parl. Pap., 1903, C. 1650, p. 8, C. 1651, p. 154). As regards such allowances by courts of quarter sessions the practice is now regulated by s. 10 (1) (*b*) of the Act of 1908, *ante*, p. 272. Directions were issued by the Treasury in 1869 in the form of rules, which indicated the view of the Treasury as to the amount of the allowances in cases not covered by the Home Office Regulations then in force. These directions are still used as a guide in those counties and boroughs where a definite scale of county allowance has not been settled. In the matter of allowances to counsel and solicitors the taxing-officer exercises his discretion subject to the direction of the court. *See R.* v. *Jones*, 67 L. J. (Q. B.) 41; 63 J. P. 139, and Parl. Pap., 1903, C. 1651, p. 154.

Costs of the defence of poor prisoners.]—Where it has been certified that a prisoner ought to have legal aid under the *Poor Prisoners Defence Act*, 1903 (3 Edw. 7, c. 38), the costs which may be directed to be paid under the Act of 1908 shall, subject to the regulations of the secretary of state under that Act, "include the fees of solicitor and counsel, the costs of a copy of the depositions, and any other expenses properly incurred in carrying on the defence." 8 Edw. 7, c. 15, s. 1 (3) (*ante*, p. 268).

The rates and scales of payment in force are as follows :—

REGULATIONS OF THE SECRETARY OF STATE, DATED DECEMBER 30, 1903, AS TO THE ALLOWANCES WHICH MAY BE MADE UNDER SECTION 1 (2) OF THE POOR PRISONERS DEFENCE ACT, 1903. (STATUTORY RULES AND ORDERS, 1903, No. 1150.) (*a*)

In pursuance of s. 1 (2) of the *Poor Prisoners Defence Act*, 1903 (3 Edw. 7, c. 38), I hereby make the following regulations as to the rates and scales of payment which may be made for the expenses of the defence :—

1. There may be allowed to the solicitor a fee not exceeding £2 2*s*. 0*d*., provided that the presiding judge, after the conclusion of the trial, may, if he thinks fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceed £5.

In addition to such fee the solicitor may be allowed travelling expenses actually and necessarily incurred by himself and his clerk on the scale applicable to the travelling expenses of ordinary witnesses for a prosecution.

2. There may be allowed to counsel a fee of £1 3*s*. 6*d*.; provided that the presiding judge, after the conclusion of the trial, may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceeding £3 5*s*. 6*d*.

(*a*) Sub-s. (2) is repealed by s. 10 of the *Costs in Criminal Cases Act*, 1908; but these regulations appear to be continued in force by s. 10 (1) (*a*), *ante*, p. 272.

3. There may be allowed to the clerk to the justices or other person by whom a copy of the depositions is supplied to the prisoner's solicitors payment for the same at the rate of twopence per folio of 90 words.

4. There may be allowed to witnesses giving professional evidence and to expert witnesses the same expenses as might be allowed to witnesses for a prosecution (*ante*, pp. 272, 273), provided that the said sum shall not in any case exceed one guinea a day, except in pursuance of a special order made by the presiding judge.

5. There may be allowed to other witnesses the same expenses as may be allowed to witnesses for a prosecution (*ante*, p. 274).

6. The travelling expenses of witnesses may be allowed as in the case of a prosecution (*ante*, p. 275).

7. In these regulations the term "presiding judge" includes a recorder and a chairman of quarter sessions or their deputies.

Given under my hand at Whitehall, this 30th day of December, 1903.

A. Akers-Douglas,
One of his Majesty's Principal
Secretaries of State.

Costs of appellant in Court of Criminal Appeal.]—ORDER OF SECRETARY OF STATE, DATED 27TH MARCH, 1908, UNDER S. 13 (2) OF THE CRIMINAL APPEAL ACT, 1907. (STATUTORY RULES AND ORDERS, 1908, No. 247.)

In pursuance of the power conferred on me by s. 13 (2) of the *Criminal Appeal Act*, 1907, I hereby make the following regulations :—

1. The expenses of any solicitor or counsel assigned to an appellant by the Court of Criminal Appeal shall be allowed as follows :—

As respects an application for leave to appeal or an application for extension of time—

A fee not exceeding £2 2*s*. for a solicitor, and £1 3*s*. 6*d*. for counsel.

As respects any appeal—

A fee not exceeding £2 2*s*. for a solicitor and a fee for counsel not exceeding £1 3*s*. 6*d*., or, if in the opinion of the court the case is one of difficulty, not exceeding £2 4*s*. 6*d*.: provided that the court, after the conclusion of the appeal, may, if it thinks fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as the court, having regard to the length and difficulty of the case, may direct, but not exceeding £7 7*s*. for a solicitor and £11 for counsel.

In addition to such fees as aforesaid, a solicitor may be allowed travelling expenses actually and necessarily incurred by himself or his clerk on the scale applicable to an ordinary witness in a case of felony tried at assizes under the secretary of state's order of the 14th June, 1904.

2. The expenses of any witnesses attending on the order of the court or examined in any proceedings incidental to the appeal shall be allowed on the same scale as those of a witness in a case of felony tried at assizes under the secretary of state's order of 14th June, 1904: except that the night allowance of witnesses necessarily detained away from home in London for one or more

nights may, if the court thinks fit, be increased to not more than 8*s*. a night, but shall not exceed the expense reasonably incurred by the witness.

3. The expenses of the appearance of an appellant not in custody on the hearing of his appeal or on any proceeding preliminary or incidental to the appeal may be allowed on the same scale as those of an ordinary witness in a case of felony tried at assizes under the secretary of state's order of 14th June, 1904. (*See ante*, p. 272.)

Where the appellant appears in custody, the warders attending in charge of him may receive the same allowances as warders in charge of a prisoner may receive under the said order. (*See ante*, p. 273.)

4. Where any examination of witnesses is conducted by a person appointed by the court for the purpose, the person so appointed shall be allowed, if he be a stipendiary magistrate or justice of the peace, the actual expenses of travelling, the actual cost of hiring a room for the examination, if no court or public room is available, and such other incidental expenses as in the opinion of the court are necessarily and reasonably incurred. If the person appointed be a practising barrister he shall be allowed such expenses as aforesaid, and in addition such fee, not exceeding five guineas a day, as the court may allow.

5. Where any question is referred to a special commissioner appointed by the court, or where any person is appointed as assessor to the court, he shall be allowed such fee as the court having regard to his qualifications and ordinary remuneration may think reasonable, not exceeding ten guineas a day.

Local taxation grant.]—For some time prior to the passing of the *Local Government Act*, 1888 (51 & 52 Vict. c. 41), a parliamentary grant in aid was made in respect of the costs in criminal cases paid out of local funds under 7 G. 4, c. 64, and other Acts superseded by the Act of 1908. Section 24 of the Act of 1888 substituted for a grant in aid a system of local taxation grants under which the Treasury has no direct concern in the amounts allowed at assizes and sessions, except in the case of offences within the admiralty jurisdiction. *See* 8 Edw. 7, c. 15, s. 4 (1) (*ante*, p. 269); Parl. Pap. 1903, C. 1650, pp. vi.-viii.

Taxation and payment.]—Under the repealed enactments the entire order of the court, including all details or particulars, must be served on the treasurer: *R.* v. *Jones*, 2 Mood. 171; 9 C. & P. 401; and if the treasurer refused to pay, the remedy seems to have been by indictment, and not by *mandamus*. *R.* v. *Jeyes*, 3 A. & E. 416: *R.* v. *Bristow*, 6 T. R. 168: *R.* v. *Johnson*, 4 M. & Sel. 515 (and *see ante*, p. 6). But *see R.* v. *Treasurer of Oswestry*, 12 Q. B. 239; 17 L. J. (Q. B.) 223: *R.* v. *Treasurer of Exeter*, 5 Man. & Ry. 167.

The allowances are made to the director of public prosecutions in Treasury and Mint cases (8 Edw. 7, c. 3, s. 2 (4), (5)); and to the solicitor to the Post Office in Post Office cases.

SECT. 2.

ORDERS FOR PAYMENT OF COSTS BY DEFENDANT OR PROSECUTOR.

8 *Edw.* 7, *c.* 15 (*Costs in Criminal Cases Act*, 1908).—Sect. 6.—*Power of court to order payment of costs of prosecution by defendant or of defence by prosecutor.*]—(1) The court by or before which any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction including any proceedings before the examining justices, as taxed by the proper officer of the court. [*This section is not limited to courts of assize or quarter sessions and covers trial on indictment or criminal information in the King's Bench Division. Before this enactment a defendant could be ordered to pay costs on conviction of felony* (33 *& 34 Vict. c.* 23, *s.* 3), *or of certain misdemeanors. See* 24 *& 25 Vict. c.* 100, *s.* 74. *Where the offender is under sixteen, the court, in cases within* 8 *Edw.* 7, *c.* 67, *s.* 99, *can order his parent or guardian to pay the costs; and on making a probation order the court may order the offender to pay costs* (7 *Edw.* 7, *c.* 17, *s.* 1 (3). *There is no power to order imprisonment in default of payment of costs ordered to be paid under this section.* R. *v.* McCluskey, 15 Cr. App. R. 148.]

(2) Where a person is acquitted on any indictment or information by a *private* prosecutor for the publication of a defamatory libel, or for any offence against the *Corrupt Practices Prevention Act*, 1854 (17 & 18 Vict. c. 102), or for the offence of any corrupt practice within the meaning of the *Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 Vict. c. 51), or on an indictment for an offence under the *Merchandise Marks Acts*, 1887 to 1894, or on an indictment presented to a grand jury under the *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17, *ante*, p. 67), in a case where the person acquitted has not been committed to or detained in custody or bound by recognizance to answer the indictment, the court before which the person acquitted is tried may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, including any proceedings before the examining justices, as taxed by the proper officer of the court. [*The limitation in this sub-section to private prosecutions only applies to defamatory libel and corrupt practices, and follows the limitations of the repealed enactments* (6 *& 7 Vict. c.* 96, *s.* 8; 17 *& 18 Vict. c.* 102, *ss.* 10, 12; *and* 46 *& 47 Vict. c.* 51, *s.* 57 (2)).]

(3) Where a charge made against any person for any indictable offence (not dealt with summarily) is dismissed by the examining justices, the justices may, if they are of opinion that the charge was not made in good faith, order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, but if the amount ordered to be paid exceeds twenty-five pounds the prosecutor may appeal against the order to a court of quarter sessions in manner provided by the *Summary Jurisdiction Acts*, and no proceedings shall be taken

upon the order until either the time within which the appeal can be made has elapsed without an appeal being made, or, in case an appeal is made, until the appeal is determined or ceases to be prosecuted. [*The justices have power to state a case on the question whether an order under this subsection is rightly made.* R. *v.* Allen [1912] 1 K. B. 365; 81 L. J. (K. B.) 258; 22 Cox, 669.]

(4) An order under this section for the payment of costs by the person convicted or by the prosecutor may be made in addition to an order directing payment of costs out of local funds (*ante*, pp. 267 *et seq.*), and, where an order is made directing payment out of local funds, the costs shall primarily be payable out of local funds in accordance with this Act, but notice of any order under this section for the payment of costs by the person convicted or by the prosecutor shall be sent to the council of the county or borough out of the funds of which they are so payable.

(5) Any order under this section may be enforced, as to any costs primarily paid out of local funds, by the council of the county or borough out of the funds of which they have been so paid, and, as to any other costs, by the person to whom the costs are ordered to be paid, in the same manner as an order for the payment of costs made by the high court in civil proceedings, or as a civil debt in manner provided by the *Summary Jurisdiction Acts*, and, in the case of costs which a person convicted is ordered to pay, out of any money taken on his apprehension from the person convicted, so far as the court so directs.

Orders made under the section are suspended pending appeal. *Criminal Appeal Rules*, 1908, r. 11.

It is assumed that the section extends to prosecutions for corrupt practices in municipal elections. 47 & 48 Vict. c. 70, s. 2, incorporates the definition of corrupt practice in 46 & 47 Vict. c. 51, s. 3, for the purpose of municipal elections. 47 & 48 Vict. c. 70, s. 30, which applied 46 & 47 Vict. c. 51, s. 53, to municipal elections, was held to warrant an order on the prosecutor to pay the defendant's costs on an unsuccessful private prosecution : *R.* v. *Law* [1900] 1 Q. B. 605; 69 L. J. (Q. B.) 348; 19 Cox, 452.

As to the position of the director of public prosecutions who takes up a prosecution after a private prosecutor has been bound over under the *Vexatious Indictments Act*, 1859 (*ante*, p. 67), and 42 & 43 Vict. c. 22, s. 7, *see Stubbs* v. *Director of Public Prosecutions*, 24 Q. B. D. 577; 59 L. J. Q. B. 201.

An order for costs under 33 & 34 Vict. c. 23, s. 3 (*rep.*), was not affected by the bankruptcy of the offender after apprehension but before trial. *R.* v. *Roberts*, L. R. 9 Q. B. 77; 43 L. J. (M. C.) 17. Where local solicitors conducted a prosecution under the *Debtors Act*, 1869, on behalf of the treasury, and an arrangement was made by which the defendant paid certain costs, the solicitors were held accountable to the treasury for the costs so received. *Re Parkinson*, 76 L. T. (N. S.) 715.

5 & 6 Geo. 5, c. 90 (*Indictments Act*, 1915).—Sect. 5. *Orders for amendment of indictment, etc.*]—(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may

make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

Sect. 6. *Costs of defective or redundant indictments.*]—Where it appears to the court that an indictment contains unnecessary matter, or is of unnecessary length, or is materially defective in any respect, the court may make such order as to the payment of that part of the costs of the prosecution which has been incurred by reason of the indictment so containing unnecessary matter, or being of unnecessary length, or being materially defective as the court thinks fit.

SECT. 3.

COSTS OF REMOVED INDICTMENTS.

SECTION 1 of the *Costs in Criminal Cases Act*, 1908, applies to courts of assize, but appears not to apply to trials in the King's Bench Division at the Royal Courts of Justice, whether proceedings began there or were removed thither by *certiorari*. The repealed Acts, 7 G. 4, c. 64, did not apply to indictments removed by *certiorari* into the King's Bench Division. *R.* v. *Johnson*, 1 Mood. 173 : *R.* v. *Richards*, 8 B. & C. 420; 2 Man. & Ry. 405 : *R.* v. *Treasurer of Exeter*, 5 Man. & Ry. 167; 6 L. J. (M. C.) 104 : *R.* v. *Kelsey*, 4 Dowl. 481 : *R.* v. *Oates*, 1 Mood. 175, *cit.* But there is some ground for saying that these authorities only applied to cases where the prosecutor had himself removed the indictment by *certiorari*. See the report of *R.* v. *Richards*, 1 Archb. Peel's Acts (3rd ed.) 214; and *Anon.*, 8 A. & E. 589, 591. As to indictments transmitted from sessions to assizes, *see ante*, p. 119.

Where an indictment or inquisition is sent to the Central Criminal Court for trial under the "*Palmer Act*" (19 & 20 Vict. c. 16), the court may order the costs of the prosecutor and witnesses to be paid by the same persons and in the same manner as if the court were held in the county or place where the indictment or inquisition was found or taken. 19 & 20 Vict. c. 16, s. 13. There are similar provisions in the *Jurisdiction in Homicides Act*, 1862 (25 & 26 Vict. c. 65), ss. 11, 12. And where the removal under the "*Palmer Act*" was at the instance of the crown, and the defendant is acquitted, the court may order the treasury to reimburse to him the amount properly expended for the removal of the trial, less any amount advanced to him by the treasury under certificate of the high court granted on ordering the removal. 19 & 20 Vict. c. 16, ss. 25, 26.

The Acts of 1856 and 1862 are not repealed by 8 Edw. 7, c. 15, s. 10, but so far as the fund out of which the costs are payable seem to fall within s. 9 (6) of that Act (*ante*, p. 271).

Where an offence committed in a county of a city is tried at the assizes in the next adjoining county, the costs of prosecution are payable by and to the same persons and in the same manner as if the indictment had been tried in a court of oyer and terminer, or general gaol delivery, in the county of the city.

51 G. 3, c. 100, s. 2; 14 & 15 Vict. c. 55, ss. 19, 23. The present effect of these sections seems to be that the costs fall on the county of a city only if it is also a county borough (*ante*, p. 270).

SECT. 4.

COSTS OF PROSECUTION BY GUARDIANS OF THE POOR.

GUARDIANS of a poor-law union may charge to the common fund of the union their reasonable costs of prosecutions at their instance, [and so far as not defrayed by the offender, or (*ut supra*) out of the county or other local rate], in respect of the following offences; (a) obstructing or assaulting any officer engaged in the administration of the poor law; (b) neglect or breach of duty in his office by an officer employed in the administration of the poor laws, or maltreatment or abuse by such officer of any poor person; (c) fraudulently obtaining, stealing, purloining, embezzling, wasting, injuring, or wilfully misapplying property applicable to or connected with the relief of the poor; (d) any offence directly affecting the administration of the poor laws, 7 & 8 Vict. c. 101, s. 9; 28 & 29 Vict. c. 79, s. 9; (e) ill-treatment of servants or apprentices or bodily injury to persons under sixteen where two justices certify that the prosecution ought in the interests of justice to be conducted by the guardians, 24 & 25 Vict. c. 100, s. 73; (f) offences in relation to a child or young person within Part II. and Sched. I. of the *Children Act*, 1908 (8 Edw. 7, c. 67, s. 34 (1)). *See* 8 Edw. 7, c. 15, s. 8 (*ante*, p. 271).

SECT. 5.

REWARDS.

7 G. 4, c. 64 (*Criminal Law Act*, 1826), *s.* 28.]—*For the better remuneration of persons who have been active in the apprehension of certain offenders, be it enacted, that* where any person shall appear to any court of oyer and terminer, gaol delivery [*superior criminal court of a county palatine, or court of great sessions*], to have been active in or towards the apprehension of any person charged with murder (*R.* v. *Durkin*, 2 Lew. 163), or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting (*not necessarily with a knife; R.* v. *Platt*, 69 J. P. 624), or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary (*R.* v. *Dunning*, 5 Cox, 142), or felonious housebreaking, or with robbery on the person (*but not stealing from the person: R.* v. *Thompson*, 1 Cox, 43), or with

arson, or with horse-stealing, bullock-stealing (*bullock, cow, heifer, etc.: R.* v. *Gillbrass*, 7 C. & P. 444; 1 Cox, 43), or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorized and empowered in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or other expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation as courts are by this Act empowered to allow to prosecutors and witnesses respectively.

Sect. 29. Every order for payment to any person in respect of such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of five shillings and no more; and the sheriff of the county for the time being is hereby authorized and required, upon sight of such order, forthwith to pay to such person, or to anyone duly authorized on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever.

14 & 15 *Vict. c.* 55 (*Criminal Justice Administration Act*, 1851), *s.* 8.]—And whereas by the *Criminal Law Act*, 1826, any court of oyer and terminer and gaol delivery, and other courts therein mentioned, are empowered to order compensation to be paid to persons who shall appear to the court to have been active in or towards the apprehension of any person charged with murder or with any other of the crimes therein mentioned: and whereas it is expedient to extend such power to courts of sessions of the peace: be it enacted, that when any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same.

Such rewards are not confined to cases where the person apprehending has

had an actual loss of time, or been at an expense. *R.* v. *Barnes*, 7 C. & P. 166. They are said not to extend to cases where the offender has escaped from England. *R.* v. *Barrett*, 6 Cox, 78. But they have been given for display of courage: *R.* v. *Womersley*, 2 Lew. 162; and for locking burglars in a room till help arrived. *R.* v. *Dunning*, 5 Cox, 142.

Under the *Local Government Act*, 1888 (51 & 52 Vict. c. 41, s. 100), the rewards appear to be payable from the same funds as the costs of assizes and sessions. If the facts, whether as to expense, exertion, or loss of time, on which the application is grounded have not appeared in evidence, the judge will require them to be laid before him on affidavit. The secretary of state has powers (which have not yet been exercised) to make regulations as to the amount of compensation to be paid for expenses, exertions, or loss of time, except where the court considers that extraordinary courage, diligence, or exertion towards apprehension was shown, in which case the court may adjudge any reward which it deems reasonable. 14 & 15 Vict. c. 55, ss. 5, 6, 7. As to quarter sessions *see* s. 8, *ante*, p. 288, and *see R.* v. *Jones*, 7 C. & P. 167: *R.* v. *Haines*, 5 Cox, 114.

A person who discovers and prosecutes to conviction a person at large without licence during a term of penal servitude is entitled to a reward of £20, payable by order of the court before whom the conviction is made, out of the county fund. 5 G. 4, c. 84, s. 22; *R.* v. *Emmons*, 2 M. & Rob. 279: *R.* v. *Ambury*, 6 Cox, 79.

7 *G.* 4, *c.* 64, *s.* 30.—*Compensation to relatives of persons killed in attempting to effect arrest.*]—If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned. [*Orders under this section are suspended pending appeal. Criminal Appeal Rules*, 1908, r. 11.]

The enactments above referred to are not repealed or affected by the *Costs in Criminal Cases Act*, 1908 (8 Edw. 7, c. 15), *ante*, p. 267.

In *R.* v. *Platel* (C. C. C., May, 1903) an order was made by Grantham, J., for the payment of £233 to the widow and family of a man who was shot and killed in endeavouring to arrest a man who had shot a police constable. *See* 38 L. J. Newsp. 273.

CHAPTER VII.

COMPENSATION AND RESTITUTION OF PROPERTY.

SECT. 1.

COMPENSATION.

Relation of civil and criminal remedies.]—At common law the remedies for civil injuries and crimes cannot be enforced in the same proceeding.

"Upon an indictment or other criminal prosecution no damages can be given to the party grieved; but it is every day's practice in the Court of King's Bench to induce defendants to make satisfaction to the prosecutors by intimating an inclination on that account to mitigate the fine due to the King." 2 Hawk. 210, cited; Burn's Justice (ed. 1797), vol. 1, xxxi.

In a few cases the court which tries an indictable offence is authorized by statute to award compensation to persons injured by it. Compensation to the relatives of persons killed in arresting certain offenders is dealt with *ante*, p. 289.

The *Forfeiture Act*, 1870 (33 & 34 Vict. c. 23), provides (s. 4), that "it shall be lawful for any such court as aforesaid (*i.e.*, *for any court by which judgment shall be pronounced or recorded*, s. 3), if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for *felony*, to award any sum of money not exceeding one hundred pounds, by way of satisfaction or compensation for any *loss of property* suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this Act." The discretionary power given by this section is not limited to cases of larceny or cognate offences, as to which *see post*, p. 293, but does not extend to offences against the person. As to its object and the proper cases for its exercise, *see R.* v. *Lovett*, 11 Cox, 602. The cases in which it is most easily applied are to the compensation of persons who are required under a restitution order to give up property obtained by larceny and acquired by them even in good faith before the conviction. But the courts usually act under

6 & 7 Geo. 5. c. 50, s. 45 (3) (*post*, p. 294). As to suspension of order made under either of these enactments pending appeal, *see post*, pp. 305, 316.

Compensation for injuries to property may be awarded *in lieu* of a conviction on summary prosecution for a first offence against the *Larceny Act*, 1861 (24 & 25 Vict. c. 96, s. 108), or the *Malicious Damage Act*, 1861 (24 & 25 Vict. c. 97, s. 66).

By the *Probation of Offenders Act*, 1907 (7 Edw. 7, c. 17), s. 1 (3), the court, in addition to making a probation order under the Act, may order the offender to pay such damages for injury or compensation for loss not exceeding in the case of a court of summary conviction ten pounds (or if a higher limit is fixed by any enactment relating to the offence that higher limit), and to pay such costs as the court thinks reasonable.

By the *Children Act*, 1908 (8 Edw. 7, c. 67), s. 99 (1), where the offender is under sixteen, the court, if it thinks the case would be best met by imposing a fine, damages, or costs, shall, if the offender is under fourteen, and may, if he is fourteen or over, order his parent or guardian to pay such damages or costs unless satisfied that he has not conduced to the offence by neglecting to exercise due care over the young offender.

Except in the cases above referred to, it is not usual to allow civil and criminal proceedings in respect of the same act or omission to be carried on concurrently. In the case of misdemeanors, there never seems to have been any ruling that concurrent proceedings might not be taken. But until a comparatively recent date, it was considered that the civil remedy in cases of injury by a felonious act could not be pursued until the completion of the prosecution of the alleged felon. In *Crosby* v. *Leng*, 12 East, 413, Lord Ellenborough says : " The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the county may be first satisfied in respect of the public offence; and after the verdict, either of conviction or acquittal, the judgment is so far conclusive in any particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action which was the proper subject of a criminal prosecution." Similar views are expressed in *Stone* v. *Marsh*, 6 B. & C. 551; 5 L. J. (K. B.) (O. S.) 201 : *Marsh* v. *Keating*, 1 Mont. & A. 592; 8 Bligh (N. S.) 651; 2 Cl. & F. 250 : *Ex parte Bolland*, Mont. & Mac. 397 : and *Ex parte Elliott*, *Re Jermyn*, 3 Mont. & A. 110.

Another mode of stating this rule is that the King's rights to the forfeitures of felons would be defeated by a failure to prosecute the offender effectively, and an acquittal by collusion of the prosecutor would debar him from his civil remedy. *Crosby* v. *Leng*, *supra*. The rule was also explained on the ground that it was the duty of the person injured by a felony to prosecute before suing. But this has been questioned in *Ward* v. *Lloyd*, 7 Scott (N. R.) 499, 507, Maule, J. : and *Wells* v. *Abrahams*, L. R. 7 Q. B. 554, 663, Lush, J. The rule barred proof in bankruptcy as well as suits at law or in equity : *Ex parte Elliott*, *supra* : but did not bar an action where the felon had been convicted and executed for another felony : *Ex parte Bolland*, *supra* ; nor actions against persons other than the felon in possession of the proceeds of the felony, unless it were larceny and the stolen goods had been sold in market overt : *White* v.

Spettigue, 13 M. & W. 603 : *Lee* v. *Bayes*, 18 C. B. 599; nor to an action by A.'s master against B. for loss of servant caused by felonious act of B.'s servant : *Osborn* v. *Gillett*, L. R. 8 Ex. 88.

A distinction seems to have once been drawn between actions of trespass or other tort and actions of debt : *see Master* v. *Miller*, 4 T. R. 322; but it has now evaporated, and the authorities now lay down as follows :—

(1) Money obtained by theft or forgery is a debt due to the loser of it, which is sufficient consideration for the assignment of the offender's property to the injured person. *Chowne* v. *Baylis*, 31 L. J. (Ch.) 757; 31 Beav. 351 : *Ex parte Ball*, 10 Ch. D. 667, where all the cases are collected : but where a debt arises out of a felonious act by the debtor the civil remedy may have to be postponed until public justice is satisfied. Where the plaintiff, who claimed to be a creditor for the amount paid by him on a forged cheque had commenced a prosecution for the forgery upon which a bill was found and the prisoner arraigned, abstained from bringing on the trial by the direction of the judge, who thought the ends of justice were satisfied by sentencing the prisoner on an indictment for another forgery to which he pleaded guilty, it was held that the plaintiff had done enough to satisfy the rule of law, and that his civil remedy revived. *Dudley, etc., Banking Co.* v. *Spittle*, 1 J. & H. 114; *Ex parte Ball*, 10 Ch. D. 667; 48 L. J. (Bankry.) 57 : *Ex parte Leslie, Re Guerrier*, 20 Ch. D. 131; 51 L. J. (Ch.) 689. The acquittal of the accused on an indictment for felony is no bar to an action for civil injury arising out of the incriminated acts, unless the plaintiff colluded with the defendant in procuring the acquittal. *Crosby* v. *Leng*, 12 East, 409.

(2) Where the felonious act also constitutes a trespass it used to be considered that the trespass merged in the felony. *Markham* v. *Cobb*, Sir W. Jones, 147; Noy, 82 : *Higgins* v. *Butcher*, Yelv. 89 : *Lutterell* v. *Reynell*, 1 Mod. 282 : *White* v. *Spettigue*, 13 M. & W. 603. But it is now held that the criminal remedy merely suspends, or must precede, the civil remedy.

Most of the authorities with reference to the basis and extent of the rule are discussed in *Wells* v. *Abrahams*, *supra:* in *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561; 50 L. J. (Q. B.) 329 : *A.* v. *B.*, 24 L. R. Ir. 235, reported also as *S.* v. *S.*, 16 Cox, 566 (*a*), and in *Ex parte Ball*, 10 Ch. D. 667; 48 L. J. (Bankry.) 57. In the last case, Bramwell, L.J., suggested four theories to support the supposed rule. 1. That no cause of action arises at all out of the felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence nor suspension of the claim by or at the instance of the felon debtor, but that the court, of its own motion, or on the suggestion of the crown, should stay proceedings till public justice is satisfied. He indicates the difficulties of each theory, but accepts *Wellock* v. *Constantine*, 32 L. J. (N. S.) Ex. 285; 2 H. & C. 146, as establishing the existence of the rule, and *see also Ex parte Ball*, 10 Ch. D. at p. 673; 48 L. J. (Bankry.) 57, *per* Baggallay, L.J.

The most recent decision of the Court of Appeal on this subject has declared that an action for damages based upon a felonious act on the part of the

(*a*) As to Canadian law, *see White* v. *McKiel*, 28 New Brunswick, 39.

defendant committed against the plaintiff is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted. and the proper course for the court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted. *Smith* v. *Selwyn* [1914] 3 K. B. 98; 83 L. J. (K. B.) 1339.

SECT. 2.

RESTITUTION OF PROPERTY.

Common Law.

AT common law the court of King's Bench could award a writ of restitution as part of its judgment on an appeal of larceny; but this power ceased on the abolition of these appeals by 59 G. 3, c. 46 (*rep.*). *R.* v. *Mayor, etc., of London*, L. R. 4 Q. B. 371; S. C. 38 L. J. (M. C.) 107; 11 Cox, 280: *sub nom. Walker* v. *Mayor, etc., of London*. 21 H. 8, c. 11 (which is now repealed and is replaced by 6 & 7 Geo. 5, c. 50, s. 45 below), empowered the court of trial to award restitution on conviction on indictment (*see* 2 Hawk. c. 23, ss. 49-57), but gave no authority to the Court of King's Bench. *Id.*

Statutes.

2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12 (*restitution of horses*). These Acts are not repealed by the *Sale of Goods Act*, 1893, 56 & 57 Vict. c. 71; s. 22 (2); but are now rarely used: *see Moran* v. *Pitt*, 42 L. J. (Q. B.) 47: *Josephs* v. *Adkins*, 2 Stark. (N. P.) 76; Chalmers, Sale of Goods (7th ed.). 171, 174.

6 & 7 *Geo. 5, c. 50* (*Larceny Act*, 1916), *s.* 45 (1.).—*Restitution.*]—If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative.

(2) In every case in this section aforesaid, the court before whom such person is convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner:

Provided that where goods as defined in the *Sale of Goods Act*, 1893, have been obtained by fraud or other wrongful means not amounting to stealing, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender:

And provided that nothing in this section shall apply to the case of:—

(*a*) any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or,

being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration without any notice or without any reasonable cause to suspect that the same had been stolen.

(3) On the restitution of any stolen property if it appears to the court by the evidence that the offender has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the offender on his apprehension, the court may, on the application of such purchaser, order that out of such moneys a sum not exceeding the amount of the proceeds of such sale be delivered to the said purchaser.

42 & 43 *Vict. c.* 22 (*Prosecution of Offences Act*, 1879), *s.* 7.—*Restitution where the director of public prosecutions intervenes.*]— . . . The prosecution of an offender by the director of public prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or obtaining, exercising, or enforcing any right, claim, or advantage whatsoever, have the same effect as if such person had been bound over to prosecute, and had prosecuted the offender, subject to this proviso, that such person shall give all reasonable information and assistance to the said director in relation to the prosecution.

56 & 57 *Vict. c.* 71 (*Sale of Goods Act*, 1893), *s.* 24.]—(1) " Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise." [*Sub-s.* 1 *did not alter the law. See R.* v. *Horan*, Ir. Rep. 6 C. L. 293.] (2) " Notwithstanding any enactment to the contrary (*vide supra*), where goods have been obtained by fraud or other wrongful means not amounting in law to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender." [*Sub-s.* 2 *altered the law as laid down in* Bentley *v.* Vilmont, 12 *App. Cas.* 471; 57 *L. J.* (*Q. B.*) 18, *where the history of the law as to restitution is stated. As to present practice with respect to restituton orders, see post*, p. 297.]

Sect. 62.—*Definition of goods.*]—(1) " In this Act unless the context or subject-matter otherwise requires, . . . ' goods ' include all chattels personal other than things in action and money."

35 & 36 *Vict. c.* 93 (*Pawnbrokers Act*, 1872), *s.* 30.—*Restitution of property where it has been pawned with a pawnbroker.*]— . . . (2) " If any person is convicted in any court of feloniously taking or fraudulently obtaining any goods or chattels, and it appears to the court that the same have been pawned with a pawnbroker . . . the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting." [*As to its effect, see* Leicester *v.* Cherryman [1907] 2 *K. B.* 101; 76 *L. J.* (*K. B.*) 678. *The* Metropolitan Police Court Act, 1839 (2 & 3 *Vict. c.* 71), *also contains provisions for making summary orders for the restitution by*

pawnbrokers of stolen goods pledged with them, and provides that a pawnbroker in the metropolitan police district, who parts with goods after notice that they have been stolen, shall forfeit the full value (ss. 27, 28). Section 40, which gives a summary remedy for illegal detention of goods under the value of 15l., has been held to enable a magistrate to award restitution of stolen goods, even after the court of trial has refused a writ of restitution. Ex parte Davison, 60 *J. P.* 808. " *Goods" in s. 40 include dogs and goats:* R. *v.* Slade, 21 *Q. B. D.* 433; 57 *L. J.* (*Q. B.*) 120 : Dover *v.* Child, 1 *Ch. D.* 172; 45 *L. J.* (*Ch.*) 462.]

42 *& 43 Vict. c.* 49 (*Summary Jurisdiction Act*, 1879), *s.* 27.]—" Where an indictable offence is under circumstances in this Act mentioned authorized to be dealt with summarily :—. . . (3) The conviction for any such offence shall be of the same effect as a conviction or indictment, and the court may make the like order for the restitution of property as might have been made by the court before whom the person convicted would have been tried if he had been tried on indictment." . . .

7 *Edw. 7, c.* 17 (*Probation of Offenders Act*, 1907, *s.* 1 (4).]—" Where an order under this section (*i.e., a probation order, vide* p. 260), is made by a court of summary jurisdiction, the order shall for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner, and as to the payment of money on or in connection with such restitution or delivery, have the like effect as a conviction."

7 *Edw. 7, c.* 23 (*Criminal Appeal Act*, 1907), *s.* 6.]—*Suspension of operation of restitution orders pending appeals against conviction; power to quash restitution orders* (*vide post*, p. 305).

60 *& 61 Vict. c.* 30 (*Police Property Act*, 1897).]—*The Act provides for the making by a court of summary jurisdiction of orders as to property coming into the possession of the police in connection with any criminal charge* (*see* R. *v.* d'Eyncourt, 21 *Q. B. D.* 109; 57 *L. J.* (*M. C.*) 64, *decided on* 2 *&* 3 *Vict. c.* 71, *s.* 29, *rep.*), *or under the* Metropolitan or City of London Police Acts (2 *&* 3 *Vict. c.* 47, *s.* 66; 2 *&* 3 *Vict. c. xciv.*), *or under a search warrant* (24 *&* 25 *Vict. c.* 96, *s.* 103), *or under s.* 34 *of the* Pawnbrokers Act, 1872 (35 *&* 36 *Vict. c.* 93).

As to the position of property which comes *in custodiam legis* by the action of the police, *see Ex parte Otto* [1894] 1 Q. B. 420 : *Bessell* v. *Wilson*, 20 L. T. Rep. (O. S.) 233, Campbell, C.J. : *Peel* v. *Jervis*, 49 J. P. 264 : and *Dillon* v. *O'Brien*, 20 L. R. (Ir.) 316; 16 Cox, 245; and the discussion of these authorities in *Barnett* v. *Campbell*, 21 N. Z. L. R. 484. In *Winter* v. *Bancks*, 19 Cox, 687; 65 J. P. 468, a constable who after B.'s acquittal delivered to B. the goods which he was charged with stealing, was held liable to A., the true owner, for conversion of the goods. As to protection from such actions, *see Bullock* v. *Dunlap*, 2 Ex. D. 43.

Effect of the enactments as to restitution.]—The law relating to restitution of stolen property has not been altered by the *Larceny Act*, 1916. Section 100 of the *Larceny Act*, 1861 (*repealed and replaced by s.* 45. *sub-ss.* 1. 2 *of the Larceny Act*, 1916, *ante*, p. 293) had (until limited by s. 24 (2) of the *Sale of Goods Act*, 1893, *ante*, p. 294) a wider scope than 21 H. 8. c. 11 (*rep.*) (*R.* v.

de Veaux, 2 Leach, 585; 2 East, P. C. 789, 839: *Bentley* v. *Vilmont*, 12 App. Cas. 471; 57 L. J. (Q. B.) 18; and extended to all offences under the *Larceny Act*, 1861, excepting offences under ss. 77-86, or under 1 Edw. 7, c. 10 (*rep.*), but including obtaining goods by false pretences (*Bentley* v. *Vilmont*, *supra*), or receiving goods so obtained. *R.* v. *Goldsmith*, 12 Cox, 594.

The operation of s. 100 was restricted by s. 24 (2) of the *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), in the case of "goods" as defined in s. 62 of that Act (*ante*, p. 294). But the section was held to apply in cases where on an indictment for obtaining goods by false pretences, where no property had passed, the defendant was convicted on evidence proving larceny by a trick or otherwise, and in such cases the court has made a restitution order: *R.* v. *Walker*, 65 J. P. 729, Fulton, Recorder. In *R.* v. *Bianci*, 67 J. P. 443, where a defendant pleaded guilty to two indictments with respect to the same goods, the first for obtaining them by false pretences, the second for stealing them, it was held that a restitution order could be made on a pawnbroker with whom the defendant had pledged the goods.

In *R.* v. *George*, 65 J. P. 729, the question arose whether the court could make an order of restitution where property had been obtained by false pretences. Bosanquet, Common Serjeant, after consulting Bigham, J., and Fulton, Recorder, said that they were all of opinion that s. 24 of the *Sale of Goods Act*, 1893, prevented property obtained by fraud being revested by the mere fact of the conviction, and that therefore restitution could not be ordered against a *bonâ fide* purchaser who had a good title in law. He quoted the law as stated by Lord Watson in *Bentley* v. *Vilmont*, 12 App. Cas. 471; 57 L. J. (Q. B.) 18; "it now appears that the sale was induced by fraud, a circumstance which gives the seller the option either of adhering to his bargain or of rescinding it in a question with the fraudulent purchaser," and held that where, as in the case under consideration, the goods were found in the possession of the person who had obtained them by fraud, the former owner might disaffirm the transaction, and was then entitled to recover the property; and in that case an order of restitution should be made. It is submitted that the above decisions are still good law, for the provisions of s. 100 of the *Larceny Act*, 1861, and of s. 24 (2) of the *Sale of Goods Act*, 1893, have been reproduced in s. 45 of the *Larceny Act*, 1916. As to power in such a case to make a restitution order against a trustee in bankruptcy, *see R.* v. *Cohen*, 71 J. P. 190.

The proviso (*a*) to s. 45 (1) (2) of 6 & 7 Geo. 5, c. 50, which replaces the first proviso to 24 & 25 Vict. c. 96, s. 100 (*rep.*), protects from restitution *bonâ fide* holders for value of negotiable instruments, including bank-notes. *Chichester* v. *Hill*, 52 L. J. (Q. B.) 160; 15 Cox, 258: *Miller* v. *Race*, 1 Smith, L. C. (11th ed.) 463; 1 Burr. 452. An order cannot be made for the restitution of current coin stolen and passed as currency to innocent persons; but can be made where the money is found on the thief or under his control. *Moss* v. *Hancock*, [1899] 2 Q. B. 111, 120; 68 L. J. (Q. B.) 657, Channell, J.: *cf. Holiday* v. *Hicks*, Cro. Eliz. 638, 661; 1 Hale, 542. And where a 5*l.* piece was stolen, and though a current coin was sold as a curiosity, it was held that a restitution order could be made against the buyer. *Moss* v. *Hancock*, *supra*.

Certain difficulties in applying the enactment arise from ss. 8, 9 of the *Factors*

Act, 1889 (52 & 53 Vict. c. 45), and s. 25 of the *Sale of Goods Act*, 1893, under which mercantile agents, bailees or factors, and certain other persons can give to purchasers from them a better title than they have themselves. *See Helby* v. *Matthews* [1895] A. C. 471; 64 L. J. (Q. B.) 465 : *Payne* v. *Wilson* [1895] 1 Q. B. 653; 2 Q. B. 537; 64 L. J. (Q. B.) 328 : *Kircham* v. *Gill* [1897] 1 Q. B. 201; 66 L. J. (Q. B.) 169 : *Farquharson* v. *King* [1902] A. C. 325; 71 L. J. (K. B.) 667 : *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50; 76 L. J. (K. B.) 806 : *Weiner* v. *Harris* [1910] 1 K. B. 285; 79 L. J. (K. B.) 342; and as to factors, *R.* v. *Wollez*, 8 Cox, 337. It is doubtful how far restitution can be made in cases where a bailee under a hire-purchase agreement misappropriates the goods hired. *See Payne* v. *Wilson* [1893] 1 Q. B. 653; 64 L. J. (Q. B.) 328 : *Helby* v. *Matthews*, *supra*: *Lee* v. *Butler* [1893] 2 Q. B. 318; 64 L. J. (Q. B.) 465.

Revesting on conviction.]—On a conviction for larceny of goods the property in the goods stolen revests in the person who was the owner of the goods or his personal representative notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (56 & 57 Vict. c. 71, s. 24, *ante*, p. 294). This merely expresses the rule laid down in *Horwood* v. *Smith*, 2 T. R. 750 : *Scattergood* v. *Sylvester*, 15 Q. B. 506; 19 L. J. (Q. B.) 447 : *White* v. *Spettigue*, 13 M. & W. 603 : *Moss* v. *Hancock* [1899] 2 Q. B. 111, 118; 68 L. J. (Q. B.) 657 : *R.* v. *Horan*, Ir. Rep. 6 C. L. 293, and makes good the title of the original owner even against an innocent purchaser. This rule only applies to "goods" as defined in the *Sale of Goods Act*, 1893 (s. 62, *ante*, p. 294), and does not apply to money nor to negotiable instruments. *Chichester* v. *Hill*, 52 L. J. (Q. B.) 160; 15 Cox, 258; 47 J. P. 324. Restitution orders cannot be made as to coin if dealt with as currency (*Moss* v. *Hancock*, *supra*), nor as to negotiable instruments if they have been already paid or negotiated in good faith (*ante*, p. 296). Until conviction of the thief "goods" innocently bought in market overt are the property of the purchaser. *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 22 : *Walker* v. *Matthews*, 8 Q. B. D. 109; 51 L. J. (Q. B.) 243 : *Hargreave* v. *Spink* [1892] 1 Q. B. 25; 61 L. J. (Q. B.) 318; and therefore, if he sells them again before the conviction, even if previously to selling them he has had notice of the theft, no order for restitution can be made against him. *Horwood* v. *Smith*, 2 T. R. 750. There is a special remedy against pawnbrokers in London who sell stolen goods after notice : *see* 2 & 3 Vict. c. 71, s. 27, *ante*, 294 : *Ex parte Davison*, 60 J. P. 808.

By whom and how made.]—An order of restitution can be made only by the court before which the offender is convicted, and the high court has no summary power to award restitution. *R.* v. *Mayor, etc., of London*, L. R. 4 Q. B. 371; *S. C. sub nom. Walker* v. *Mayor, etc., of London*, 38 L. J. (M. C.) 107; 11 Cox, 280.

The order is discretionary. *See Vilmont* v. *Bentley*, 18 Q. B. D. 327; 57 L. J. (Q. B.) 18. Its refusal is no bar to a civil action or summary proceedings to recover the goods. *Ex parte Davison*, 60 J. P. 808 : *Scattergood* v. *Sylvester*, 15 Q. B. 506; 19 L. J. (Q. B.) 447. In cases of difficulty or complications it is usual to refuse an order and leave the prosecutor to his other

legal remedies for recovery of his property. And it is the practice not to make an order of restitution in a case where the circumstances require that there should be terms imposed, unless the prosecutor consents to compensate the person who has possession of the stolen goods. *See Leicester* v. *Cherryman* [1907] 1 K. B. 101, 103; 76 L. J. (K. B.) 678.

The Recorder of London, upon the trial and conviction at the Central Criminal Court of a prisoner charged with larceny, having refused to order (under 24 & 25 Vict. c. 96, s. 100) (*rep.*) the person with whom the stolen property was pledged to restore it to the prosecutor, the Queen's Bench Division refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the recorder to make such order, on the ground that the Central Criminal Court being a Superior Court, no mandamus would lie against it. *R.* v. *Justices of Central Criminal Court*, 11 Q. B. D. 479; 52 L. J. (M. C.) 121: and *see ante*, p. 217.

Before making the order the court may hear counsel on behalf of persons in possession of the goods. *R.* v. *Macklin*, 5 Cox, 216. The order if made by a court of assize (including the Central Criminal Court) is enforceable by attachment. *R.* v. *Wollez*, 8 Cox, 337.

On whom made.]—The order may be made on the offender or on his agent or on his trustee in bankruptcy or on any pledgee or sub-purchaser or possessor of the goods, even though he innocently bought in market overt. *Cundy* v. *Lindsay*, 3 A. C. 459; 47 L. J. (Q. B.) 481; 13 Cox, 162, 588: *Horwood* v. *Smith*, 2 T. R. 750; 1 R. R. 613; but it cannot be made on a purchaser who has re-sold before conviction. *Cundy* v. *Lindsay* (*supra*); and *see R.* v. *Stancliffe*, 11 Cox, 318: *R.* v. *Goldsmith*, 12 Cox, 594. As to the law when the offender has become bankrupt, *see Re Vautin* [1899] 2 Q. B. 549; 68 L. J. (Q. B.) 971.

As to what made.]—The power to award restitution seems to be limited to property produced and identified at the time (or more probably to property specified in the indictment) as being the subject of the offence. *R.* v. *Goldsmith*, 12 Cox, 594: *R.* v. *Smith*, *Id.* 597. The power does not extend to property found on the prisoner but not connected with the offence: *R.* v. *Mayor, etc., of London*, E. B. & E. 509; 27 L. J. (M. C.) 231: *S. C. sub nom. R.* v. *Pierce*, Bell, 235; 8 Cox, 344; and an order made in such a case was quashed by the high court. *Id.* The power to award restitution extends to the proceeds of the property as well as the property itself if in the hands of the prisoner or of an agent holding for him. *R.* v. *Justices of Central Criminal Court*, 18 Q. B. D. 314; 56 L. J. (M. C.) 25; 16 Cox, 196, C. A. But it does not authorize delivery to the prosecutor of pawntickets supposed to represent the stolen goods; *R.* v. *Rolfe*, 53 J. P. 823; nor an order restoring both the property and the proceeds of its conversion or sale. *Ex parte Dettmer*, 72 J. P. 513.

Annulling, quashing, or varying the order.]—In the case of an order made by a court of assize, including the Central Criminal Court, the High Court

(King's Bench Division) has no power to intervene by *certiorari* or otherwise to quash or vary the order, except incidentally to the determination of a criminal appeal, *see post*, pp. 305, 316. Awards illegally made by a court of quarter sessions may be dealt with on *certiorari*. *Ex parte Dettmer*, *supra*.

CHAPTER VIII.

CRIMINAL APPEAL.

SECT. 1.

APPEALS UNDER THE CRIMINAL APPEAL ACT, 1907.

THE *Criminal Appeal Act*, 1907 (7 Edw. 7, c. 23), introduced a new system and procedure with respect to the review (in England and Wales) of convictions on indictment or criminal information. That Act has abolished writs of error (*a*) and the jurisdiction and practice of the King's Bench Division as to the grant of new trials in criminal cases (*b*), and has substituted a procedure by appeal on questions of law or fact or of mixed law and fact, or as to the legality or propriety of the sentence imposed.

It makes no provision for appeals in case of acquittal or where judgment has been given *against the crown* on a demurrer or motion to quash an indictment or to arrest judgment, and it makes no provision for the grant of a new trial, even where the conviction on the first trial is quashed for technical reasons.

As to *venire de novo*, *vide post*, p. 346.

Court of Criminal Appeal.

7 *Edw.* 7, *c.* 23 (*Criminal Appeal Act*, 1907), *s.* 1.—*Constitution of Court of Criminal Appeal.*]—(1) There shall be a Court of Criminal Appeal, and the lord chief justice of England and *all the* judges of the King's Bench Division of the high court [appointed for the purpose by the lord chief justice with the consent of the lord chancellor for such period as he thinks desirable in each case] shall be judges of that court. [*The words in italics were substituted for the word "eight," and the words in brackets were virtually repealed by the* Criminal Appeal Amendment Act, 1908 (8 *Edw.* 7, *c.* 46), *s.* 1.]

(*a*) As to writs of error, *vide* Archb. Cr. Pl. (23rd Ed.) 278; Short & Mellor Cr. Pr. (2nd Ed.) 149, 205, 301.

(*b*) As to new trials in criminal cases *see* Archb. Cr. Pl. (23rd Ed.) 291; Short & Mellor Cr. Pr. (2nd Ed.) 142.

(2) For the purpose of hearing and determining appeals under this Act, and for the purpose of any other proceedings under this Act, the Court of Criminal Appeal shall be summoned in accordance with directions given by the lord chief justice of England with the consent of the lord chancellor, and the court shall be duly constituted if it consists of not less than three judges and of an uneven number of judges.

If the lord chief justice so directs, the court may sit in two or more divisions.

The court shall sit in London except in cases where the lord chief justice gives special directions that it shall sit at some other place.

(3) The lord chief justice, if present, and in his absence the senior member of the court, shall be president of the court.

(4) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the court hearing the case.

(5) Unless the court direct to the contrary in cases where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court. [*For an instance of separate judgments, see R.* v. *Kerr*, 15 Cr. App. R. 165.]

(6) If in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the attorney-general that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that court to any other court. [*Under former practice no appeal lay to any court from the Court for Crown Cases Reserved, but an appeal lay to the Court of Appeal and to the House of Lords from judgments of the high court in a criminal cause or matter where error in law appeared on the record* (36 & 37 *Vict. c.* 66, *s.* 47 : Castro *v.* R., 6 *A. C.* 229; 50 *L. J.* (*Q. B.*) 497. *As to procedure on appeals to the House of Lords, see* R. *v.* Ball [1911] *A. C.* 47, *at pp.* 61, 76; 80 *L. J.* (*K. B.*) 691; 22 *Cox*, 366; 75 *J. P.* 180; 6 *Cr. App. R.* 31.]

(7) The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court.

(8) Rules of court shall provide for securing sittings of the Court of Criminal Appeal, if necessary, during vacation. (*Vide*, *r.* 50, *post*, p. 327.)

(9) Any direction which may be given by the lord chief justice under this section may, in the event of any vacancy in that office, or in the event of the incapacity of the lord chief justice to act from any reason, be given by the senior judge of the Court of Criminal Appeal.

Sect. 2.—*Registrar and staff of the court.*]—There shall be a registrar of the Court of Criminal Appeal (in this Act referred to as the registrar) who [shall be appointed by the lord chief justice from among the masters of the Supreme Court acting in the King's Bench Division, and] shall be entitled to such additional salary (if any), and be provided with such additional staff (if any), in respect of the office of registrar as the lord chancellor, with the concurrence of the treasury, may determine.

The senior master of the Supreme Court shall be the first registrar. [*The words in square brackets are virtually repealed by* 8 *Edw.* 7, *c.* 46, *s.* 2 (1), *infra.*]

8 *Edw.* 7, *c.* 46 (*Criminal Appeal Amendment Act*, 1908), *s.* 2.—[*Registrar and assistant registrar.*]—(1) "Notwithstanding anything in s. 2 of the *Criminal Appeal Act*, 1907, from and after the passing of this Act (21st December, 1908), the master of the crown office shall be the registrar of the Court of Criminal Appeal;" (2) "The power to provide additional staff for the registrar of the Court of Criminal Appeal includes a power to appoint an assistant registrar, but any assistant registrar so appointed shall be either a master of the Supreme Court or a practising barrister of not less than seven years' standing, and shall be appointed by the lord chief justice of England."

Right of Appeal and Determination of Appeals.

7 *Edw.* 7, *c.* 23, *s.* 3.—*Right of appeal.*]—A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

(*a*) against his conviction on any ground of appeal which involves a question of law alone; and

(*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

(*c*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

Sect. 20.—*Abolition of writs of error and new trials.*]—(1) Writs of error and the powers and practice now existing in the high court in respect of motions for new trials and the granting thereof in criminal cases are hereby abolished.

(2) This Act shall apply in the case of convictions on criminal informations (*ante*, p. 127) and coroners' inquisitions (*ante*, p. 140) and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the *Vagrancy Act*, 1824 (5 G. 4, c. 83, s. 5), as it applies in the case of convictions on indictments, but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a court of assize. ["*Criminal information*" does not *include an information for smuggling under* 39 *&* 40 *Vict. c.* 36, *s.* 186, *filed by the attorney-general in the King's Bench Division.* R. *v.* Hausmann, 3 *Cr. App. R.* 3; 73 *J. P.* 516. *As to the cases to which the exception applies*, vide ante, p. 169.]

(3) Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act. [*Vide post, tit. Highways.*]

(4) All jurisdiction and authority under the *Crown Cases Act*, 1848 (11 & 12 Vict. c. 78, *post*, p. 340), in relation to questions of law arising in criminal trials which is transferred to the judges of the high court by s. 47 of the *Supreme Court of Judicature Act*, 1873 (36 & 37 Vict. c. 66), shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the *Crown Cases Act*, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved. [*This power has not yet been exercised.*]

Sect. 21.—*Definitions.*]—In this Act, unless the context otherwise requires,—

The expression "appellant" includes a person who has been convicted and desires to appeal under this Act; and [*It also includes a prisoner on whose conviction a case has been reserved under the* Crown Cases Act, 1848, *post*, p. 340.]

The expression "sentence" includes any order of the court made on conviction with reference to the person convicted or his wife or children, and any recommendation of the court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of s. 3 of the *Aliens Act*, 1905 (5 Edw. 7, c. 13, *ante*. p. 236), as the certificate and recommendation of the convicting court.

[*In a clear case the court may quash that part of the sentence which consists of a recommendation that an expulsion order be made.* R. *v.* Schaffner, 14 *Cr. App. R.* 131 : R. *v.* Gilbert, 16 *Cr. App. R.* 34; *but ordinarily will leave the matter to the Home Secretary.* R. *v.* Josephson, 10 *Cr. App. R.* 8. *By virtue of the* Costs in Criminal Cases Act, 1908, *s.* 6, *anorder for payment of costs by the person convicted is part of the sentence, and appeal therefore lies from such order to the Court of Criminal Appeal. See* R. *v.* Howard, 6 *Cr. App. R.* 17.]

8 *Edw.* 7, *c.* 59 (*Prevention of Crime Act*, 1908), *s.* 11.]—"A person sentenced to preventive detention may, notwithstanding anything in the *Criminal Appeal Act*, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal." [R. *v.* Smith [1910] 1 *K. B.* 17; 79 *L. J.* (*K. B.*) 1.]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 99 (6).]—"A parent or guardian may appeal against an order under this section— . . .

(*b*) If made by a court of assize or a court of quarter sessions to the Court of Criminal Appeal in accordance with the *Criminal Appeal Act*, 1907, as if the parent or guardian against whom the order was made had been convicted on indictment, and the order was a sentence on conviction."

Under the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), s. 10 (5), a person sentenced by a court of quarter sessions under that section to detention in a Borstal Institution may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment, and the provisions of the *Criminal Appeal Act*, 1907, shall apply accordingly.

7 *Edw.* 7, *c.* 23, *s.* 4.—*Determination of appeals in ordinary cases.*]—(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice had actually occurred (*vide post*, p. 334).

(2) Subject to the special provisions of this Act (*infra*, s. 5), the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered. [*There is no power to order a new trial:* R. *v.* Dyson [1908] 2 *K. B.* 454; 77 *L. J.* (*K. B.*) 813; 72 *J. P.* 303; 1 *Cr. App. R.* 13: R. *v.* Stoddart, 73 *J. P.* 348; 2 *Cr. App. R.* 245; *but see post*, p. 346, *venire de novo.*]

(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal. [*The words "by the verdict" are treated as superfluous:* R. *v.* Ettridge [1909] 2 *K. B.* 24; 78 *L. J.* (*K. B.*) 479. *The Court is not compelled by the words of this sub-section to pass another sentence, and may simply quash the sentence passed at the trial.* R. *v.* Johnson [1909] 1 *K. B.* 439: R. *v.* Bradford, 76 *J. P.* 46; 22 *Cox*, 627; 7 *Cr. App. R.* 42.]

Sect. 5.—*Powers of court in special cases.*]—(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted. [*See* R. *v.* Cooper, 24 *T. L. R.* 867: R. *v.* George, 73 *J. P.* 11: R. *v.* Wong Chey, 6 *Cr. App. R.* 59.]

(2) Where an appellant has been convicted of an offence and the jury could

on the indictment have found him guilty of some other offence (*vide ante*, pp. 211 *et seq.*), and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity. [*See* R. *v.* Rose, 2 *Cr. App. R.* 265 : R. *v.* Taylor [1911] 1 *K. B.* 674; 80 *L. J.* (*K. B.*) 311 : R. *v.* Fisher, 103 *L. T.* 320; 74 *J. P.* 427; 22 *Cox*, 340 : R. *v.* Dargue, 6 *Cr. App. R.* 261 : R. *v.* Pitts, 8 *Cr. App. R.* 126 : R. *v.* Connor, 77 *J. P.* 247; 8 *Cr. App. R.* 152 : R. *v.* Parks, 10 *Cr. App. R.* 50 : R. *v.* Evans, 12 *Cr. App. R.* 8 : R. *v.* Gilbert, 11 *Cr. App. R.* 23; 24 *Cox*, 586.]

(3) Where on the conviction of the appellant the jury have found a special verdict (*vide ante*, p. 216), and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

(4) If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions (*vide ante*, p. 217), the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the *Trial of Lunatics Act*, 1883 (46 & 47 Vict. c. 38), in the same manner as if a special verdict had been found by the jury under that Act. [*The court has acted under this sub-section in* R. *v.* Jefferson, 72 *J. P.* 467; 1 *Cr. App. R.* 95 : and in R. *v.* Gilbert, 11 *Cr. App. R.* 23; 24 *Cox*, 586.]

Sect. 6.—*Re-vesting and restitution of property on conviction.*]—(1) The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation in case of any such conviction, of the provisions of sub-section (1) of s. 24 of the *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71, *ante*, p. 294), as to the re-vesting of the property in stolen goods on conviction, shall (unless the court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended—

(*a*) in any case until the expiration of ten days after the date of the conviction; and

(*b*) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions. [*See*

Rules 9-13, *post*, p. 316. *This section does not give any right of appeal to any person, other than the accused, on whom the order of restitution is made:* R. *v.* Elliott [1908] 2 *K. B.* 452; 77 *L. J.* (*K. B.*) 812.]

(2) The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

Procedure.

Sect. 7.—*Time for appealing.*]—(1) Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within ten days of the date of conviction: Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the court. [*See Rules* 17-25, p. 318.]

Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal. [*There is no power to grant extension of time in the case of a conviction of murder even though the sentence of death has been commuted.* R. *v.* Twynham, 85 *J. P.* 48; 15 *Cr. App. R.* 38.]

(2) In the case of a conviction involving sentence of death or corporal punishment—

(*a*) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(*b*) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

Sect. 8.—*Judge's notes and report.*]—The judge or chairman of any court before whom a person is convicted shall, in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the registrar, in accordance with rules of court, his notes of the trial; and shall also furnish to the registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case. [*As to obtaining this report, see Rules* 14, 15, post, p. 318.]

Sect. 9.—*Supplemental powers of court.*]—For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interests of justice,—

(*a*) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(*b*) if they think fit order any witnesses who would have been compellable witnesses at the trial (*vide post*, pp. 457, 467), to attend and be examined before the court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court or before any officer of the court or justice of the peace or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court. [*The court will only act upon this power under very special circumstances. For recent instances where witnesses were ordered, see* R. *v.* Hamilton, 13 *Cr. App. R.* 32: R. *v.* Kurasch, 13 *Cr. App. R.* 13: R. *v.* Warren, 14 *Cr. App, R.* 4]; and

(*c*) if they think fit receive the evidence if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application [*The court will very rarely indeed allow the appellant to give evidence where he did not give evidence at the trial*: R. *v.* Rose, 14 *Cr. App. R.* 14]; and

(*d*) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court conveniently be conducted before the court, order the reference of the question in manner provided by rules of court for inquiry and report to a special commissioner appointed by the court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(*e*) appoint any person with special expert knowledge to act as assessor to the court in any case where it appears to the court that such special knowledge is required for the proper determination of the case:

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders and sentences of the court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial. [*As to procedure on orders of reference under this section, see Rule* 41, post: *and as to issue of a warrant, see* R. *v.* Ball, 6 *Cr. App. R.* 49: *and as to hearing evidence of matters subsequent to the trial, see* R. *v.* Robinson [1917] 2 *K. B.* 108; 86 *L. J.* (*K. B.*) 773; 12 *Cr. App. R.* 226.]

Sect. 10.—*Legal aid for applicant.*]—The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel or counsel only in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid. [*A solicitor as well as counsel is rarely assigned in any appeal, and in appeals against sentence only legal aid is very rarely granted.*]

Sect. 11.—*Right of appellant to be present.*]—(1) An appellant, notwith-

standing that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal, and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the court gives him leave to be present. [*See* R. *v.* Dunleavey [1909] 1 *K. B.* 200; 78 *L. J.* (*K. B.*) 359.]

(2) The power of the court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

Sect. 12.—*Duty of director of public prosecutions.*]—It shall be the duty of the director of public prosecutions to appear for the crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a government department, or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the *Prosecution of Offences Act*, 1879 (42 & 43 Vict. c. 22), shall apply as though the duty of the director of public prosecutions under this section were a duty under s. 2 of that Act, and provision shall be made by rules of court for the transmission to the director of public prosecutions of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section. [*See Rules* 27, 28, post, *p.* 321.]

Sect. 13.—*Costs.*]—(1) On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto under this Act no costs shall be allowed on either side.

(2) The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the court or examined in any proceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the court for the purpose or any reference of a question to a special commissioner appointed by the court, or of any person appointed as assessor to the court, shall be defrayed, up to an amount allowed by the court, but subject to any regulations as to rates and scales of payment made by the secretary of state, in the same manner as the expenses of a prosecution in cases of felony. [*See the Regulations*, ante, *p.* 282.]

8 *Edw.* 7, *c.* 15 (*Costs in Criminal Cases Act*, 1908), *s.* 9 (5).]—"For the purposes of s. 13 of the *Criminal Appeal Act*, 1907 (which relates to the costs of appeal), the hearing of a case stated under the *Crown Cases Act*, 1848, shall be deemed to be an appeal and the person in relation to whose conviction the case is stated shall be deemed to be an appellant, and the provisions of this Act (*ante*, p. 267) giving power to direct the payment of the costs of the prosecution and defence shall not apply to the hearing of any case so stated."

(6) "A reference to the payment of costs out of local funds under this Act (*ante*, p. 271) shall be substituted for any reference to the payment of expenses in the case of an indictment for felony, or any like reference . . . in s. 13 of the *Criminal Appeal Act*, 1907."

7 *Edw.* 7, *c.* 23, *s.* 14.—*Admission of appellant to bail, and custody when attending court.*]—(1) An appellant who is not admitted to bail shall, pending

the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the *Prison Act*, 1898 (61 & 62 Vict. c. 41), s. 2. [*See the* Prison Rules, 1908.]

(2) The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal. [*As to persons sentenced to fine, or in default of payment to imprisonment, see Rule* 7, post, *p.* 315. *As to bail, etc., see Rules* 29-31, post, *pp.* 321.]

(3) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence. [*The court leans against giving directions that the time an appellant has been specially treated in custody as an appellant shall count as part of the sentence, and in practice rarely does so except where leave to appeal has been given, and in some cases, though not in all, where the sentence is imprisonment in the second division. As to warrant to arrest appellant, see Rule* 47, post, *p.* 327.]

(4) Where a case is stated under the *Crown Cases Act*, 1848 (11 & 12 Vict. c. 78, *post*, p. 340), this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

(5) Provision shall be made by prison rules within the meaning of the *Prison Act*, 1898 (61 & 62 Vict. c. 41), for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of Criminal Appeal or any judge thereof may order him to be taken for the purpose of any proceedings of that court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules shall be deemed to be in legal custody. [*See the* Prison Rules, 1908.]

Sect. 15.—*Duties of registrar with respect to notices of appeal, etc.*]—(1) The registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the court in proper form all documents, exhibits, and other things relating to the proceedings in the court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application. [*For definition of exhibits and dealing with them at the trial, see Rules* 2, 8, 32, 36, 39, post, *pp.* 313 et seq.]

(2) If it appears to the registrar that any notice of an appeal against a con-

viction purporting to be on a ground of appeal which involves a question of law alone does not show any substantial ground of appeal, the registrar may refer the appeal to the court for summary determination, and, where the case is so referred, the court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the crown thereon.

(3) Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorised to appeal under this Act, shall be kept in the custody of the court of trial in accordance with rules of court made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.

(4) The registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands the same, and to officers of courts, governors of prisons, and such other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the registrar.

(5) The registrar shall report to the court or some judge thereof any case in which it appears to him that, although no application had been made for the purpose, a solicitor and counsel or counsel only ought to be assigned to an appellant under the powers given to the court by this Act.

Sect. 16.—*Shorthand notes of trial.*]—(1) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof : Provided that a transcript shall be furnished to any party interested upon the payment of such charges as the treasury may fix. [*The provisions of this sub-section are directory: and if no shorthand note was taken, or the note taken is inadequate, the Court of Criminal Appeal can proceed on the materials available:* R. *v.* Rutter, 73 *J. P.* 12; 25 *T. L. R.* 73 : R. *v.* Elliott, 25 *T. L. R.* 572; 2 *Cr. App. R.* 171; *including the statement of counsel present at the trial:* R. *v.* Bennett, 2 *Cr. App. R.* 182; 25 *T. L. R.* 528. *The court may, however, be placed in a position of great difficulty through the absence of a transcript. See* R. *v.* Moran, 75 *J. P.* 110 : R. *v.* Bennett, supra. *And it is of great importance that the utmost care be taken by shorthand writers in order to ensure that the notes and transcript shall be as perfect as possible. See* R. *v.* Rimes, 28 *T. L. R.* 409; 7 *Cr. App. R.* 240 : R. *v.* Harris, 8 *Cr. App. R.* 30, 35 : R. *v.* Austin and Davies, 12 *Cr. App. R.* 171, *at p.* 177. *As to appointment and duties of shorthand writers, see Rule* 5, post, *p.* 314.]

(2) The secretary of state may also, if he thinks fit in any case, direct a

transcript of the shorthand notes to be made and furnished to him for his use.

(3) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the registrar or by the secretary of state, shall be defrayed, in accordance with scales of payment fixed for the time being by the treasury, out of moneys provided by parliament, and rules of court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript.

Sect. 17.—*Powers which may be exercised by a judge of the court.*]—The powers of the Court of Criminal Appeal under this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court of Criminal Appeal in the same manner as they may be exercised by the court, and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act. [*For procedure under this section, see Rules* 25, 43, post, *pp.* 319, 327. *The judge may refer the case to the full court:* R. *v.* Munns, 24 *T. L. R.* 627; 1 *Cr. App. R.* 4: R. *v.* George, 2 *Cr. App. R.* 252, 254.]

Sect. 18.—*Rules of court.*]—(1) Rules of court for the purposes of this Act shall be made, subject to the approval of the lord chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the secretary of state, by the lord chief justice and the judges of the Court of Criminal Appeal, or any three of such judges, with the advice and assistance of the committee hereinafter mentioned. Rules so made may make provision with respect to any matter for which provision is to be made under this Act by rules of court, and may regulate generally the practice and procedure under this Act, and the officers of any court before whom an appellant has been convicted, and the governor or other officers of any prison or other officer having the custody of an appellant and any other officers or persons shall comply with any requirements of those rules so far as they affect those officers or persons, and compliance with those rules may be enforced by order of the Court of Criminal Appeal.

(2) The committee hereinbefore referred to shall consist of a chairman of quarter sessions appointed by a secretary of state, the permanent under secretary of state for the time being for the home department, the director of public prosecutions for the time being, the registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the peace appointed by the lord chief justice, and a solicitor appointed by the president of the Law Society for the time being, and a barrister appointed by the general council of the Bar. The term of office of any person who is a member of the committee by virtue of appointment shall be such as may be specified in the appointment.

(3) Every rule under this Act shall be laid before each House of Parliament

forthwith, and if an address is presented to his Majesty by either House of Parliament within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, his Majesty in council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder. [*See the Rules*, post, *pp.* 313, *et seq.* *As to the effect of non-compliance, see r.* 45, post, *p.* 327.]

Sect. 19.—*Saving of prerogative of mercy. Reference of cases to the court by the secretary of state.*]—Nothing in this Act shall affect the prerogative of mercy, but the secretary of state on the consideration of any petition for the exercise of his Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—

(*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted [*see Rule* 48, post, *p.* 327, *and for an instance of the exercise of this power, see* R. *v.* Gray, 12 *Cr. App. R.* 244]; or

(*b*) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the court shall consider the point so referred and furnish the secretary of state with their opinion thereon accordingly. [*See Rule* 51, post, *p.* 327.]

Sect. 20.—Set out *ante*, p. 302.

Sect. 21.—*Definitions.*]—In this Act, unless the context otherwise requires,—

The expression "appellant" includes a person who has been convicted and desires to appeal under this Act. [*For definition of "sentence,"* vide ante, *p.* 303.]

Sect. 22.—*Repeal.*]—The Acts specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule. [*The scheduled enactments are* 7 *&* 8 *W.* 3, *c.* 3 (Treason Act, 1695), *s.* 9, *from "but nevertheless" to the end of the section;* 11 *&* 12 *Vict. c.* 78 (Crown Cases Act, 1848), *ss.* 3, 5, *as to England;* 38 *&* 39 *Vict. c.* 77 (*Supreme Court, E.*), *s.* 19, *the words "including the practice and procedure with respect to Crown Cases Reserved;"* 44 *&* 45 *Vict. c.* 68 (*Supreme Court, E.*), *s.* 15.]

Sect. 23.—*Short title, extent, and application.*]—(1) This Act may be cited as the *Criminal Appeal Act*, 1907.

(2) This Act shall not extend to Scotland or Ireland.

(3) This Act shall apply to all persons convicted after the eighteenth day of April nineteen hundred and eight, but shall not affect the rights, as respects appeal, of any persons convicted on or before that date. [*The court assumed power to deal with a sentence passed after the Act upon a conviction before the Act came into operation. See* R. *v.* Davies [1909] 1 *K. B.* 892; 78 *L. J.* (*K. B.*) 363.]

STATUTORY RULES AND ORDERS, 1908.

THE CRIMINAL APPEAL RULES, 1908 (ST. R. & O. 1908, No. 227). RULES MADE, WITH THE APPROVAL OF THE LORD CHANCELLOR AND THE SECRETARY OF STATE, BY THE LORD CHIEF JUSTICE AND THE JUDGES OF THE COURT OF CRIMINAL APPEAL.

Interpretation of Rules.

1. *Citation.*]—These Rules may be cited as the Criminal Appeal Rules, 1908, and shall come into operation on the 18th of April, 1908.

2. *Definitions.*]—(*a.*) The expression "The Act" shall mean the Criminal Appeal Act, 1907.

The expression "Judge of the Court of Trial" shall mean the Judge or Chairman of any Court from the conviction before or the sentence of which a person desires to appeal under the Act.

The expression "Proper Officer of the Court of Trial" shall mean the Clerk of Assize or Clerk of the Peace, or other person for the time being acting as such in any Court of Assize or Court of Quarter Sessions or as Officer for the time being of any Court held under the Central Criminal Court Acts, 1834 to 1881, from the conviction before or the sentence of which a person desires to appeal under the Act.

The expression "Secretary of State" shall mean His Majesty's Principal Secretary of State for the Home Department.

The expression "Registrar" shall include any person temporarily appointed by the Lord Chief Justice from among the Masters of the Supreme Court acting in the King's Bench Division to act during the absence of the Registrar through sickness or other unavoidable cause.

The expression "Shorthand Writer" shall mean the person or persons appointed from time to time as such for the purposes of section 16 of the Act (*ante*, p. 310).

The expression "Respondent" shall mean the person who under section 12 of the Act (*ante*, p. 308) has the duty of appearing for the Crown, or who undertakes the defence of the Appeal.

The expression "Government Department" shall, for the purposes of these Rules, be deemed to include the Commissioners of Police of the Metropolis.

The expression "Exhibits" shall include all books, papers, and documents, and all other property, matters and things whatsoever connected with the proceedings against any person who is entitled or may be authorised to appeal under the Act, if the same have been forwarded to the Court of Trial on the person accused being committed for trial or have been produced and used in evidence during the trial of, or other proceedings in relation to a person entitled or authorised under the Act to appeal, and any written statement handed in to the Judge of the Court of Trial by such person, but shall not include the original depositions of witnesses examined before the Committing Justice or Coroner nor any indictment or inquisition against any such person nor any plea filed in the Court of Trial.

(*b.*) The Interpretation Act, 1889 (52 & 53 Vict. c. 63), shall apply for the interpretation of these Rules as it applies for the interpretation of an Act of Parliament.

3. The forms set out in the Schedule to these Rules, or forms as near thereto as circumstances permit, shall be used in all cases to which such forms are applicable.

Notices of Appeal.

4. (*a.*) Every Notice of Appeal or Notice of Application for leave to appeal or Notice of Application for extension of time within which such Notice shall be given under the Act shall be signed by the Appellant himself, except under the provisions of paragraphs (*d*) and (*e*) of this Rule.

Any other Notice required or authorised to be given for the purposes of the Act or these Rules shall be in writing and signed by the person giving the same or by his Solicitor. All Notices required or authorised to be given for the purposes of the Act or

these Rules to the Court of Criminal Appeal shall be addressed to "The Registrar of the Court of Criminal Appeal, London."

(*b.*) Any notice or other document which is required or authorised by the Act or these Rules to be given or sent shall be deemed to be duly given or sent if forwarded by Registered Post addressed to the person to whom such notice or other document is so required or authorised to be given or sent.

(*c.*) When an appellant or any other person authorised or required to give or send any notice of appeal or notice of any application for the purposes of the Act or of these Rules is unable to write he may affix his mark thereto in the presence of a witness who shall attest the same, and thereupon such notice shall be deemed to be duly signed by such Appellant.

(*d.*) Where, on the trial of a person entitled to appeal under the Act, it has been contended that he was not responsible according to law for his actions on the ground that he was insane at the time the act was done or the omission made by him, any notice required by these Rules to be given and signed by the Appellant himself may be given and signed by his Solicitor or other person authorised to act on his behalf.

(*e.*) In the case of a body corporate where by the Act or these Rules any notice or other document is required to be signed by the Appellant himself, it shall be sufficient compliance therewith if such notice or other document is signed by the Secretary, Clerk, Manager, or Solicitor of such body corporate.

Shorthand Writers and Transcript of Notes.

5. (*a.*) Shorthand Writers shall be appointed from time to time as required for the purposes of the Act by the Lord Chancellor and the Lord Chief Justice for such period and on such conditions as they shall think right.

(*b.*) The Shorthand Writer shall sign the shorthand note taken by him of any trial or proceeding, or of any part of such trial or proceeding, and certify the same to be a complete and correct shorthand note thereof, and shall retain the same unless and until he is directed by the Registrar to forward such shorthand note to him.

(*c.*) The Shorthand Writer shall, on being directed by the Registrar, furnish to him for the use of the Court of Appeal a transcript of the whole or of any part of the shorthand note taken by him of any trial or proceeding in reference to which an Appellant has appealed under the Act. [*The questions and answers are to be numbered*: R. v. Grey, 2 Cr. App. R. 37.]

(*d.*) The Shorthand Writer shall furnish to a party interested in a trial or other proceeding in relation to which a person may appeal under the Act, and to no other person, a transcript of the whole or any part of the shorthand note of any such trial or other proceedings, on payment by such party interested to such Shorthand Writer of his charges on such scale as the Treasury may fix.

(*e.*) A party interested in an Appeal under the Act may obtain from the Registrar a copy of the transcript of the whole or of any part of such shorthand note as relates to the Appeal subject to the provisions of section 16 of the Act.

(*f.*) For the purposes of this Rule, "a party interested" shall mean the prosecutor (not being the Director of Public Prosecutions), or the person convicted, or any other person named in, or immediately affected by, any order made by the Judge of the Court of Trial, or other person authorised to act on behalf of a party interested, as herein defined.

(*g.*) Whenever under the Act or these Rules a transcript of the whole or of any part of such shorthand note is required for the use of the Court of Appeal such transcript may be made by the Shorthand Writer who took and certified the shorthand note, or by such other competent person as the Registrar may direct.

(*h.*) A transcript of the whole or any part of the shorthand note relating to the case of any Appellant which may be required for the use of the Court of Appeal shall be typewritten and verified by the person making the same by a Statutory Declaration in the form (VIII.) in the Schedule to these Rules that the same is a correct and complete transcript of the whole, or of such part, as the case may be, of the shorthand note purporting to have been taken, signed, and certified by the Shorthand Writer who took the same.

Certificate of Judge at Trial.

6. (*a.*) The certificate of the Judge of the Court of Trial under section 3*b* of the Act (*ante*, p. 302) may be in the form (I.) in the Schedule to these Rules.

(*b.*) The Judge of the Court of Trial may, in any case in which he considers it desirable so to do, inform the person convicted before or sentenced by him that the case is in his opinion one fit for an appeal to the Court of Appeal under section 3*b*, and may give to such person a certificate to that effect in the form (I.) in the Schedule to these Rules.

Appeals where Fine only is inflicted.

7. (*a.*) Where a person has, on his conviction, been sentenced to payment of a fine, and in default of payment to imprisonment, the person lawfully authorised to receive such fine shall, on receiving the same, retain it until the determination of any Appeal in relation thereto.

(*b.*) If such person remains in custody in default of payment of the fine, he shall be deemed, for all purposes of the Act or these Rules, to be a person sentenced to imprisonment.

(*c.*) Where any person has been convicted and is thereupon sentenced to the payment of a fine, and, in default of such payment, to imprisonment, and he intimates to the Judge of the Court of Trial that he is desirous of appealing against his conviction to the Court of Appeal, either upon grounds of law alone, or, with the Certificate of the Judge of the Court of Trial, upon any grounds mentioned in section 3 (*b*) of the Act, such Judge may, if he thinks right so to do, order such person forthwith to enter into recognizances in such amount, and with and without sureties in each amount as such Judge may think right, to prosecute his appeal. And, subject thereto, may order that payment of the said fine shall be made at the final determination of his said appeal, if the same be dismissed, to the Registrar of the Court of Appeal, or as such Court may then order. The recognizance under this Rule shall be in the forms (XX.) and (XXI.) in the Schedule hereto. A surety becoming duly bound by recognizance under this Rule, shall be deemed to be, for all purposes, and shall have all the powers of a surety under the provisions of Rule 29 (*post*, p. 321).

The proper officer of the Court of Trial shall forward the recognizances of the Appellant and his surety or sureties to the Registrar.

(*d.*) An Appellant who has been sentenced to the payment of a fine, and has paid the same in accordance with such sentence, shall, in the event of his Appeal being successful, be entitled, subject to any order of the Court of Appeal, to the return of the sum or any part thereof so paid by him.

(*e.*) If an appellant to whom Rule 7 (*c*) applies, does not serve in accordance with these rules, a Notice of Appeal upon grounds of law alone, or with the Certificate of the Judge of the Court of Trial upon any grounds mentioned in section 3 (*b*) of the Act, within ten days from the date of his conviction and sentence, the Registrar shall report such omission to the Court of Appeal, who may, after notice in the forms (XXII.) and (XXIII.) in the Schedule hereto has been given to the Appellant and his sureties, if any, order an estreat of the recognizances of the Appellant and his sureties in manner provided by Rule 29 (*p*) hereof, and may issue a warrant for the apprehension of the Appellant and may commit him to prison in default of payment of his fine, or may make such other order as they think right.

Custody of Exhibits used at Trial.

8. (*a.*) The Judge of the Court of Trial may make any Order he thinks fit for the custody, disposal, or production of any exhibits in the case, but unless he makes any such order, exhibits shall be returned to the custody of the person producing the same or of the Solicitor for the prosecution or defence respectively. Such person or Solicitor shall retain the same pending any appeal and shall, on notice from the Registrar or Director of Public Prosecutions, produce or forward the same as and when required so to do.

(*b.*) The proper officer of the Court of Trial shall keep a record of any order or direction of the Judge thereof given under this Rule.

(*c.*) Whenever a person is committed for trial, it shall be the duty of the Coroner or of the Clerk to the Justice committing such person for trial to make and forward, with the depositions taken in relation to such person, a complete list of such exhibits as have been produced and used in evidence for or against him during any proceedings before such Coroner or Justice, to the Court before which such person is to be tried. Such list shall be in the form (XXXIII.) in the Schedule to these Rules, subject to the necessary modifications, and shall be signed by such Coroner or Clerk. The exhibits appearing on such list shall be marked with consecutive numbers for the purpose of readily identifying the same. (Care should be taken to observe this rule. See *R.* v. *Thornley*, 11 Cr. App. R. 270.)

Any exhibits put in for the first time at the trial shall be added to such list by the proper officer of the Court of Trial and marked as herein provided.

Order made at Trial. Consequential Orders and Suspension of same pending Appeal.

9. *Varying Order of Restitution of Property.*]—Where, upon the trial of a person entitled to appeal under the Act against his conviction, an order of restitution of any property to any person has been made by the Judge of the Court of Trial, the person in whose favour or against whom the order of restitution has been made, any person in whose favour or against whom an order to which Rule 10 relates has been made, and, with the leave of the Court of Appeal, any other person, shall, on the final hearing by the Court of Appeal of an appeal against the conviction on which such order of restitution was made, be entitled to be heard by the Court of Appeal before any order under the provisions of section 6, sub-section 2, of the Act (*ante*, p. 306), annulling or varying such order of restitution is made.

10. *Non-suspension of Orders for Restitution, etc.*]—Where the Judge of the Court of Trial is of opinion that the title to any property the subject of an order of restitution made on a conviction of a person before him, or any property to which the provisions of sub-section 1 of Section 24 of the Sale of Goods Act, 1893 (*ante*, p. 294), apply, is not in dispute, he, if he shall be of opinion that such property or a sample or portion or facsimile representation thereof is reasonably necessary to be produced for use at the hearing of any Appeal, shall give such directions to or impose such terms upon the person in whose favour the order of restitution is made, or in whom such property revests under such sub-section as he shall think right in order to secure the production of such sample, portion or facsimile representation for use at the hearing of any such Appeal.

11. (*a.*) *Temporary Suspension of Orders made on Conviction, as to Money Rewards, Costs, etc.*]—Where, on the conviction of a person, the Judge of the Court of Trial makes an order condemning such person to the payment of the whole or of any part of the costs and expenses of the prosecution for the offence of which he shall be convicted out of any moneys taken from such person on his apprehension or otherwise, or where such Judge lawfully orders a reward to any person who shall appear to have been active in the apprehension of any such convicted person, or where such Judge makes any order under section 30 of the Criminal Law Act, 1826 (7 Geo. IV. c. 64) (*ante*, p. 289), or under section 74 of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100) (*superseded* by 8 Edw. 7, c. 15, s. 6 (1), *ante*, p. 284), or under section 9 of the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35) (see now 6 & 7 Geo. 5, c. 90, s. 45 (3), *ante*, p. 293), or where such Judge makes any order awarding to any person aggrieved any sum of money to be paid by such convicted person under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), section 4 (*ante*, p. 290), or where such Judge lawfully makes on the conviction of any person before him any order for the payment of money by such convicted person or by any other person or any order affecting the rights or property of such convicted person the operation of such orders shall in any of such cases be suspended until the expiration of ten days after the day on which any of such orders were made. And in cases where Notice of Appeal or Notice of Application for leave to appeal is given within ten days from and after the date of the verdict against such person, such order shall be further suspended until the determination of the appeal against the conviction in relation to which they were made. The Court of Appeal may, by order, annul an

order to which this Rule refers on the determination of any appeal under the Act, or may vary such order, and such order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

The proper officer of the Court of Trial shall keep a record of any orders to which this Rule refers.

(*b.*) *Judge's Directions as to Property of Convicted Person pending Appeal.*]—Where the Judge of the Court of Trial makes any such Order on a person convicted before him, as in this Rule mentioned, he shall give such directions as he thinks right as to the retention by any person of any money or valuable securities belonging to the person so convicted and taken from such person on his apprehension or of any money or valuable securities at the date of his conviction in the possession of the prosecution for the period of ten days, or in the event of an appeal, until the determination thereof by the Court of Appeal. The proper officer of the Court of Trial shall keep a record of any directions given under this Rule.

(*c.*) *Suspension of Disqualifications consequent on Conviction.*]—Where upon conviction of any person of any offence any disqualification, forfeiture or disability attaches to such person by reason of such conviction, such disqualification, forfeiture or disability shall not attach for the period of ten days from the date of the verdict against such person nor in the event of an appeal under the Act to the Court of Appeal, until the determination thereof. This Rule shall not affect the provisions of section 8 of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23) (*ante*, p. 265).

(*d.*) *Judge's Directions as to securing Payment of Money by Convicted Person pending Appeal.*]—When the Judge of the Court of Trial on the conviction of a person before him, makes any order for the payment of money by such person or by any other person upon such conviction, and, by reason of this Rule, such order would otherwise be suspended, such Judge may, if he thinks right so to do, direct that the operation of such order shall not be suspended unless the person on whom such order has been made shall in such manner and within such time as the said Judge shall direct, give security by way of undertaking or otherwise for the payment to the person in whose favour such order shall have been made of the amount therein named. Such security may be to the satisfaction of the person in whose favour the order for payment shall have been made or of any other person as such Judge shall direct.

(*e.*) *Suspension of Order of Destruction or Forfeiture of Property.*]—Where on a conviction any property, matters or things the subject of the prosecution or connected therewith, are to be or may be ordered to be destroyed or forfeited under the provisions of any statute, the destruction or forfeiture or order for destruction or forfeiture thereof shall be suspended for the period of ten days from and after the date on which the verdict on such indictment was returned, and in the event of an appeal under the Act, shall be further suspended until the determination thereof by the Court of Appeal.

(*f.*) *Suspension of Proceedings or Claims consequent on Conviction.*]—Where, upon conviction of any person of any offence, any claim may be made or any proceedings may be taken under any statute against such person or any other person in consequence of such conviction, such proceedings shall not be taken until after the period of ten days from the date on which the verdict against such person was returned nor in the event of an appeal under the Act to the Court of Appeal until the determination thereof.

Any person affected by any orders which are suspended under this Rule may, with the leave of the Court of Appeal, be heard on the final determination of any appeal, before any such orders are varied or annulled by the Court of Appeal.

12. *Period of Suspension of Orders under Section 6 of Act.*]—The time during which an Order of Restitution or the operation of sub-section 1 of section 24 of the Sale of Goods Act, 1893 (*ante*, p. 294), is suspended under section 6 of the Act, shall commence to run from the day on which the verdict of the Jury was returned, and, in cases where Notice of Appeal or Notice of Application for leave to appeal is duly given within ten days after such day, the period of suspension of such order or of the operation of the sub-section shall continue until the determination of the appeal.

13. (*a.*) *Certificate of Conviction when not to Issue.*]—The Clerk of the Court of Trial or other officer thereof, having the custody of the Records of such Court, or the deputy of such Clerk or other officer, shall not issue, under any Statutes authorising him so to do, a certificate of conviction of any person convicted on indictment in the Court to

which he is such Clerk, officer, or deputy, for the period of ten days after the actual day on which such conviction took place, nor in the event of such Clerk, officer, or deputy receiving information from the Registrar of the Court within such ten days that a Notice of Appeal or if application for leave to appeal has been given under the Act, until the determination thereof.

(*b.*) Where an application is made to such Clerk, officer, or deputy to issue such certificate of conviction as in this Rule mentioned after the expiration of the said period of ten days, he shall require, before issuing the same, to be satisfied that there is no appeal then pending in the Court of Appeal against such conviction. A person desirous of obtaining a certificate of conviction from such Clerk, officer, or deputy shall be entitled to obtain from the Registrar a certificate in such form as the said Registrar may think right for the purpose of satisfying, by the production thereof, such Clerk, officer, or deputy that no appeal against such conviction is then pending. After the expiration of two months from the date of the conviction a certificate thereof may be issued by such Clerk, officer, or deputy as heretofore, except in cases in which he has had notice of an appeal still undetermined.

For the purposes of this Rule the expression "conviction" shall mean the verdict or plea of guilty and any final judgment passed thereon.

Notes and Report of Judge of Trial.

14. The Registrar when he has received a Notice of Appeal, or a Notice of Application for leave to appeal under the Act, or a Notice of Application for extension of the time within which under the Act such notices shall be given, or when the Secretary of State shall exercise his powers under section 19 of the Act (*ante*, p. 312), shall request the Judge of the Court of Trial to furnish him with the whole of or any part of his note of the trial or with a copy of such note or any part thereof, and such Judge of the Court of Trial shall thereupon furnish the same to the Registrar in accordance with such request.

15. (*a.*) The Registrar when he has received a Notice of Appeal, or a Notice of Application for leave to appeal under the Act, or a Notice of Application for extension of time within which under the Act such notices shall be given, or when the Secretary of State shall exercise his power under section 19 of the Act (*ante*, p. 312), or wherever it appears to be necessary for the proper determination of any appeal or application, or for the due performance of the duties of the Court of Appeal under the said section may and, whenever in relation to any appeal under the Act the Court of Appeal or any Judge thereof directs him so to do, shall request the Judge of the Court of Trial to furnish him with a Report in writing, giving his opinion upon the case generally or upon any point arising upon the case of the Appellant, and the Judge of the Court of Trial shall furnish the same to the Registrar in accordance with such request.

(*b.*) The Report of the Judge shall be made to the Court of Appeal, and except by leave of the Court or a Judge thereof the Registrar shall not furnish to any person any part thereof.

16. When the Registrar shall request the Judge of the Court of Trial to furnish a Report under these Rules, he shall send to such Judge of the Court of Trial a copy of the Notice of Appeal or Notice of Application for leave to appeal or Notice of Application for extension of time within which under the Act such notice shall be given or any other document or information which he shall consider material, or which the Court of Appeal at any time shall direct him to send, or with which such Judge may request to be furnished by the Registrar, to enable such Judge to deal in his Report with the Appellant's case generally or with any point arising thereon.

Notices of Appeal and Period for Appealing; Abandonment of Appeals.

17. A person desiring, under the provisions of the Act, to appeal to the Court of Appeal against his conviction or sentence, shall commence his appeal by sending to the Registrar a Notice of Appeal or Notice of Application for leave to appeal, or Notice of Application for extension of time within which such notice shall be given, as the case may be, in the form of such Notices respectively set forth in the Schedule to these

Rules, and in the Notice or Notices so sent, shall answer the questions and comply with the requirements set forth thereon, subject to the provisions of Rule 45.

18. *Time for Appeal.*]—The time within which a person convicted shall give Notice of Appeal or Notice of his Application for leave to appeal to the Court of Criminal Appeal against his conviction, shall commence to run from the day on which the verdict of the Jury was returned, whether the Judge of the Court of Trial shall have passed sentence or pronounced final judgment upon him on that day or not.

19. *Time for Appealing against Sentence.*]—The time within which a person convicted and sentenced, shall give Notice of Appeal or Notice of Application for leave to appeal against such sentence under the Act to the Court of Criminal Appeal, shall commence to run from the day on which such sentence shall have been passed upon him by the Judge of the Court of Trial.

20. (*a.*) *Furnishing with Particulars, etc., of Trial.*]—When the Registrar has received a Notice of Appeal, or a Notice of Application for leave to appeal, or a Notice of Application for extension of time within which, under the Act, such notices shall be given, or where the Secretary of State shall exercise his powers under section 19 of the Act, he shall forthwith apply to the proper officer of the Court of Trial for the particulars of the trial and conviction according to the form (II.) in the Schedule hereto, and for the Calendar supplied to the Judge of the Court of Trial or a copy thereof so far as the same refers to the Appellant, and such officer shall forthwith furnish the same to the Registrar.

(*b.*) *Furnishing Depositions, Indictments, Pleas, etc.*]—The Registrar may, if it appears to him to be necessary for the proper determination of any appeal or application or for the due performance of the duties of the Court of Appeal under the said section or whenever in any such cases he is directed by the Court of Appeal so to do, shall require the proper officer of the Court of Trial to furnish him with the original depositions of witnesses examined before the committing Justice or Coroner, or with any exhibit retained by such officer, and with the indictment or indictments or inquisition against the Appellant, or with an abstract or copy thereof or any part thereof or with any plea filed in the Court of Trial, and such officer shall forthwith furnish the same to the Registrar.

21. *Prosecutor at Trial to be Ascertained.*]—The proper officer of the Court of Trial shall ascertain and record in every case the name and address of the person, whether a private prosecutor or not, who is responsible for and is carrying on a prosecution in such Court, and the name and address of the Solicitor, if any, for the prosecution.

22. *Notice of Application for Leave to Appeal.*]—Where the Court of Appeal has, on a Notice of Application for leave to appeal duly served, and in the form provided under these Rules, given an Appellant leave to appeal, it shall not be necessary for such Appellant to give any Notice of Appeal, but the Notice of Application for leave to appeal shall in such case be deemed to be a Notice of Appeal.

23. *Abandonment of Appeal.*]—An Appellant at any time after he has duly served Notice of Appeal or of Application for leave to appeal, or of application for extension of time within which under the Act such notices shall be given, may abandon his appeal by giving notice of abandonment thereof in the form (III.) in the Schedule to these Rules to the Registrar and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal.

24. *Notice of Application for Extension of Time.*]—An application to the Court of Appeal for an extension of time within which notices may be given, shall be in the form (IX.) in the Schedule hereto. Every person making an application for such extension of time, shall send to the Registrar together with the proper form of such application, a form, duly filled up, of Notice of Appeal, or of Notice of Application for leave to appeal, appropriate to the ground or grounds upon which he desires to question his conviction or sentence, as the case may be.

Proceedings before Judge of Appeal Court under Section 17 (*ante*, p. 311).

25. (*a.*) *Dealing with Applications for Leave to Appeal and other Preliminary Applications.*]—Notice of Application for leave to appeal or for extension of time within which Notice of Appeal or Notice of Application for leave to appeal shall be given under the

Act in the forms in the Schedule hereto, and the answers to the questions on forms (IV.), (V.), (VI.), and (VII.), which an Appellant is by these Rules required to make, in reference to legal aid being assigned to him, or to leave being granted to him to be present at the hearing of his appeal, shall be deemed to be applications to the Court of Appeal in such matters respectively.

(*b.*) *Procedure on Refusal of Applications under Section* 17.]—The Registrar when any application mentioned in this Rule has been dealt with by such Judge shall notify to the Appellant the decision. In the event of such Judge refusing all or any of such applications the Registrar on notifying such refusal to the Appellant shall forward to him form (XIII.) in the Schedule hereto, which form the Appellant is hereby required to fill up and forthwith return to the Registrar. If the appellant does not desire to have his said application or applications determined by the Court of Appeal as duly constituted for the hearing of appeals under the Act, or does not return within five days to the Registrar form (XIV.) duly filled up by him, the refusal of his application or applications by such Judge shall be final. If the Appellant desires that his said application or applications shall be determined by the Court of Appeal as duly constituted for the hearing of appeals under the Act and is not legally represented he may, if the Court of Appeal give him leave, be present at the hearing and determination by the Court of Appeal of his said application: provided that an Appellant who is legally represented shall not be entitled to be present without special leave of the Court of Appeal.

When an Appellant duly fills up and returns within the prescribed time to the Registrar form (XIV.) expressing a desire to be present at the hearing and determination by the Court of Appeal of the applications mentioned in this Rule, such form shall be deemed to be an application by the Appellant for leave to be so present. And the Registrar, on receiving the said form, shall take the necessary steps for placing the said application before the Court of Appeal. If the said application to be present is refused by the Court of Appeal, the Registrar shall notify the Appellant; and if the said application is granted, the Registrar shall notify the Appellant and the Governor of the Prison wherein the Appellant is in custody, and the Prison Commissioners, as provided by these Rules. For the purpose of constituting a Court of Appeal the Judge who has refused any such application may sit as a member of such Court, and take part in determining such application.

(*c.*) *Sittings under Section* 17.]—A Judge of the Court of Appeal sitting under the provisions of section 17 of the Act may sit and act wherever convenient.

Procedure under Crown Cases Act, 1848 (*post*, p. 340).

26. (*a.*) *Procedure for adopting Crown Cases Act*, 1848.]—Where a person is entitled to appeal under the Act on grounds of appeal involving a question of law alone, and his appeal is not dealt with under the provisions of section 15, sub-section 2, of the Act (*ante*, p. 309), an application by him or by the respondent may at any time be made to the Court of Appeal that the questions of law raised in such appeal should be decided by the Court of Appeal in accordance with the procedure under the Crown Cases Act, 1848, as amended by the Act. And the Court of Appeal may upon such application, or upon a report made to them by the Registrar that the procedure under the Crown Cases Act, 1848, as amended by the Act, would, in his opinion, be a more convenient method of dealing with the points of law raised in such appeal, make an order that the same shall be so dealt with.

(*b.*) When an order has been made under this Rule, the Registrar shall notify the Judge of the Court of Trial thereof, and shall forward to him for the purpose of giving to him facilities in the statement of the case, a copy of the Notice of Appeal and any supplemental or explanatory statement furnished by the Appellant to the Registrar and any other information or material which the Registrar may think necessary or such Judge may require.

(*c.*) The Judge of the Court of Trial shall forward a case stated by him in pursuance of this Rule to the Registrar, together with all documents or other material received from the Registrar, who shall on receiving the same send a copy of such case to the Appellant and Respondent respectively.

(*d.*) Where under the provisions of the Crown Cases Act, 1848, the Judge of the Court of Trial states a case for the consideration of the Court for Crown Cases Reserved, the person convicted shall for the purposes of these Rules be deemed to be an Appellant who has appealed under section 3 (*a*) of the Act, (*ante*, p. 302), provided that in such case section 15, sub-section 2 (*ante*, p. 309), thereof shall not apply.

Duties of Director of Public Prosecutions.

27. (*a.*) *Registrar's Duties as to Ascertaining Respondent.*]—When the Registrar has received a Notice of Appeal, or a Notice of Appeal on grounds of law alone, which does not, in his opinion, fall within the provisions of section 15, sub-section 2, of the Act (*ante*, p. 309), or where leave to appeal is granted to any Appellant, he shall forthwith ascertain from the person specified in form (II.) as the Prosecutor, unless such person shall be the Director of Public Prosecutions, or a Government Department, or from the Solicitor of such person, whether the Prosecutor intends to undertake the defence of the appeal. And in the event of the Prosecutor declining to undertake the defence of the appeal, notice to that effect shall be sent by the Registrar to the Director of Public Prosecutions.

Where such Prosecutor in the Court of Trial was the Director of Public Prosecutions, the Registrar shall notify him of such appeal.

(*b.*) *Prosecutor to afford all Information, Documents, etc., to Registrar and Director of Public Prosecutions.*]—It shall be the duty of a Prosecutor who declines to undertake the defence of an appeal, and of his Solicitor, to furnish to the Registrar and the Director of Public Prosecutions, or either of them, any information, documents, matters, and things in his possession or under his control connected with the proceedings against the Appellant, which the Registrar or Director of Public Prosecutions may require for the purposes of their duties under the Act.

28. *Substitution of Director of Public Prosecutions for Private Prosecutor.*]—Where the defence of an appeal is undertaken by a private prosecutor the Court of Appeal may, at any stage of the proceedings in such appeal, if it shall think right so to do, order that the Director of Public Prosecutions or the Solicitor of a Government Department shall take over the defence of the appeal and be responsible on behalf of the Crown for the further proceedings in the same.

Procedure on Applications for Bail: Rights of Sureties: Estreat of Recognizances.

29. (*a.*) When the Court of Appeal under the Act admits an Appellant to bail pending the determination of his appeal on an application by him duly made in compliance with these Rules, the Court shall specify the amounts in which the Appellant and his surety or sureties (if any be required) shall be bound by recognizance, and shall direct, if they think right so to do, before whom the recognizances of the Appellant and his surety or sureties (if any) may be taken. (See *R.* v. *Ridley*, 25 T. L. R. 508.)

(*b.*) In the event of the Court of Appeal not making any special order or giving special directions under this Rule, the recognizances of the Appellant may be taken before a Justice of the Peace being a member of the Visiting Committee of and at the Prison in which he shall then be confined or the Governor thereof, and the recognizances of his surety or sureties (if any) may be taken before any Petty Sessional Court.

(*c.*) The Registrar shall notify the Appellant and the Governor of the Prison within which he is confined, the terms and conditions on which the Court shall admit the Appellant to bail under the Act.

(*d.*) The said Petty Sessional Court shall be entitled to require the assistance of the Police acting within such Petty Sessional Division for the purpose of making inquiry as to the sufficiency or otherwise of any person offering himself as a surety on behalf of any Appellant who has, under the Act, been granted bail, and it shall be the duty of such Police to give such assistance to and as and when required by a Petty Sessional Court under this Rule.

(*e.*) After the recognizance of a surety has been duly taken under these Rules by such Petty Sessional Court, the Clerk thereof shall forward such recognizance to the Registrar, and the Governor of the Prison in which the Appellant is then confined shall, after the

Appellant's recognizance has been duly taken in pursuance of this Rule, forward the same to the Registrar. The Clerk shall after the recognizances of a surety are taken give to him a certificate in the form (XV.) in the Schedule hereto, which such surety shall sign, and retain.

(*f.*) The Registrar on being satisfied that the recognizances of the appellant and his surety or sureties (if any) are in due form and in compliance with the order of the Court admitting the Appellant to bail, shall send in the form (XII.) in the Schedule to these Rules a notice to the Governor of the Prison in which the Appellant shall then be confined. This notice, when received by the said Governor, shall be a sufficient authority to him to release the Appellant from custody.

(*g.*) The recognizances provided for in this Rule shall be in the forms (X.) and (XI.) in the Schedule hereto.

(*h.*) An Appellant who has been admitted to bail under the Act, shall, by the order of the Court of Appeal or a Judge thereof under which he was so admitted to bail, be ordered to be and shall be personally present at each and every hearing of his appeal, and at the final determination thereof. The Court of Appeal may, in the event of such Appellant not being present at any hearing of his appeal, if they think right so to do, decline to consider the appeal, and may proceed to summarily dismiss the same, and may issue a Warrant for the apprehension of the Appellant in the form (XIX.) in the Schedule hereto. Provided that the Court of Appeal may consider the appeal in his absence, or make such other order as they think fit.

(*i.*) When an Appellant is present before the Court of Appeal, such Court may on an application made by any person or, if they think right so to do, without any application make any order admitting the Appellant to bail, or revoke or vary any such order previously made, or enlarge from time to time the recognizance of the Appellant or of his sureties or substitute any other surety for a surety previously bound as they think right.

(*j.*) Where the surety or sureties, for an Appellant under the Act, upon whose recognizances such Appellant has been released on bail by the Court of Criminal Appeal, suspects that the said Appellant is about to depart out of England or Wales, or in any manner to fail to observe the conditions of his recognizances on which he was so released, such surety or sureties may lay an information before one of His Majesty's Justices of the Peace acting in and for the Petty Sessional Division in which the said Appellant is, or is by such surety or sureties believed to be, or in which such surety or sureties may then be, in the form (XVI) in the Schedule hereto, and such Justice shall thereupon issue a Warrant in the form (XVII.) in the Schedule hereto, for the apprehension of the said Appellant.

(*k.*) The said Appellant shall, upon being apprehended under the said Warrant, be brought before the Petty Sessional Court in and for which the said Justice acts before whom the said information was laid, or some other Petty Sessional Court specified in the said Warrant. The said Petty Sessional Court shall on verification of the said information by oath of the informant, by Warrant of Commitment in the form (XVIII.) in the Schedule hereto, commit him to the prison to which persons charged with indictable offences before such Petty Sessional Court are ordinarily committed. The Governor of such prison shall, unless such prison was the prison from which the Appellant was released on bail under these Rules, notify the Prison Commissioners of such commitment, as in this Rule mentioned.

Where the Appellant is by such Petty Sessional Court committed to a prison which was not the prison from which he was released on bail after his conviction, the Prison Commissioners subject to any order of the Court of Appeal may transfer him to the prison from which he was so released.

(*l*) The Clerk of the said Petty Sessional Court on the commitment of any such Appellant, shall forthwith notify the Registrar to that effect, and forward to him the said information and the deposition in verification thereof taken before such Petty Sessional Court together with a copy of the said Warrant of Commitment.

(*m.*) At any time after an Appellant has been released on bail under the Act, the Court of Appeal may, if satisfied that it is in the interest of justice so to do, revoke the order admitting him to bail, and issue a Warrant in the form (XIX.) in the Schedule hereto for his apprehension, and order him to be committed to prison.

(*n.*) When an Appellant has been released on bail and has, under a Warrant under these Rules or by his surety or sureties, been apprehended and is in prison, the Governor thereof shall forthwith notify the Registrar, who shall take steps to inform the Court thereof, and the Court of Appeal may give to the Registrar such directions as to the appeal or otherwise as they shall think right.

(*o.*) Nothing in these Rules shall affect the lawful right of a surety to apprehend and surrender into custody the person for whose appearance he has become bound, and thereby to discharge himself of his suretyship.

(*p.*) The Court of Appeal may on any breach of the recognizances of the Appellant, if it thinks right so to do, order such recognizances and those of his surety or sureties to be estreated, and the manner of such estreat shall be that provided for estreating recognizances under the Crown Office Rules, 1906 (Rule 115, *ante*, p. 96).

30. *Enquiry and Report by Police as to Appellant's Means.*]—It shall be the duty of the Chief Officer of Police of the district in which the Appellant shall have resided before his conviction, or of the district from which he was committed, to enquire as to and to report to the Registrar when applied to by him, upon the means and circumstances of any Appellant where a question as to his means and circumstances arises under the Act or these Rules.

31. (*a.*) *Attendance of Warders at Sittings of Court of Appeal.*]—The Prison Commissioners shall on notice from the Registrar cause from time to time such sufficient number of male and female warders to attend the sittings of the Court of Appeal, as having regard to the list of appeals thereat they shall consider necessary.

(*b.*) An Appellant who is not in custody, shall, whenever his case is called on before the Court of Appeal, surrender himself to such persons as the Court shall from time to time direct, and thereupon shall be searched by them, and shall be deemed to be in their lawful custody until further released on bail or otherwise dealt with as the Court shall direct.

32. (*a.*) *Obtaining Documents, Exhibits, etc., for Purposes of Appeal, and same to be Open for Inspection.*]—The Registrar may, on an application made to him by the Appellant or Respondent in any appeal, or where he considers the same to be necessary for the proper determination of any appeal or application, or shall where directed by the Court of Appeal so to do, obtain and keep available for use by the Court of Appeal any documents, exhibits, or other things relating to the proceedings before the Court, and pending the determination of the appeal, such documents, exhibits, or other things shall be open as and when the Registrar may arrange, for the inspection of any party interested.

(*b.*) *Ordering Production of any Document or Exhibits, etc.*]—The Court of Criminal Appeal may, at any stage of an appeal, whenever they think it necessary or expedient in the interest of justice so to do, on the application of an Appellant or Respondent, order any document, exhibit, or other thing connected with the proceedings, to be produced to the Registrar or before them, by any person having the custody or control thereof. Any order of the Court of Appeal under this Rule may be served as in this Rule provided.

(*c.*) *Service of Orders.*]—Service of any order made under this Rule shall be personal service, unless the Court otherwise order, and for the purpose of effecting due service thereof the Registrar may require the assistance of the Metropolitan Police, or may forward the order together with instructions to the Chief Officer of Police of the County or Borough in which the person is, or is believed to be, in whose custody or under whose control such document, exhibit, or other thing is; and it shall be the duty of the Metropolitan Police or of such Chief Officer of Police to carry out any directions of the Registrar under this Rule.

Exhibits in Court of Trial, how dealt with.

33. (*a.*) Exhibits, other than such documents as are usually kept by the proper officer of the Court of Trial shall, subject to any order which the Court of Appeal may make, be returned to the person who originally produced the same, provided that any such exhibit to which the provisions of section 6 of the Act (*ante*, p. 305) relate shall not be so returned except under the direction of the Court of Appeal.

Notifying Result of Appeals.

34. (*a.*) On the final determination of any appeal under the Act or of any matter under section 17 of the Act (*ante*, p. 311), the Registrar shall give to the Appellant, if he is in custody and has not been present at such final determination, and to the Secretary of State, and to the Governor of the prison in which the Appellant then is, or from which he has been released on bail or to which under such determination he is committed, and to the Prison Commissioners, notice of such determination in the forms (XXIX.), (XXX.), (XXXI.), and (XXXII.) respectively provided for such cases in the Schedule hereto.

(*b.*) In any case of an appeal in relation to a conviction involving sentence of death, the Registrar shall on receiving the Notice of Appeal or of Application for leave to appeal, send a copy thereof to the Secretary of State, and on the final determination of any such appeal by the Court of Appeal shall forthwith notify the Appellant, the Secretary of State, the Governor of the prison in which the Appellant then is or to which he is committed under such determination, and the Prison Commissioners thereof.

35. (*a.*) The Registrar at the final determination of an appeal shall notify in such manner as he thinks most convenient to the proper officer of the Court of Trial the decision of the Court of Appeal in relation thereto and also any orders or directions made or given by the Court under the Act, or these Rules, in relation to such appeal or any matter connected therewith.

(*b.*) The proper officer of the Court of Trial shall on receiving the notification referred to in this Rule, enter the particulars thereto on the Records of the Court of which he is such officer.

36. Upon the final determination of an appeal for the purposes of which the Registrar has obtained from the proper officer of the Court of Trial any original depositions, exhibits, indictment, inquisition, plea, or other documents usually kept by the said officer, or forming part of the Record of the Court of Trial, the Registrar shall cause the same to be returned to such officer.

Legal Aid to Appellants.

37. A report made by the Registrar under section 15, sub-section 5, of the Act (*ante*, p. 310), shall be made to a Judge of the Court, and any directions given thereupon by such Judge shall be final.

38. (*a.*) *List of Counsel and Solicitors to be prepared and maintained by Clerks of Assize.*]—The Clerk of Assize on each Circuit in England and Wales shall cause to be prepared, in such form as he thinks most convenient, a list of Counsel usually attending Courts of Assize and County and Borough Quarter Sessions held in the Counties on his Circuit who are willing to act as Counsel for Appellants if and when nominated under the Act. In the preparation of such list the Clerk of Assize shall, as far as possible, indicate the towns or places on his Circuit at which such counsel usually practise.

The Clerk of Assize on each Circuit shall also cause to be prepared in such form as he thinks most convenient a list of Solicitors practising at places within Counties comprising his Circuit as shall be willing to act as Solicitors on behalf of Appellants if and when nominated so to do under the Criminal Appeal Act, 1907; and the Clerk of Assize may for the purposes of preparing such list of Solicitors consult with the President of the Law Society or the President or Chairman of any Local Law Society within the Counties comprising his Circuit.

Such list shall be prepared and forwarded to the Registrar as soon as may be after the 18th April, 1908, and before the conclusion of the Winter Assize in each succeeding year shall be similarly revised by, and, when revised, forwarded by the Clerk of Assize to the Registrar.

For the purposes of this Rule the Quarter Sessions for the Counties of London and Middlesex respectively and the Sessions of the Central Criminal Court shall be deemed to be Courts of Assize for their respective jurisdictions; and the Clerks of the Peace of the said Counties and the Clerk of the Central Criminal Court shall be respectively deemed to be Clerks of Assize.

(*b.*) *Legal Aid to be Provided from such Lists.*]—When legal aid is assigned to an Appellant, the Court of Appeal may give such directions as to the stage of the appeal

at which such legal aid shall commence and whether Counsel only, or Counsel and Solicitor, shall be assigned or otherwise as they think right.

The Registrar shall thereupon, subject to any special order of the Court of Appeal, select from such lists or otherwise a Counsel — or / and Solicitor for the purpose of affording legal aid to an appellant under the directions of the Court of Appeal, having regard in so doing to the place at which the Appellant was tried and the Counsel or Solicitor, if any, who represented the Appellant at his trial and the nature of the appeal.

Copies of Documents for Use of Appellants.

39. (*a.*) At any time after Notice of Appeal or Notice of Application for leave to appeal has been given under the Act or these Rules, an Appellant or Respondent, or the Solicitor or other person representing either of them, may obtain from the Registrar copies of any documents or exhibits in his possession under the Act or these Rules for the purposes of such appeals. Such copies shall be supplied by the Registrar at such charges as may be provided in regulations as to rates and scales of payment to be made by the Treasury, and such charges shall be paid by stamps.

(*b.*) Where Solicitor and Counsel, or Counsel only, are assigned to an Appellant under the Act, copies of any documents or exhibits which they or he may request the Registrar to supply shall without charge be supplied unless the Registrar thinks that they are not necessary for the purpose of the Appeal.

(*c.*) A transcript of the Shorthand Notes taken of the proceedings at the trial of any Appellant shall not be supplied free of charge, except by an Order of the Court of Appeal or a Judge thereof, upon an application made by an Appellant or by his Counsel or Solicitor assigned to him under the Act.

(*d.*) Where an Appellant, who is not legally represented, requires from the Registrar a copy of any document or exhibit in his custody for the purposes of his appeal, he may obtain it free of charge if the Registrar thinks, under all the circumstances, it is desirable or necessary to supply the same to him.

Procedure as to Witnesses before Court of Appeal, and their Examination before Examiner.

40. (*a.*) Where the Court of Appeal have ordered any witness to attend and be examined before the Court under section 9 (*b*) of the Act (*ante*, p. 307), an order in the form (XXV.) in the Schedule hereto shall be served upon such witness specifying the time and place at which to attend for such purpose.

(*b.*) Such order may be made on the application at any time of the Appellant or Respondent, but if the Appellant is in custody and not legally represented the application shall be made by him in the form (XXVI.) in the schedule hereto.

(*c.*) Where the Court of Appeal order the examination of any witness to be conducted otherwise than before the Court itself, such order shall specify the person appointed as examiner to take and the place of taking such examination and the witness or witnesses to be examined thereat.

(*d.*) The Registrar shall furnish to the person appointed to take such examination any documents or exhibits and any other material relating to the said appeal as and when requested to do so. Such documents and exhibits and other material shall after the examination has been concluded be returned by the Examiner together with any depositions taken by him under this Rule to the Registrar.

(*e.*) When the Examiner has appointed the day and time for the examination he shall request the Registrar to notify the Appellant or Respondent and their legal representatives, if any, and when the Appellant is in prison, the Governor of that prison, thereof. The Registrar shall cause to be served on every witness to be so examined a notice in the form (XXVII.) in the schedule hereto.

(*f.*) Every witness examined before an Examiner under this Rule shall give his evidence upon oath, to be administered by such Examiner, except where any such witness if giving evidence as a witness on a trial on indictment need not be sworn.

(*g.*) The examination of every such witness shall be taken in the form of a deposition in the same manner as is prescribed by section 17 of The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), and unless otherwise ordered shall be taken in private. The caption in the form (XXIV.) in the schedule hereto shall be attached to any such deposition.

(*h.*) Where any witness shall receive an order or notice to attend before the Court of Appeal or an Examiner, the Police Officer serving the same may, if it appears to him necessary so to do, pay to him a reasonable sum not exceeding the amount of the scale sanctioned by Secretary of State for the travelling expenses of such witness from his place of residence to the place named in such notice or order, and the sum so paid shall be certified by such Officer to the Registrar. Any expenses certified by the Registrar under this Rule shall be paid as part of the expenses of a prosecution.

(*i.*) Any order or notice required by this Rule to be given to any witness may be served as an order may be served under Rule 32 (*c*) hereof, and any such notice shall be deemed to be an order of the Court of Appeal on such witness to attend at the time and place specified therein.

(*j.*) The Appellant and Respondent, or Counsel or Solicitor on their behalf, shall be entitled to be present at and take part in any examination of any witness to which this Rule relates.

41. (*d.*) *Proceedings and Reference under Section* 9.]—When an order of Reference is made by the Court of Appeal under section 9 (*d*) of the Act (*ante*, p. 307), the question to be referred and the person to whom as Special Commissioner the same shall be referred shall be specified in such order. The Court of Appeal may in such order or by giving directions as and when they from time to time shall think right, specify whether the Appellant or Respondent or any person on their behalf may be present at any examination or investigation or at any stage thereof as may be ordered under section 9 (*d*) of the Act, and specify any and what powers of the Court of Appeal under the Act or these Rules may be delegated to such Special Commissioner, and may require him from time to time to make interim reports to the Court of Appeal upon the question referred to him under section 9 (*d*) of the Act, and may, if the Appellant is in custody, give leave to him to be present at any stage of such examination or investigation and give the necessary directions to the Governor of the prison in which such Appellant is, accordingly, and may give directions to the Registrar that copies of any Report made by such Special Commissioner shall be furnished to the Appellant and Respondent or to Counsel or Solicitor on their behalf.

Cause Lists.

42. (*a.*) The Registrar shall keep a Register, in such form as he thinks right, of all cases in which he shall receive a Notice of Appeal, or Notice of Application for leave to appeal under the Act, which Register shall be open for public inspection in such place and at such hours as the Registrar, subject to the approval of the Court of Appeal, shall consider convenient.

(*b.*) The Registrar shall also take the necessary steps for preparing from time to time, a general list of cases to be dealt with by the Court of Appeal when fully constituted for hearing appeals under the Act or for considering applications which a Judge of the Court has, when sitting, under section 17 of the Act, refused to grant, and shall cause such list to be published at such times and in such a manner and at such places as subject to the approval of the Court of Appeal he shall think convenient for giving due notice to any parties interested, of the hearing of such cases by the Court of Appeal.

(*c.*) The Registrar shall also prepare from such general list a list of appeals and applications which have been refused by a Judge of the Court of Appeal when sitting under section 17 of the Act, which the Court of Appeal may consider on the days on which the Court of Appeal as fully constituted shall sit, and shall cause such list to be published at such times, in such places, and in such a manner as he, subject to the approval of the Court of Appeal, shall think convenient for giving due notice to any parties interested therein of the hearing of the cases in such list by the Court of Appeal. Provided that, where an Appellant is in custody and has obtained leave or is entitled to be present at the hearing and determination of his application or appeal, the Registrar shall notify the Appellant, the Governor of the Prison in which the Appellant then is,

and the Prison Commissioners, of the probable day on which his appeal or application will be heard. The Prison Commissioners shall take steps to transfer the Appellant to a prison convenient for his appearance before the Court of Appeal, at such a reasonable time before the hearing as shall enable him to consult his legal adviser, if any.

Miscellaneous Provisions.

43. (*a.*) *Application not specially provided for, how made.*]—Except where otherwise provided in these Rules, any application to the Court of Appeal may be made by the Appellant or Respondent, or by Counsel on their behalf, orally or in writing, but in regard to such applications if the Appellant is unrepresented and in custody and is not entitled or has not obtained leave to be present before the Court, he shall make any such application by forwarding the same in writing to the Registrar, who shall take the proper steps to obtain the decision of the Court thereon.

(*b.*) *Audience of Solicitors.*]—In all proceedings before a Judge under section 17 of the Act, and in all preliminary and interlocutory proceedings and applications except such as are heard before the full Court, the parties thereto may be represented and appear by a Solicitor alone.

44. *Notice to Appellant of Results of all Applications.*]—When the Court of Appeal has heard and dealt with any application under the Act or these Rules, the Registrar shall (unless it appears to him unnecessary so to do) give to the Appellant (if he is in custody and has not been present at the hearing of such application) notice of the decision of the Court of Appeal in relation to the said application.

45. *Waiver of Non-compliance with Rules not wilful.*]—Non-compliance on the part of an Appellant with these Rules or with any rule of practice for the time being in force under the Act, shall not prevent the further prosecution of his appeal if the Court of Appeal or a Judge thereof consider that such non-compliance was not wilful and that the same may be waived or remedied by amendment or otherwise. The Court of Appeal or a Judge thereof may in such manner as he or they think right, direct the Appellant to remedy such non-compliance, and thereupon the appeal shall proceed. The Registrar shall forthwith notify to the Appellant any directions given by the Court or the Judge thereof under this Rule, where the Appellant was not present at the time when such directions were given.

46. *Enforcing Duties under Rules.*]—The performance of any duty imposed upon any person under the Act or these Rules may be enforced by Order of the Court of Appeal.

47. *Warrants for Arrest of Appellants.*]—Any Warrant for the apprehension of an Appellant issued by the Court of Appeal shall be deemed to be, for all purposes, a Warrant issued by a Justice of the Peace for the apprehension of a person charged with any indictable offence under the provisions of The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), or any Act amending the same.

48. *Reference under Section* 19 (*a*).]—When the Secretary of State exercises his powers under section 19 (*a*) of the Act (*ante*, p. 312), and refers the whole case to the Court of Appeal, the petitioner whose case is so dealt with shall be deemed to be for all the purposes of the Act or these Rules a person who has obtained from the Court of Appeal leave to appeal, and the Court of Appeal may proceed to deal with his case accordingly.

49. *Payment of Expenses under Section* 13.]—The payments to be made in pursuance of orders by the Court of Appeal on a County or Borough Treasurer under section 13, sub-section 2, of the Act (*ante*, p. 308) shall be payable by him either to the persons in whose favour such orders are made or to the Solicitor of or assigned to the Appellant in any case or to any Police Officer named in the order. Such payments may if and when convenient be made by cheque or Post Office Order. Orders for payment under this Rule shall be in the form (XXVIII.) in the Schedule hereto.

50. *Sittings during Long Vacation.*]—The Judges of the Court of Criminal Appeal shall make arrangements for any sittings that may be necessary between the 1st of August and the 12th of October.

51. *Reference to Court under Section* 19 (*b*).]—Where the Secretary of State refers a point to the Court of Criminal Appeal under section 19 (*b*) of the Act (*ante*, p. 312), such Court shall, unless they otherwise determine, consider such point in private.

17th March, 1908.

FORMS UNDER THE CRIMINAL APPEAL ACT, 1907.

The following forms under the Criminal Appeal Act, 1907, are given below as being likely to be found useful in practice. Form XXXIV., relating to Notice of Appeal, etc., will probably be found of most value. Copies of these forms are supplied *gratis* on application to the Criminal Appeal Office in the Royal Courts of Justice.

FORM I. (Section 3 (*b*).)

CRIMINAL APPEAL ACT, 1907.

Judge's Certificate.

In the Court of , Holden at , in and for the of .

R. *v.*

WHEREAS the said was tried and convicted before me, the undersigned, in the said Court on the day of , on an indictment charging him with and was thereupon sentenced by me to [*State shortly the offence*, e.g., *larceny, murder, forgery, etc.*]

I DO HEREBY CERTIFY that the case is a fit case for an Appeal by the said to the Court of Criminal Appeal under section 3 (*b*) of the Criminal Appeal Act, 1907, upon the following grounds:—[*Here specify in general terms the grounds on which Certificate granted.*]

(Signed)
Judge or Commissioner of Assize.
Recorder of the Borough of .
Chairman of Quarter Sessions for the County of .

Dated this day of 19 .

FORM IX. (*Rule* 24.)

CRIMINAL APPEAL ACT, 1907.

Notice of Application for Extension of Time within which to Appeal.

To the Registrar of the Court of Criminal Appeal.

I, having been convicted of the offence of [*Here state the offence*:—e.g., *larceny, murder, forgery, etc.*] at the Assizes (Sessions) held at on the day of , A.D. 19 , and being now a prisoner in His Majesty's Prison at [*if not in custody, set out address in full*], Give you Notice, that I hereby apply to the Court of Criminal Appeal for an extension of the time within which I may give Notice of Appeal (or Notice of Application for leave to appeal), on the grounds following:—[*here set out clearly and concisely the reasons for the delay in giving such notice, and the grounds on which you submit the Court should extend the time.*]

(Signed)

Appellant.

Dated this day of , 19 .

Form XXXIV. must be filled up and sent *with this notice* to the Registrar.

FORM X. (*Rule* 29 (*g*).)

CRIMINAL APPEAL ACT, 1907.

Recognizance of Bail of Appellant.

Be it remembered that whereas was convicted of on the day of , 19 (and was thereupon sentenced to), and now is in lawful custody in His Majesty's Prison at and has duly appealed against his conviction (and sentence) to the Court of Criminal Appeal, and has applied to the said Court for bail pending the determination of his appeal, and the said Court has granted him bail on

entering into his own recognizances in the sum of £ (and with sureties each in the sum of £), the said personally cometh before me the undersigned being one of His Majesty's Justices of the Peace acting in and for the of and a Member of the Visiting Committee of the said Prison [or Governor of the said Prison], and acknowledges himself to owe to our said Lord the King the said sum of £ , of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements to the use of our said Lord the King, his heirs and successors, if he the said fail in the condition endorsed.

Taken and acknowledged this day of , 19 , at the Prison at , before me,

Justice of the Peace.

Condition.

The condition of the within written Recognizance is such that if he the said shall personally appear and surrender himself at and before the Court of Criminal Appeal at each and every hearing of his appeal to such Court and at the final determination thereof and to then and there abide by the Judgment of the said Court and not to depart or be absent from such Court at any such hearing without the leave of the said Court, and in the meantime not to depart out of England or Wales, then this recognizance to be void or else to stand in full force and effect.

The following to be filled up by the Appellant and signed by him:—

When released on bail my residence, to which any Notices, etc., are to be addressed, will be as follows:—

(Signed)

Appellant.

FORM XI. (*Rule* 29 (*g*).)

CRIMINAL APPEAL ACT, 1907.

Recognizance of Appellant's Sureties.

Be it remembered that on this day of , 19 , of (occupation), and , of (occupation), personally came before us the undersigned being (two) of His Majesty's Justices of the Peace sitting at a Petty Sessional Court at in the of and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say, the said the sum of £ , and the said the sum of £ , of good and lawful money of Great Britain, to be made and levied of their goods and chattels, lands and tenements, respectively, to the use of the said Lord the King, his heirs and successors, if , now in lawful custody in His Majesty's Prison at . fail in the condition hereon endorsed.

Taken and acknowledged before (us) the undersigned, the day and year first above mentioned.

Justices of the Peace.

Condition.

The condition of the within written Recognizance is such that whereas the said , having been convicted of and now in such lawful custody as before mentioned (under a sentence of for such offence), has duly appealed to the Court of Criminal Appeal against his said conviction (and sentence), and having applied to the said Court for bail, pending the determination of his said appeal, has been granted bail on his entering into recognizances in the sum of £ , with sureties each in the sum of £ , if the said shall personally appear and surrender himself at and before the said Court at each and every hearing of his said appeal to such Court and at the final determination thereof, and to there and then abide by the Judgment of the said Court, and not depart or be absent from the said Court at any such hearing without the leave of the Court. and in the meantime not to depart out of England and Wales, then this recognizance to be void or else to stand in full force and effect.

NOTE:—This recognizance may be entered into by the surety at any Petty Sessional Court.

FORM XV.

CRIMINAL APPEAL ACT, 1907.

CERTIFICATE TO SURETY.

R. *v.*

THIS IS TO CERTIFY that you [*Here fill in Surety's name and address*] , of , whose signature is below, have been accepted by the Petty Sessional Court acting in and for the Petty Sessional Division of , on this day of A.D. 19 , as surety for the above-named in the sum of £ , for the due appearance of the said before the Court of Criminal Appeal at each and every hearing of his appeal and at the final determination thereof, and that the said shall then and there abide by the Judgment of the said Court and not depart or be absent from such Court at any such hearing without the leave of the said Court, and in the meantime not to depart out of England or Wales. And that your said recognizance will be duly forwarded by me to the Registrar of the Court of Criminal Appeal.

(Signed)

Clerk of the said Court.

I acknowledge that the above Certificate is correct.

(Signed)

Surety.

FORM XX. (*Rule* 7 (*c*).)

CRIMINAL APPEAL ACT, 1907.

RECOGNIZANCE OF APPELLANT SENTENCED TO PAYMENT OF A FINE.

TO WIT. Be it remembered that whereas of was on the day of , A.D. 19 , convicted of and was thereupon sentenced to pay the sum of £ as a fine for his said offence by the [*Here fill in the Court of Trial*] and has intimated to the said Court that he desires to appeal against his said conviction on a question of law alone (or upon a certificate of the Judge of the said Court that his is a fit case for appeal). And whereas the said Court considers that the said Appellant may in lieu of payment at and upon his said conviction of the said sum, be ordered to enter into recognizance of bail himself in the sum of £ and with sureties, each in the sum of £ to prosecute his said appeal before the Court of Criminal Appeal.

The said doth hereby acknowledge himself to owe to our Lord the King the said sum of £ of good and lawful money of Great Britain, to be made and levied of his goods and chattels lands and tenements to the use of our said Lord the King his heirs and successors if he the said fail in the condition endorsed.

Taken and acknowledged this day of at the said Court, at and before the Judge of the said Court.

(Signed)

Clerk of the Peace
or
Clerk of Assize
(as the case may be).

Condition.

The Condition of the within written recognizance is such that if the said of shall personally appeal and be present at and before the Court of Criminal Appeal at each and every hearing of his appeal to such Court, and at the final determination thereof and then and there to prosecute his said appeal and abide by the Judgment of the said Court, and not to depart or be absent from such Court at any such hearing without leave of the said Court, and to pay the said sum of £ , or such sum as the said Court may order to the Registrar thereof, then this recognizance shall be void, otherwise of full force and effect.

FORM XXI. (*Rule* 7 (*c*).)

CRIMINAL APPEAL ACT, 1907.

RECOGNIZANCE OF SURETIES FOR APPELLANT SENTENCED TO A FINE.

TO WIT. Be it remembered that on the day of , 19 , of (occupation) and of (occupation) personally came before the Court of [*Here fill in name of Court of Trial*] and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say, the said the sum of £ and the said the sum of £ of good and lawful money of Great Britain, to be made and levied of their goods and chattels lands and tenements respectively to the use of our said Lord the King his heirs and successors if now before the said Court fail in the condition hereon endorsed.

Taken and acknowledged before the said Court of on the day and year first above mentioned.

(Signed)

Clerk of the Peace
or
Clerk of Assize
(as the case may be).

Condition.

The Condition of the within written recognizance is such that whereas the said having been convicted of and having been sentenced to pay a fine of £ for his said offence, and having now intimated his desire to appeal on question of law alone (or with the certificate of the Judge of this Court) to the Court of Criminal Appeal against the said conviction, and having, in lieu of payment at and upon his said conviction of the said sum of £ , been ordered to enter into recognizance of bail himself in the sum of £ and with sureties in the sum of £ if the said shall personally appear and be present at and before the Court of Criminal Appeal at each and every hearing of his appeal to such Court and at the final determination thereof, and then and there to prosecute his said appeal and abide by the Judgment of the said Court, and not to depart or be absent from such Court at any such hearing without the leave of the said Court, then this recognizance to be void, or else to stand in full force and effect.

FORM XXVI. (*Rule* 40 (*b*).)

To the Registrar of the Court of Criminal Appeal.

NOTICE OF APPLICATION FOR FURTHER WITNESS.

R. *v.*

Appellant.

I, the above named Appellant, hereby give you notice that I wish to apply to the Court for leave to call the following witness. [*One of these forms must be filled up for each witness.*]

Signed

Appellant.

Dated this day of , 19 .

WITNESS.

1. Name and address of witness.
2. Was the witness examined at the Trial?
   If not, why was not the witness so examined?
3. State shortly the evidence the witness can give.

FORM XXXIII.

CRIMINAL APPEAL ACT, 1907.

R. *v.*

LIST OF EXHIBITS.

Number or other identifying mark on Exhibit.	Short description of Exhibit.	Produced by Prosecution or Defence.	Name and address of person retaining Exhibit.	Directions of the Judge of the Court of Trial.

Signed *Coroner.*
Clerk to Committing Justice.
Officer of Court of Trial.

FORM XXXIV.

To the Registrar of the Court of Criminal Appeal.

NOTICE OF APPEAL OR APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION OR SENTENCE.

Name of Appellant convicted at the [*Assizes, or County, City or Borough Sessions*] held at . Offence of which convicted [e.g., *Larceny, Forgery, "Habitual Criminal"*]. Sentence [*If the sentence runs from a day other than that upon which it was passed, set out such day*]. Date when convicted and date when sentence passed [*Set out the actual date upon which the Appellant was convicted or sentenced*]. Name of prison [*If not in custody here set out Appellant's address in full*].

I, the above-named Appellant, hereby give you notice that I desire to appeal to the Court of Criminal Appeal against my conviction [*If the Appellant only desires to appeal against sentence, cross out the words "against my conviction"*], and against my sentence [*If the Appellant only desires to appeal against conviction and not against sentence, cross out the words "against my sentence"*] on the grounds hereinafter set forth on page 2 of this notice.

(Signed) [*This notice must be signed by the Appellant. If he cannot write he must affix his mark in the presence of a witness. The name and address of such attesting Witness must be given*].

Dated this [*If this notice is signed more than ten days after the conviction or sentence appealed against the Appellant must fill in form IX. and send it with this notice*] day of A.D. 19 .

QUESTIONS.*	ANSWERS.
1. Did the Judge before whom you were tried grant you a Certificate that it was a fit case for Appeal?	
2. Do you desire the Court of Criminal Appeal to assign you legal aid? If your answer to this question is "Yes," then answer the following questions:—	
(a) What was your occupation and what wages, salary or income were you receiving before your conviction?	
(b) Have you any means to enable you to obtain legal aid for yourself?	
(c) Is any Solicitor now acting for you? If so, give his name and address.	
3. Do you desire to be present when the Court considers your case?	
4. Do you desire to apply for leave to call any witnesses on your appeal? If your answer to this question is "Yes," you must also fill in form XXVI., and forward it *with this notice*.	

*The Appellant must answer each of these questions.

Grounds of Appeal or Application.

These must be filled in before the notice is sent to the Registrar.

The Appellant must here set out the grounds or reasons he alleges why his conviction should be quashed or his sentence reduced.

The Appellant can also, if he wishes, set out, in addition to his above reasons, his case and argument fully.

FORM XXXV.

CRIMINAL APPEAL ACT, 1907.

Notice of Application by Appellant for Bail pending Appeal.

I, , having been convicted of the offence of and being now a prisoner in His Majesty's Prison at and having [*put here "given Notice of Appeal," or "been granted leave to Appeal" as the case may be*], Do Hereby give you Notice that I desire to apply to the Court of Criminal Appeal for bail [*put here "with" or "without" as the case may be*] Sureties on the following grounds:—

[*State the grounds as clearly and concisely as possible.*]

The undermentioned persons are willing to become sureties for my presence at the hearing and determination of the Appeal to the amount of £ [*fill in the amount for which each surety is willing to be bound*] each.

Name
Address
Name
Address

(Signed)

Dated this day of 19 .

APPEALS AGAINST CONVICTION.

Meaning of conviction.]—The word "conviction" includes a conviction upon the defendant's plea of guilty, as well as upon the verdict of guilty found by the jury. *R.* v. *Verney*, 73 J. P. 288; 2 Cr. App. R. 107 : *R.* v. *Alexander*, 76 J. P. 215; 28 T. L. R. 200; 7 Cr. App. R. 110 : *R.* v. *Ingleson* [1915] 1 K. B. 512; 11 Cr. App. R. 21. It does not include the finding of a jury that a person arraigned was or was not fit to plead. *R.* v. *Jefferson*, 72 J. P. 467; 1 Cr. App. R. 95 : *R.* v. *Larkins*, 75 J. P. 320; 22 Cox, 598; 6 Cr. App. R. 194; nor the finding of a jury that the accused was insane at the time he committed the act or made the omission charged in the indictment. *Felstead* v. *R.* [1914] A. C. 534; 83 L. J. (K. B.) 1132; 24 Cox, 243; 30 T. L. R. 422; 10 Cr. App. R. 129 : *R.* v. *Taylor*, 11 Cr. App. R. 198; 31 T. L. R. 449. A conviction includes a verdict which is held to warrant a judgment against the accused, as well as a verdict actually followed by judgment, as the judge at the trial might postpone sentence. In Rule 18 (*ante*, p. 319) conviction is used in the latter sense; in Rules 13-19, in the former.

No appeal lies under s. 20 (2) against the conviction of an incorrigible rogue, but only against the sentence, as the conviction is not by the court of quarter sessions, which merely imposes a sentence on the conviction at petty sessions. *R.* v. *Johnson* [1909] 1 K. B. 439; 78 L. J. (K. B.) 290; 73 J. P. 135; 25 T. L. R. 229.

Grounds of Appeal.

1. Questions of law.]—An appeal by a person convicted lies as of right on grounds involving a question of law alone, not only in cases which under the former practice might have been dealt with by case reserved (*post*, p. 340), or writ of error, or motion for a new trial on conviction of misdemeanor, or for judgment *non obstante veredicto*, or on a special verdict (*ante*, pp. 216, 305) (*a*) but also in the cases, if any, not within the statutes and decisions regulating the former practice. The following are the grounds most commonly met with in practice—

Defects in the indictment.—Where it is alleged that the indictment was bad in law an appeal lies as of right, but the court does not encourage appeals on this ground unless the defect is one of substance. *See R.* v. *Elliott* [1908] 2 K. B. 452; 77 L. J. (K. B.) 812; 72 J. P. 285; 1 Cr. App. R. 15 : *R.* v. *Stoddart*, 73 J. P. 348; 25 T. L. R. 612. Where possible the court will apply its powers to dismiss the appeal on the ground that no substantial miscarriage of justice has actually occurred : *R.* v. *Harris*, 5 Cr. App. R. 285 : or may resort to its power to substitute a verdict of guilty of some other offence. *R.* v.

(*a*) As to motion to enter judgment *non obstante veredicto*, *see R.* v. *Platts*, 48 L. J. (Q. B.) 848; 24 W. R. 915; Cr. Off. Rules 1906, r. 156. Error might be assigned on a special verdict whereon judgment was passed on the defendant. *R.* v. *Chadwick*, 11 Q. B. 205; 17 L. J. (M. C.) 33.

Garland, [1910] 1 K. B. 154; 74 J. P. 135; 102 L. T. 254; 26 T. L. R. 130; 3 Cr. App. R. 199; and *see ante*, p. 211. But where the defect in the indictment may have caused real embarrassment to the accused the court will quash the conviction. *R.* v. *Edwards and Gilbert* [1913] 1 K. B. 187; 82 L. J. (K. B.) 347; 23 Cox, 380; 8 Cr. App. R. 128: *R.* v. *Thompson* [1914] 2 K. B. 99; 83 L. J. (K. B.) 643; 78 J. P. 212; 9 Cr. App. R. 252; 30 T. L. R. 223.

Wrongful admission of evidence.—Where it is established that evidence has been wrongfully admitted the court will quash the conviction unless it holds that the evidence so admitted cannot reasonably be said to have affected the minds of the jury in arriving at their verdict, and that they would have arrived at the same verdict if the evidence had not been admitted. In considering this question the nature of the evidence so admitted and the direction with regard to it in the summing-up are the most material matters. *See* on the one hand *R.* v. *Beecham*, [1921] 3 K. B. 464; 37 T. L. R. 932; 85 J. P. 276; 16 Cr. App. R. 26; and on the other *R.* v. *Fisher* [1910] 1 K. B. 149; 79 L. J. (K. B.) 187; 102 L. T. 111; 74 J. P. 104; 3 Cr. App. R. 176; 26 T. L. R. 122: *R.* v. *Ellis* [1910] 2 K. B. 746; 79 L. J. (K. B.) 841; 102 L. T. 922; 26 T. L. R. 535; 74 J. P. 388; 5 Cr. App. R. 41: *R.* v. *Norton* [1910] 2 K. B. 496; 79 L. J. (K. B.) 756; 74 J. P. 375; 5 Cr. App. R. 65: *R.* v. *Westfall*, 76 J. P. 336; 107 L. T. 463; 7 Cr. App. R. 176; 28 T. L. R. 297: *R.* v. *Rodley* [1913] 3 K. B. 468; 23 Cox, 574; 29 T. L. R. 700; 82 L. J. (K. B.) 1070; 9 Cr. App. R. 69.

Wrongful exclusion of evidence.—Where evidence has been wrongly excluded the court have to consider what would have been its effect upon the minds of the jury had it been allowed to be given, and unless the verdict would in all probability have been the same the conviction will be quashed. *Cf. R.* v. *Sagar*, [1914] 3 K. B. 1112; 10 Cr. App. R. 279; and *R.* v. *Smallman*, 10 Cr. App. R. 1.

No case to go to the jury.—That the judge of the court of trial wrongfully refused to withdraw the case from the jury, at the close of the case for the prosecution, on a submission being made to him that there was no evidence to be left to them, involves either a question of law alone, or, more correctly, perhaps two questions—one of fact and one of law. Whether or not a submission is made at the close of the case for the prosecution that there is no evidence to be left to the jury, which the judge wrongly overrules, the Court of Criminal Appeal will not quash the conviction if the evidence given for the defence supplies that which was lacking on the part of the prosecution. *R.* v. *Power* [1919] 1 K. B. 572: *R.* v. *Jackson*, 74 J. P. 352; 5 Cr. App. R. 22. Where the evidence given in the case does not prove the offence charged the conviction will be quashed. For instances, *see R.* v. *Clay*, 74 J. P. 55; 3 Cr. App. R. 92: *R.* v. *Pearson*, 74 J. P. 175; 4 Cr. App. R. 40: *R.* v. *Johnson*, 6 Cr. App. R. 82: *R.* v. *Davis*, 9 Cr. App. R. 66.

Absence of corroboration.—Where evidence is given by an accomplice, if the judge has failed to give the proper warning to the jury as to the danger of

convicting on his evidence without corroboration in material particulars implicating the accused, the Court of Criminal Appeal will quash the conviction. *R.* v. *Tate* [1908] 2 K. B. 680; 77 L. J. (K. B.) 1043; 99 L. T. 620; 1 Cr. App. R. 39: *R.* v. *Baskerville* [1916] 2 K. B. 658; 12 Cr. App. R. 81. If after the proper caution by the judge the jury convict the prisoner the court will not quash the conviction merely upon the ground that the accomplice's evidence was uncorroborated, but will review all the facts of the case, and if it thinks the verdict unreasonable or that it cannot be supported having regard to the evidence the court will quash the conviction. *R.* v. *Baskerville*, *supra*. *See* also *R.* v. *Norris*, 12 Cr. App. R. 156. Where corroboration is required by statute similar rules obtain. *R.* v. *Baskerville*, *supra*. *See* also *R.* v. *Goldstein*, 11 Cr. App. R. 27: *R.* v. *Davies*, 85 L. J. (K. B.) 208; 114 L. T. 80; 11 Cr. App. R. 272.

Matters within the discretion of the judge of the court of trial.—Discharge of the jury by the judge before verdict is a matter within the discretion of the judge, and does not afford a ground of appeal. *R.* v. *Lewis*, 73 J. P. 446; 78 L. J. (K. B.) 722; 2 Cr. App. R. 180, following *Winsor* v. *R.*, L. R. 1 Q. B. 289, 390; 35 L. J. (M. C.) 121, 161; and *see ante*, p. 221. So also allowing evidence to be given by the crown in rebuttal of evidence called for the defence. *R.* v. *Crippen* [1911] 1 K. B. 149; 80 L. J. (K. B.) 290; 75 J. P. 141; 27 T. L. R. 269; 5 Cr. App. R. 255 (*ante*, p. 206), and allowing a witness to be treated as hostile. *R.* v. *Williams*, 77 J. P. 240; 29 T. L. R. 188; 8 Cr. App. R. 132; refusing to order separate trials of two or more defendants. *R.* v. *Gibbons & Proctor*, 13 Cr. App. R. 134; 82 J. P. 287; commenting on the accused not going into the witness box. *R.* v. *Voisin*, 13 Cr. App. R. 89, are not grounds of appeal under ordinary circumstances.

Construction of the verdict.—Where the finding of the jury is ambiguous there may arise a ground of appeal involving a question of law, *e.g.*, where it is contended that the jury have negatived by their finding the existence of some essential element of the offence charged. *R.* v. *Muirhead*, 73 J. P. 31; 25 T. L. R. 88; 1 Cr. App. R. 189: *R.* v. *Knight*, 73 J. P. 14; 25 T. L. R. 87; 1 Cr. App. R. 186: *R.* v. *Lomas*, 30 T. L. R. 125: *R.* v. *Johnson*, 9 Cr. App. R. 57: *R.* v. *Chainey*, 9 Cr. App. R. 175; though it may only afford a ground involving a question of fact, *i.e.*, as to what in fact the jury has actually found. *See R.* v. *Petch*, 25 T. L. R. 401; 2 Cr. App. R. 71: *R.* v. *Charlton*, 6 Cr. App. R. 119: *R.* v. *Rawlings*, 3 Cr. App. R. 5: *R.* v. *Rutter*, 25 T. L. R. 73: *R.* v. *Syme*, 27 T. L. R. 562; 6 Cr. App. R. 257.

Misdirection.—Misdirection as to the law applicable to the case being tried gives a right of appeal without leave, but misdirection as to the evidence is not a ground involving a question of law, and leave to appeal is necessary. Where misdirection as to the law is established by the appellant the conviction will be quashed unless the prosecution can show that on a right direction the jury would have come to the same conclusion. *R.* v. *Cohen and Bateman*, 73 J. P. 352; 2 Cr. App. R. 197, at p. 207: *R.* v. *Stoddart*, 73 J. P. 384; 25 T. L. R.

612; 2 Cr. App. R. 217 : *R.* v. *Norton* [1910] 2 K. B. 496, 501; 79 L. J. (K. B.) 756; 26 T. L. R. 550; 102 L. T. 926; 74 J. P. 375; 5 Cr. App. R. 65, 76 : *R.* v. *Sbarra*, 13 Cr. App. R. 118; 82 J. P. 171 : *R.* v. *Sanders*, 14 Cr. App. R. 11. Omission to direct as to the law in a difficult case may also lead to the conviction being quashed. *R.* v. *Bloom*, 74 J. P. 183; 4 Cr. App. R. 30 : *R.* v. *Ferguson*, 9 Cr. App. R. 113 : *R.* v. *Wilson*, 9 Cr. App. R. 124 : *R.* v. *Hilliard*, 9 Cr. App. R. 171 : *R.* v. *Brereton*, 10 Cr. App. R. 201 : *R.* v. *Morgan*, 13 Cr. App. R. 2.

Misdirection as to the evidence to be of any avail to an appellant must be of such a nature and the circumstances of the case must be such that it is reasonably probable that the jury would not have returned their verdict had there been no misdirection. The burden of establishing this lies upon the appellant, not upon the prosecution. *R.* v. *Cohen and Bateman*, 73 J. P. 352; 2 Cr. App. R. 197, 207 : *R.* v. *Rodda*, 74 J. P. 412; 5 Cr. App. R. 85 : *R.* v. *Ellsom*, 76 J. P. 38; 28 T. L. R. 1; 7 Cr. App. R. 4 : *R.* v. *Wann*, 76 J. P. 269; 107 L. T. 462; 23 Cox, 153; 7 Cr. App. R. 135 : *R.* v. *Corrigan*, 8 Cr. App. R. 4 : *R.* v. *Hagan*, 9 Cr. App. R. 25. As to omission to put the defence to the jury, *see R.* v. *Richards*, 4 Cr. App. R. 161 : *R.* v. *Dinnick*, 74 J. P. 18; 26 T. L. R. 74; 3 Cr. App. R. 77 : *R.* v. *Rowan*, 5 Cr. App. R. 279 : *R.* v. *Hill*, 7 Cr. App. R. 26 : *R.* v. *Immer & Davis*, 13 Cr. App. R. 22; and as to omission to direct the jury sufficiently, *see R.* v. *Wolff*, 10 Cr. App. R. 107 : *R.* v. *Finch*, 85 L. J. (K. B.) 1575; 12 Cr. App. R. 77 : *R.* v. *Hamilton*, 13 Cr. App. R. 32 : *R.* v. *Twigg*, 14 Cr. App. R. 71 : *R.* v. *Smith*, 84 J. P. 67 : *R.* v. *Bartlett*, 14 Cr. App. R. 157. Where misdirection is alleged substantial particulars must be given in the notice of appeal. *R.* v. *Wyman*, 13 Cr. App. R. 163.

Verdict against the weight of evidence.—In order to succeed on this ground it is necessary to show that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not sufficient to show merely that the case against the appellant was a very weak one : *R.* v. *McNair*, 25 T. L. R. 228; 2 Cr. App. R. 2; nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict : *R.* v. *Simpson*, 2 Cr. App. R. 128 : *R.* v. *Crook*, 4 Cr. App. R. 60 : *R.* v. *Graham*, 74 J. P. 246; 4 Cr. App. R. 218; nor that the judge of the court of trial has given a certificate on that ground. *R.* v. *Perfect*, 12 Cr. App. R. 273. If there was evidence to support the conviction the appeal will be dismissed. *R.* v. *Hancox*, 29 T. L. R. 331; 8 Cr. App. R. 193. For recent instances where the appeal has been allowed on the ground that the verdict was unreasonable, *see R.* v. *Chadwick*, 12 Cr. App. R. 247 : *R.* v. *Hall*, 14 Cr. App. R. 58; 84 J. P. 56 : *R.* v. *Smith*, 14 Cr. App. R. 81 : *R.* v. *Scranton*, 15 Cr. App. R. 104 : and *cf. R.* v. *Weisz*, 15 Cr. App. R. 85.

Question of mixed law and fact.—Under section 3 (b) of the *Criminal Appeal Act*, 1907, leave to appeal is necessary where the ground involves a question of mixed law and fact. It is not quite clear what this means, but it enables the court to act if there is doubt or confusion as to whether in the points raised questions of law and fact can be separated.

"*Any other ground which appears to the court to be a sufficient ground of appeal.*"—These are general words inserted in section 3 (b) of the *Criminal Appeal Act* to cover any ground which cannot be said to involve a question of law alone or of fact alone or of mixed fact and law. They may be compared with the general words in section 4 (which defines the grounds on which appeals may be allowed) "or that on any ground there was a miscarriage of justice." They include questions as to the constitution of the jury or misconduct on the part of one or more jurymen. *See R.* v. *Syme*, 10 Cr. App. R. 284; 24 Cox, 502; 79 J. P. 40; and cases of mis-trial, surprise, or the like. It is doubtful whether the Court of Criminal Appeal can alone give leave to appeal on this ground, or whether the judge of the court of trial can also give a certificate. *Cf.* section 3 (b) of the *Criminal Appeal Act*, with rule 7 (c) of the Criminal Appeal Rules. It is submitted that an appeal might lie under these words in the case of evidence being irregularly given to the jury at a view, as to which doubts existed under former practice. *R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M. C.) 113.

"*On any ground there was a miscarriage of justice.*"—These general words in section 4 (1) of the *Criminal Appeal Act* cover cases where there has been misdirection as to the evidence (*see ante*, p. 337), or where the court allows further evidence owing to insufficient time to call it at the trial or other sufficient reason (*see ante*, p. 307), or where the trial was conducted unfairly: *R.* v. *Hill*, 7 Cr. App. R. 1; 28 T. L. R. 15: *R.* v. *Crippen* [1911] 1 K. B. 149, at p. 158; 80 L. J. (K. B.) 290: *R.* v. *Howarth*, 82 J. P. 152; 13 Cr. App. R. 99: *R.* v. *Ratcliffe*, 84 J. P. 15; 14 Cr. App. 95; or where it has accidentally become known to the jury that the defendant has been previously convicted. *Cf. R.* v. *Hemingway*, 8 Cr. App. R. 47: and *R.* v. *Williams & Woodley*, 14 Cr. App. R. 135; or where the identification of the accused has not been conducted properly in a case where it is important: *R.* v. *Dickman*, 26 T. L. R. 640; 74 J. P. 449; 5 Cr. App. R. 135; or there has been any tampering with a juror: *R.* v. *Crippen*, *supra: R.* v. *Morrison*, 6 Cr. App. R. 159, at p. 171; or the jury have taken into consideration matters which they ought not to have done. *R.* v. *Newton*, 7 Cr. App. R. 214; 28 T. L. R. 362.

Substantial miscarriage of justice.—By the proviso to section 4 (1) of the *Criminal Appeal Act* (*ante*, p. 304), notwithstanding that the court are of opinion that the point raised in the appeal might be decided in favour of the appellant, they may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred. The chief application of this proviso occurs where the ground alleged is misdirection as to the law or wrongful admission or rejection of evidence, as to which *see ante*, pp. 335 *et seq.*

APPEALS AGAINST SENTENCE.

Where appeal lies.—Where the sentence is one which could not lawfully be given for the offence, no appeal lies as of right without leave as being on a ground of law alone, though in such a case leave is given almost as a matter of course. *See R.* v. *Briggs* [1909] 1 K. B. 381; 78 L. J. (K. B.) 116. An

appeal lies as of right against a sentence of preventive detention as a habitual criminal (*ante*, p. 303), and, in practice, against the sentence of penal servitude, which must precede such sentence of detention : *R.* v. *Smith and R.* v. *Weston* [1910] 1 K. B. 17, 21; 79 L. J. (K. B.) 1. No appeal lies against the commutation of a sentence by the crown : *R.* v. *Lord*, 1 Cr. App. R. 110 : *R.* v. *Keating*, 74 J. P. 452; 22 Cox, 343; 5 Cr. App. R. 181; nor against the remanet of a sentence of a penal servitude. *R.* v. *Williams*, 3 Cr. App. R. 2.

Where the sentence imposed is not one fixed by law, but is one which could lawfully be imposed, appeal lies only by leave of the court (s. 3) or a judge (s. 17). On such appeal the appellate court may dismiss the appeal, or may quash the sentence, if illegal, or excessive, or inadequate, and substitute such other sentence, whether more or less severe, warranted in law by the verdict, as they think ought to have been passed. But the court are not obliged to pass any other sentence, and may, in a proper case, merely quash the sentence passed at the trial. *R.* v. *Johnson* [1909] 1 K. B. 439; 78 L. J. (K. B.) 290 : *R.* v. *Bradford*, 76 J. P. 46; 77 L. J. (K. B.) 475.

Where the appellate court substitutes for the verdict of the jury a verdict of guilty of another offence involved in the original finding, they may substitute for the original sentence such other, but not severer sentence, as may be warranted by law for the offence found by the substituted verdict; s. 5 (2) (*ante*, p. 304). A like power exists where the Court of Criminal Appeal differs from the court of trial as to the legal effect of a special verdict; s. 5 (3) (*ante*, p 305).

In passing sentence the judge may take into account other charges pending against the accused which he admits to be well founded, but is not bound to do so. *R.* v. *Syres*, 73 J. P. 13; 25 T. L. R. 71 : *R.* v. *M'Lean* [1911] 1 K. B. 332; 80 L. J. (K. B.) 309; 75 J. P. 127; 27 T. L. R. 138; 6 Cr. App. R. 26 : *R.* v. *Davies*, 7 Cr. App. R. 254 : *R.* v. *Smith*, 85 J. P. 224; 15 Cr. App. R. 172. The Court of Criminal Appeal may order that the sentence shall include other similar offences admitted by the appellant. *R.* v. *Aleron*, 2 Cr. App. R. 152 : *R.* v. *Wells*, 3 Cr. App. R. 197 : *R.* v. *Smith*, 6 Cr. App. R. 207.

In exercising its jurisdiction to review sentences the Court of Criminal Appeal has sought so far as possible to standardise sentences : *R.* v. *Nuttall*, 73 J. P. 30; 1 Cr. App. R. 180 : *R.* v. *Woodman*, 73 J. P. 286; 2 Cr. App. R. 67. For a statement of the principles on which the Court acts, *see R.* v. *Sherskewsky*, 28 T. L. R. 364. The power to increase the sentence has rarely been exercised : *R.* v. *Mortimer*, 72 J. P. 349; 99 L. T. 204; 24 T. L. R. 745; *R.* v. *Simpson*, 5 Cr. App. R. 217. The court has discouraged the passing of sentences of penal servitude to follow on a term of imprisonment. *R.* v. *Islip*, 3 Cr. App. R. 209 : *R.* v. *Jones*, 1 Cr. App. R. 196 : *R.* v. *Hemming*, 28 T. L. R. 402; 7 Cr. App. R. 402 : *R.* v. *Johnston*, 12 Cr. App. R. 137; and a sentence of imprisonment to follow upon a term of penal servitude : *R.* v. *Johnson*, 7 Cr. App. R. 97 : *R.* v. *Veale*, 11 Cr. App. R. 114.

In reviewing the sentence the court will take into account errors made by the judge at the trial in appreciating the matters laid before him with respect to the history of the accused : *R.* v. *Whiteman*, 73 J. P. 102 : *R.* v. *Raybould*, 73 J. P. 334. It has strongly discouraged delaying bringing a prisoner for

trial till after he has served the term of imprisonment imposed for some other offence : *R.* v. *Higson*, 5 Cr. App. R. 167 : *R.* v. *Sullivan*, 6 Cr. App. R. 4 : *R.* v. *Ward*, 7 Cr. App. R. 180 : *R.* v. *Davies*, 7 Cr. App. R. 254. It will take into account the circumstances of the offence to see if there are grounds for mitigating the punishment : *R.* v. *O'Connell*, 73 J. P. 118; and it may take into consideration also the powers of the Prison Commissioners with regard to the alteration of sentences. *R.* v. *Thompson*, 2 Cr. App. R. 112 : *R.* v. *Morton*, 2 Cr. App. R. 145. It has been held that it is not proper for the judge of the court of trial to impose a longer term than is appropriate in the particular case in order that the prisoner may get the benefit of the modified Borstal system as it is administered in prison. *R.* v. *Oxlade* [1919] 2 K. B. 628; 83 J. P. 218; 14 Cr. App. R. 65. But this does not apply to a sentence of detention in a Borstal Institution. *R.* v. *Kirkpatrick*, 73 J. P. 29; 1 Cr. App. R. 170 : *R.* v. *Webb*, 5 Cr. App. R. 112. The court will very rarely interfere with such a sentence. *See* Note, 14., Cr. App. R. 84.

SECT 2.

APPEALS BY CROWN CASES RESERVED.

STATUTES.

11 & 12 *Vict. c.* 78 (*Crown Cases Act*, 1848), *s.* 1.]—" When any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justice of the peace before whom the case shall have been tried, *may, in his or their discretion*, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer [*now of the Court of Criminal Appeal, ante*, p. 290] ; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment, until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

[*The section extends to special commissioners of oyer and terminer, etc.*: R. *v.* Bernard, 8 *St. Tr.* (*N. S.*) 887, 1001; 1 *F. & F.* 240; *and to recorders of boroughs*. R. *v.* Masters, 1 *Den.* 332; 18 *L. J.* (*M. C.*) 2; *but apparently not to trials on a record of the K. B. D. either in the Civil Court at assizes or at the Royal Courts*. *As to granting bail*, see R. *v.* Harris, 4 *Cox*, 21 : R. *v.* Bird, 5 Cox, 11; *and* 7 *Edw.* 7, *c.* 23, *s.* 14 (*ante*, p. 308), and Criminal Appeal Rules, 1908, rr. 29-32 (ante, p. 321). *As to treatment of a prisoner pending decision of a case reserved*, see Prison Rules.

Sect. 2.—*Statement and hearing of the case.*]—"The judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the manner now usual (*a*), the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen (*see ante*, p. 290, *now to the Court of Criminal Appeal in England*); and such case shall be transmitted to the said justices and barons; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons, the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons shall be certified, under the hand of the presiding chief justice or chief baron, to the clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, in the form as near as may be or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and, in that case, such sheriff or gaoler shall forthwith discharge him, and, also, the next court of oyer and terminer and gaol delivery, or sessions of the peace, shall vacate the recognizance of the bail, if any; and, if the court of oyer and terminer and gaol delivery, or court of quarter sessions, shall be directed to give judgment, the said court shall proceed to give judgment at the next session." [*For forms of certificate used in England under this Act, see Archb. Cr. Pl.* (23*rd. ed.*). *p.* 273.]

Sect. 3.—*Judgment to be delivered in open court.*]—[*Repealed as to England and Wales; 7 Edw. 7, c. 23, s. 22, ante, p. 362.*]

Sect. 4.—*Amendment of case.*]—"The said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall

(*a*) This refers to the practice existing before 1848 of reserving by case for the common law judges points taken by persons accused of treason or felony as to their indictment or the evidence against them in courts of oyer and terminer or gaol delivery. *See* Archb. Cr. Pl. (22nd ed.) 271.

have been amended." [This power has been exercised when material facts were omitted: *R.* v. *Hay*, 1 Den. 602, 604: *R.* v. *Perkins*, 2 Den. 460; or the judge adopts shorthand notes instead of stating concisely the material facts: *R.* v. *Gray*, 68 J. P. 40; or the case is imperfectly stated. *R.* v. *Hilton*, Bell, 20, 24; 28 L. J. (M. C.) 28.]

Sect. 5.—*Judgment on writ of error.*]—[*Repealed as to England by* 7 *Edw.* 7, *c.* 23, *s.* 22, ante, *p.* 312.]

Sect. 6.—*Penalty for forgery of documents.*]—[*Repealed by* 3 *& 4 Geo.* 5, *c.* 27.]

The Court of Criminal Appeal is a superior court of record; 7 *Edw.* 7, *c.* 23, *s.* 1 (7), ante, *p.* 301.

36 *& 37 Vict. c.* 66 (*Supreme Court of Judicature Act*, 1873), *s.* 47.]—"The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either bench and the barons of the Exchequer by the *Crown Cases Act*, 1848, or any Act amending the same, shall and may be exercised by the *judges of the high court.* . . . The determination of any such question by the judges of the high court in manner aforesaid shall be final and without appeal; *and no appeal shall lie from any judgment of the said high court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the* Crown Cases Act, 1848." [*The jurisdiction under this section is vested in the Court of Criminal Appeal;* 7 *Edw.* 7, *c.* 23, *s.* 20 (4), *infra. The words in italics at the end of the section are virtually repealed as to indictable offences by the abolition of writs of error by* 7 *Edw.* 7, *c.* 23, *s.* 20 (1).]

42 *& 43 Vict. c.* 22 (*Prosecution of Offences Act*, 1879), *s.* 2.]—"It shall be the duty of the director of public prosecutions under the superintendence of the attorney-general to institute, undertake, or carry on such criminal proceedings, whether in the Court for Crown Cases Reserved . . . as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the attorney-general." . . . [*For regulations, see* post, *p.* 345.]

7 *Edw.* 7, *c.* 23 (*Criminal Appeal Act*, 1907), *s.* 12.]—Duty of director of public prosecutions as to criminal appeals, *ante*, p. 308.]

Sect. 20 (4).—*Crown cases to be dealt with by Court of Criminal Appeal.*]—[*Set out* ante, *p.* 303; *and see* Criminal Appeal Rules, 1908, *r.* 26, ante, *p.* 320.]

8 *Edw.* 7, *c.* 15 (*Costs in Criminal Cases Act*, 1908, *s.* 9 (6).—*Costs of an appeal by case stated.*]—*See* ante, p. 271.

Effect of Criminal Appeal Act, 1907.]—The *Criminal Appeal Act*, 1907, does not take away from any court having power to reserve a question of law under the *Crown Cases Act*, 1848, the power to reserve such question for the Court of Criminal Appeal, and the provisions of the Act of 1907 as to appeals from convictions on indictment in relation to highways, bridges or rivers, 7 Edw. 7, c. 23, s. 20 (3), *ante*, p. 303, do not specifically exclude the right to reserve a case under the Act of 1848. Where the judge at the trial reserves a case it is for the purposes of the Criminal Appeal Rules treated as an appeal under s 3 (a) of the *Criminal Appeal Act*, 1907, but cannot be summarily dealt with

under s. 15 (2), as showing no substantial ground of appeal. *Criminal Appeal Rules*, 1908, *r.* 26 (*d*), *ante*, p. 321.

The power to reserve a case is rarely exercised since the judge can certify for an appeal on a point of law under s. 3 (b) of the Act of 1907. The power was exercised in *R.* v. *Garland* [1910] 1 K. B. 154; 74 J. P. 135 : *R.* v. *Turner* [1910] 1 K. B. 346; 79 L. J. (K. B.) 176; 74 J. P. 81; 3 Cr. App. R. 103 : *R.* v. *Spratling* [1911] 1 K. B. 77; 80 L. J. (K. B.) 176; 22 Cox, 348 : *R.* v. *Levy* [1912] 1 K. B. 158; 81 L. J. (K. B.) 264; 22 Cox, 702 : *R.* v. *Jones*, 6 Cr. App. R. 290 : *R.* v. *Castiglioni*, 76 J. P. 351; 23 Cox, 46 : *R.* v. *Cade* [1914] 2 K. B. 209; 83 L. J. (K. B.) 796; 10 Cr. App. R. 23.

But the Act of 1907 gives power to the Court of Criminal Appeal (but not to a single judge under s. 17) to require the court of trial to state in the form of a case reserved questions of law alone raised by an appeal; 7 Edw. 7, c. 23, s. 20 (4). This power applies to matters not within the *Crown Cases Act*, 1848, *e.g.*, conviction on trials on the civil side at assizes or in the King's Bench Division. The procedure for this purpose is contained in Criminal Appeal Rules, 1908, r. 26 (a), (c), *ante*, p. 320.

This power seems not to have been exercised, as it is found simpler to deal with such matters by the ordinary process of appeal.

Questions of law which shall have arisen "at the trial."]—The words of s. 1 of the Act of 1848, "any question of law which shall have arisen at the trial," include not only questions of law raised by the evidence, but also questions of law arising on a motion in arrest of judgment : *R.* v. *Martin*, 1 Den. 398; 18 L. J. (M. C.) 137; or as to the sufficiency of the indictment : *R.* v. *Webb*, 1 Den. 338; 18 L. J. (M. C.) 39 : *R.* v. *Craddock*, 2 Den. 31; 20 L. J. (M. C.) 31 : *R.* v. *Garland*, 11 Cox, 224 (Ir.); 39 L. J. (Q. B.) 86; Ir. Rep. 3 C. L. 383; or as to the legality of the sentence. *R.* v. *Summers*, L. R. 1 C. C. R. 182; 38 L. J. (M. C.) 62 : *R.* v. *Garland* (*supra*) : *R.* v. *Horn*, 15 Cox, 205. A case cannot be reserved by the court of trial on questions which arise on *demurrer* : *R.* v. *Fadermann*, 1 Den. 565; 19 L. J. (M. C.) 147. But under s. 20 (4) of the *Criminal Appeal Act*, 1907 (*ante*, p. 303), the Court of Criminal Appeal could apparently have a point raised on demurrer reviewed by case stated. Where a prisoner pleaded guilty to an indictment and after the judge left the assize town his attention was called to an unreported case (*R.* v. *Dodd*, 1877), which, if law, showed that the indictment was bad on the face of it, and he thereupon stated a case, requesting the opinion of the court whether the conviction was good, it was held that the objection to the indictment was a question which had arisen *at the trial* so as to give the court jurisdiction (*a*). *R.* v. *Brown*, 24 Q. B. D. 357; 59 L. J. (M. C.) 47; 16 Cox, 715. In this case the court distinguished a prior case to the contrary effect. *R.* v. *Clark*, L. R. 1 C. C. R. 54; 36 L. J. (M. C.) 16; 10 Cox, 338, but were prepared to overrule it had it been directly in point, and it was disapproved in *R.* v. *Plummer* [1902]

(*a*) *See R.* v. *Martin* [1904] 4 N. S. W. State Rep. 720, where a magistrate pleaded guilty to administering an unlawful oath: Held, that a case could not be reserved as to whether he had *mens rea*.

2 K. B. 339; 71 L. J. (K. B.) 805. Where it was discovered, on the day after the conviction of a prisoner for felony, that one of the jurors who tried the case had by mistake answered to the name of another juror on the panel when called, and so had served on the jury without objection, whereby it was suggested that there had been a mis-trial, this was held not to be "a question of law which arose on the trial," and therefore that the court had not jurisdiction to set aside the verdict and judgment, or to award a *venire de novo*. *R.* v. *Mellor*, Dears. & B. 468; 27 L. J. (M. C.) 121; 7 Cox, 454. It seems to have been thought that the court had no authority to award a *venire de novo*, or to order a new trial. *Id.* *See also* *R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M. C.) 113; 12 Cox, 204. The court did, however, award a *venire de novo* in *R.* v. *Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70; 9 Cox, 91, where a court of quarter sessions had declined to receive a verdict of common assault on an indictment under 14 & 15 Vict. c. 100, s. 29, and the jury had therefore returned a general verdict of guilty. In *R.* v. *Saunders* [1899] 1 Q. B. 490; 68 L. J. (Q. B.) 296, the court directed the reversal of judgment against one of three prisoners who had not joined in an objection to the admissibility of evidence which had been taken on behalf of another prisoner, and had been held to be a valid objection on a case reserved on the latter's behalf. They purported to act on the words "make such other order as justice may require," in s. 2 (*ante*, p. 341). (*a*). *R.* v. *Gibson*, 18 Q. B. D. 537; 56 L. J. (M. C.) 49; 16 Cox, 181: *R.* v. *Saunders*, *supra*, and the *Criminal Appeal Act*, 1907, appear to exclude all jurisdiction to grant a new trial: but see *R.* v. *Crane* [1921] 2 A. C. 399, *post*, p. 348. It is uncertain whether, if a view is allowed during the trial, and if any evidence is given irregularly to the jury at such view, that fact is ground for reserving a case, or for appeal, or whether it merely furnishes ground for an application to the home secretary for remission of the sentence. *R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M. C.) 113. The appellate court cannot amend the indictment: *R.* v. *Garland*, 11 Cox, 224 (Ir.); 39 L. J. (Q. B.) 86; Ir. Rep. 3 C. L. 383, but can consider its sufficiency, even if no question is reserved upon it: *R.* v. *Webb*, 1 Den. 338; 18 L. J. (M. C.) 39; and may look at it even if it is not set out in the case. *R.* v. *Williams*, 2 Den. 61; 20 L. J. (M. C.) 106; 4 Cox, 356. The court did not entertain questions of mere *practice*, such as whether a case was properly left to the jury on the unconfirmed testimony of an accomplice: *R.* v. *Stubbs*, Dears. 555; 25 L. J. (M. C.) 16; 7 Cox, 48; and decided only the points reserved for its opinion, although other points in the prisoner's favour might appear on the face of the case, but were not reserved for the opinion of the court. *R.* v. *Tyree*, L. R. 1 C. C. R. 177; 38 L. J. (M. C.) 58; 6 Cox, 377.

Where an amendment, without which the indictment was bad, had been improperly made after verdict, the appellate court ordered the record to be restored to its original state, and a verdict of not guilty to be entered. *R.* v. *Larkin*, Dears. 365; 23 L. J. (M. C.) 125.

Preparation and argument of case.]—By rules of court made 1st June, 1850, signed by all the judges, it was ordered . . .

(2) "That every case transmitted for the consideration of this court shall

briefly state the question or questions of law reserved (*R.* v. *Gray*, 68 J. P. 40), and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment, or the particular count."

(3) "That no case be heard upon any demurrer to the pleadings" (*vide ante*, p. 151).

(4) "That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison, or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution." (*a*)

The case should not contain hypothetical questions for the guidance of the court below on future occasions. *R.* v. *Whitehead*, L. R. 1 C. C. R. 33; 35 L. J. (M. C.) 186; 10 Cox. 234; nor statements of a jury which are not part of the verdict. *R.* v. *Trebilcock*, Dears. & B. 453, 457; 27 L. J. (M. C.) 103: 7 Cox, 408. It should state the facts briefly: *R.* v. *Steer*, 18 L. J. (M. C.) 30; 1 Den. 349; and be submitted in a complete form. *R.* v. *Holloway*, 1 Den. 370; 2 C. & K. 942; 18 L. J. (M. C.) 60; 3 Cox, 241; and should not adopt or annex shorthand notes: *R.* v. *Gray*, *supra*. If the case appears to omit a material point, counsel may properly communicate with the judge and ask for any amendment which appears necessary. *R.* v. *Smith*, 1 Den. 510, 512: 2 C. & K. 882; 4 Cox, 42. As to signing a case where the judge who tried the indictment dies, *see R.* v. *Featherstone*, Dears. 369; 23 L. J. (M. C.) 127. (*b*) The case may be returned for amendment; 11 & 12 Vict. c. 78, s. 4 (*ante*, p. 341); but if, after being so sent back, it is returned substantially unaltered, the court will not interfere, nor receive affidavits to supplement its defects. *R.* v. *Studd*, 10 Cox, 258.

The cases are now lodged with the registrar of the Court of Criminal Appeal.

By regulations made on Jan. 25, 1886, under the *Prosecution of Offences Act*, 1879 (Statutory Rules and Orders Revised (ed. 1904), vol. 4, *tit. Criminal Procedure*, *E.*)—

"(4) Where it is brought to the notice of the director of public prosecutions that a case has been reserved for the opinion of the High Court of Justice under the *Crown Cases Act*, 1848 (*ante*, p. 340), and that counsel has not been instructed for the prosecution, he shall, if he thinks the case of sufficient importance or is so directed by the attorney-general, instruct counsel to appear for the prosecution." This provision is extended by 7 Edw. 7, c. 23, s. 12, *ante*, p. 308, and the rules set out on p. 321.

Before 1908, counsel who appeared on the trial of the prisoner, but was not instructed to argue the case reserved, was allowed to cite authorities as *amicus curiæ*. *R.* v. *Thomas*, L. & C. 313; 33 L. J. (M. C.) 22; 9 Cox, 376, 382; and even allowed to argue the case. *R.* v. *Moore*, 61 L. J. (M. C.) 80; 17 Cox, 458. Prisoners jointly defended below were held not to be entitled

(*a*) Rule 1, as to delivery of case and seventeen copies for the judges (Archb. Cr. Pl. (23rd ed.) 277), is not now acted on. Rule 5, as to notice of intention to appear by counsel, etc. (Archb. Cr. Pl. (23rd ed.), 277), is superseded by the provisions of the Act of 1907, *ante*, p. 308. Rule 6, as to fees (Archb. Cr. Pl. (23rd ed.), 277), seems to be superseded by the Crown Office Fees Rules. See Short & Mellor, Cr. Pl. (2nd ed.), 583).

(*b*) Cf. *R.* v. *Cook* [1903] 5 West Austr. Rep. 84.

to appear separately on the argument of a case reserved. *R.* v. *Bird*, 5 Cox, 11 (C. C. R.).

Under the *Criminal Appeal Act* and *Rules* the Court of Criminal Appeal can assign to the prisoner (who is an appellant) counsel and solicitor in a case in which it appears desirable, if he has not sufficient means to obtain legal aid. 7 Edw. 7, c. 23, s. 10, *ante*, p. 307.

Counsel, in arguing the case, must confine themselves to the facts as they appear on the case stated. *R.* v. *Smith*, 1 Den. 510 : *R.* v. *Blakemore*, 2 Den. 410; 21 L. J. (M. C.) 60. Counsel for the prisoner begins ,and has a reply. *R.* v. *Gate Fulford*, Dears. & B. 74, 94; 7 Cox, 230. The court may hear counsel for the prisoner, or for the prosecution, although no counsel appears on the other side. *R.* v. *Garner*, 1 Den. 329; 18 L. J. (M. C.) 1 : *R.* v. *Masters*, 1 Den. 322 : *R.* v. *Martin*, (*ante*, p. 344). Where no counsel appear, the presiding judge reads the case, and then judgment is pronounced as in other criminal appeals (*ante*, p. 301).

If the judges differed on a question of law it was usual to have the case re-argued before all the judges. *R.* v. *Burrell*, L. & C. 354; 33 L. J. (M. C.) 54; 9 Cox, 368 : *R.* v. *Keyn*, 2 Ex. D. 63; 46 L. J. (M. C.) 17.

Costs.]—The jurisdiction and practice (*a*) as to costs under the *Crown Cases Act*, 1848, appears to be wholly superseded in England by the provisions of s. 13 of the *Criminal Appeal Act*, 1907, as amended and explained by s. 9 (5) of the *Costs in Criminal Cases Act*, 1908 (*ante*, p. 271).

SECT. 3.

VENIRE DE NOVO.

THE abolition of the powers and practice of granting new trials in criminal cases in the High Court (7 Edw. 7, c. 23, s. 20 (1), *ante*, p. 302) has not directly affected the law as to grant of a writ of *venire facias de novo juratores* (*i.e.*, an order to summon and swear a fresh jury to re-try the case). The distinction between this writ and an order for a new trial is that the latter could only be granted by the High Court (King's Bench Division), after a general verdict for the crown, in the case of indictments or informations for misdemeanor tried in the King's Bench Division, or on a record of the King's Bench Division, Archb. Cr. Pl. (23rd ed.) 291.

Venire de novo could be awarded (1) before the completion of the first trial if the judge thought fit to discharge the first jury (*vide ante*, p. 221).

(2) Where a special verdict had been returned on which the appellate court could not enter judgment for either party : *R.* v. *Woodfall*, 5 Burr. 266 : *R.* v. *Mawbey*, 6 T. R. 619, 637 : *R.* v. *Rowlands*, 2 Den. 364, 386; 21 L. J. (N. S.) M. C. 81; or in cases in which there had been some irregularity in the proceed-

(*a*) *See* Archb. Cr. Pl. (23rd ed.) 278: and *R.* v. *Payne*, 69 J. P. 440.

ings at the trial not affecting the merits, but amounting to a mis-trial, *e.g.*, cases of defect of jurisdiction in respect of time, place, and person (*see Arundel's case*, 6 Co. Rep. 14 (*a*), or of verdicts so imperfectly worded or so ambiguous or inconsistent, that no judgment could be founded thereon. *R.* v. *Keite*, 1 Ld. Raym. 138 : *R.* v. *Huggins*, 2 Ld. Raym. 1574 : *R.* v. *Evans*, 6 Ir. C. L. R. 500; 7 Cox, 151 (Ir.) : *R.* v. *Murphy*, L. R. 2 P. C. 535, 538. *And see R.* v. *Oxfordshire*, 13 East, 411, 416, n, (*b*); 1 Chit. Cr. L. 654; 2 Tidd's Prac. 905; Burns, J. (30th ed.) New Trial : *R.* v. *Day*, Sayer, 202 : *R.* v. *Peters*, 1 Burr. 568; Bac. Abr., Trial (L.) : *R.* v. *Mayor of Oxford*, 3 Nev. & M. 877 : Huband, Grand Jury in Ireland, pp. 1000, *et seq.*

(3) By a court of error in cases of *mistrial* of treason, felony, or misdemeanor; *e.g.*, where the defendant was denied his right of challenge : *R.* v. *Edmonds*, 1 St. Tr. (N. S.) 785; 4 B. & Ald. 471 : *Gray* v. *R.*, 6 St. Tr. (N. S.) 117, 158; 11 Cl. & F. 427; 8 Eng. Rep. 1164, or the jury process had been misawarded : *Campbell* v. *R.*, 11 Q. B. 799; 17 L. J. (M. C.) 89; but *see* 7 G. 4, c. 64, s. 21 (*ante*, p. 44), or where the jury has been improperly chosen or irregularly returned, and perhaps in some cases of misconduct by the jury, discovered after judgment. *See* 2 Tidd's Prac. 922 : *Witham* v. *Lewis*, 1 Wils. (K. B.) 48. It had, however, been held that in a case of felony, where the indictment was good, and the prisoner has been given in charge to a jury duly impanelled, chosen, and sworn, and a verdict has been returned, and judgment given, a *venire de novo* would not lie, although there might have been conduct on the part of the jury which the court considers unsatisfactory. *R.* v. *Murphy*, L. R. 2 P. C. 535; 38 L. J. (P. C.) 53. *R.* v. *Fowler*, 4 B. & Ald. 273, which at first sight appears to be an authority to the contrary, was explained in *R.* v. *Murphy*, *supra*, to be in fact no decision on this point. A court of error could also, it seems, award a *venire de novo* in felony on an imperfect verdict : *Conway and Lynch* v. *R.* [1845] 7 L. R. (Ir.) 149 : *per* Blackburn, J., in *Winsor* v. *R.*, 35 L. J. (M. C.) 121, 133; L. R. 1 Q. B. 289, citing *Campbell* v. *R.*, 11 Q. B. 799; 17 L. J. (M. C.) 89.

(4) The Court for Crown Cases Reserved in *R.* v. *Yeadon*, L. & C. 81; 31 L. J. (M. C.) 70; 9 Cox, 91, granted a *venire de novo* on a case reserved, where it appeared that the court below had wrongly refused to receive the first verdict returned by the jury (of common assault), and they had under his direction returned another verdict, which it was held could not stand. In this case it was ruled that the first verdict would have been good and valid if it had been accepted. (*a*)

In cases in which a verdict had been actually returned and received a *venire de novo* has been awarded only for matter appearing on the record, *e.g.*, where the verdict as recorded was a nullity, and a new trial where the verdict was wrong, *e.g.*, against the weight of evidence as obtained by misdirection. *Witham* v. *Lewis*, 1 Wils. (K. B.) 48.

(*a*) This seems to be the only case in which the Court for Crown Cases Reserved granted a *venire de novo*, and their authority to grant it is somewhat doubtful. *See R.* v. *Mellor*, D. & B. 468; 27 L. J. (M. C.) 121; 7 Cox, 454. *R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. (M. C.) 113; 12 Cox, 204. *R.* v. *Crane* [1921] A. C. 299.

The Criminal Appeal Act, 1907, does not affect the discretionary power of the judges of the court of trial to discharge a jury before verdict, and to direct a fresh jury to be summoned. As to these powers, *vide ante*, pp. 221 *et seq.*

In the case of a defective, inconsistent, ambiguous, or special verdict the court of trial would seem now to be bound to interpret the verdict and to enter judgment for or against the crown, or to rule that the findings were too imperfect to amount to a verdict at all. In the latter case the power to summon a fresh jury would seem to survive. Where judgment is entered against the accused his remedy is by appeal. *See R.* v. *Harding*, 1 Cr. App. R. 219; 25 T. L. R. 139 : *R.* v. *Petch*, 25 T. L. R. 401; 2 Cr. App. R. 71 : *R.* v. *Knight*, 73 J. P. 14 : *R.* v. *Muirhead*, 73 J. P. 31 : *R.* v. *Charlton*, 6 Cr. App. R. 119 : *R.* v. *Johnson*, 9 Cr. App. R. 57 : *R.* v. *Chainey*, 9 Cr. App. R. 175; 30 T. L. R. 51.

Where the Court of Criminal Appeal holds that the trial of an appellant has been a nullity it has power to order that the appellant be tried on the indictment in question. *R.* v. *Crane* [1921] 2 A. C. 299; 85 J. P. 245; 37 T. L. R. 788; 15 Cr. App. R. 183.

Effect and form of writ.]—When a *venire de novo* is awarded, the parties stand precisely as they did before the first trial, and the whole of the facts are to be reheard.

The following is the form of a *venire de novo* at quarter sessions, in a case of felony, where there has been a mis-trial :—

Therefore let a new jury come before the justices at the next general quarter sessions of the peace, to be holden at Chichester, in and for the said county, to try whether the defendants or either of them are guilty of the premises in the indictment charged against them or not; because as well W. B. L., *who prosecutes for our lord the King, as the said defendants, have put themselves upon the jury: the same day, etc.; at which last-mentioned general quarter sessions, holden at Chichester aforesaid, on, etc., before, etc., justices of our said lord the King, assigned to keep the peace in the said county, also to hear and determine divers felonies, etc., committed in the county aforesaid, come as well the said* W. B. L., *who prosecutes for our lord the King, as the defendants in their proper persons, etc.* [For other forms, *see* Huband, Grand Jury in Ireland, p. 1001.]

PART II.

EVIDENCE GENERALLY.

CHAPTER I.

WHAT ALLEGATIONS MUST BE PROVED.

WHERE the defendant pleads the general issue, "not guilty" (*see ante*, p. 165), the prosecutor is obliged to prove at the trial every fact or circumstance stated in the indictment which is material and necessary to constitute the offence charged.

Where the replication or other pleading on the part of the prosecution consists of a general traverse of the defendant's pleading, the defendant must prove the facts thus traversed and put in issue.

Caution is necessary as to the evidence adduced for the prosecution, because in criminal cases, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the Court of Criminal Appeal may feel constrained to quash the conviction, notwithstanding that there was other evidence before the jury properly admitted and sufficient in itself to warrant conviction. *See R.* v. *Dyson* [1908] 2 K. B. 454; 77 L. J. (K. B.) 813: *R.* v. *Stoddart*, 73 J. P. 348; 3 Cr. App. R. 217: *R.* v. *Fisher* [1910] 1 K. B. 149; 79 L. J. (K. B.) 187: *R.* v. *Norton* [1910] 2 K. B. 496; 79 L. J. (K. B.) 756: *R.* v. *Westfall*, 76 J. P. 336; 107 L. T. 463; and other cases cited *ante*, p. 335.

Amendment.]—Under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 5 (1): Where, before trial, or at any stage of the trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

This enactment repealed several previous enactments which regulated the amendment of variances between the description of an offence in the indictment and the evidence given in support, and both by the wide power of amendment given under the above section and by the simplification of indictments enacted in the other sections and the rules made under the Act (*see ante*, p. 54) much

of the former law has become obsolete. It may, however, be still of some value to consider the parts of an indictment necessary to be proved under the following heads.

Dates.]—The almanack annexed to the Common Prayer Book has been held evidence that such a day of the year was Sunday, or the like. In *R.* v. *Dyer*, 6 Mod. 41, it was stated that the almanack was part of the law of England to be judicially noticed. *Cf. Page* v. *Faucet*, Cro. Eliz. 227; 1 Leon, 242: *Brough* v. *Perkins*, 6 Mod. 81. The original almanack was superseded in 1750, by that scheduled to the *Style Act* (24 G. 2, c. 23).

Time.]—As a general rule the time at which an offence took place is not an essential part of the offence. Where, however, it is, *e.g.*, in the case of burglary, the offence must be proved to have been committed within the essential time. In the case of manslaughter by injury the death must be proved to have taken place within a year and a day from the time at which the injury is proved to have been caused, counting the day on which it was done as the first day. 1 Hawk. c. 31, s. 9; 4 Bl. Com. 197; 1 East, P. C. 343, 344: *R.* v. *Dyson* [1908] 2 K. B. 454; 77 L. J. (K. B.) 813.

Place.]—The forms of indictment prescribed under the *Indictments Act* require the county in which the offence took place to be stated in the indictment. And it is necessary to prove that the offence was committed within the county or other extent of the court's jurisdiction; 2 Hawk. c. 25, s. 84, and *see ante*, p. 51. The parish and place are as a rule immaterial. To this rule there are said to be several exceptions: (1) That if the statute upon which the indictment is framed gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *R.* v. *Glossop*, 4 B. & Ald. 616. (2) Upon an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish; and the same in all other cases in which the place where the fact occurred is a necessary ingredient in the offence. *R.* v. *Steventon*, 1 C. & K. 55. (3) In the case of affray, the offence must be alleged and proved to have been committed in a public street or highway. *R.* v. *O'Neill* [1871] Ir. Rep. 6 C. L. 1.

The offence.]—Under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 8 (1), nothing in the Act is to prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged. By rule 4 (3) the statement of the offence in the indictment need not necessarily include all the essential elements of the offence.

Money.]—Allegations as to money, so far as regards the description of the property, are sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, is not proved. 14 & 15 Vict. c. 100, s. 18 (*ante*, p. 52).

By the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 40 (2), an allegation in an indictment that money or bank-notes have been embezzled or obtained by false pretences can, so far as regards the description of the property, be sustained by proof that the offender embezzled or obtained any piece of coin or bank-note or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly.

Words.]—Where words are the gist of the offence (as in defamatory, blasphemous, or seditious libels), and are set out *verbatim* in the indictment, they must be proved as laid: and before the *Indictments Act*, 1915, the defendant was entitled to acquittal if there was any material variance between the words proved and those laid—even if laid as spoken in the third person, and proved to have been spoken in the second (*R.* v. *Berry*, 4 T. R. 217) or laid as spoken affirmatively, and proved to have been spoken by way of interrogation, *Barnes* v. *Holloway*, 8 T. R. 150, or the like. The powers of amendment given by 14 & 15 Vict. c. 100 (*rep.*), do not seem to have extended to material variances in a libel case. *See R.* v. *Fussell*, 3 Cox, 291: *Re Crowe*, 3 Cox, 123. But if some of the words were proved as laid, and the words so proved were sufficient to constitute the offence for which the defendant is indicted, failure to prove the remainder of the words was not material. The rule was the same as in civil actions for defamation under the practice prior to the *Common Law Procedure Acts*. *See Compagnon* v. *Martin*, 2 W. Bl. 790: *Walters* v. *Mace*, 2 B. & Ald. 756: *Hancock* v. *Winter*, 7 Taunt. 205; and *see* Odgers on Libel (4th ed.) 668. Under the *Indictments Act*, 1915, where it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case. *See ante*, p. 54.

Identity.]—Identification by finger prints by a person expert in such prints is allowed, and may be the only evidence of identification. *R.* v. *Castleton*, 3 Cr. App. R. 74; and *see* 46 Sol. J. 757, 769; 112 L. T. J. 445, 447 (*a*) So is identification by handwriting, even without the aid of experts. *R.* v. *Smith*, 74 J. P. 54; 3 Cr. App. R. 87. Where photographs have been used by the police in order to secure the arrest of the accused, care should be taken by the prosecution that the accused should not be prejudiced at the trial by the evidence being given in such a way as to lead the jury to suppose that he must have been previously convicted. *See R.* v. *Palmer*, 10 Cr. App. R. 77; *R.* v. *Varley*, 10 Cr. App. R. 125: *R.* v. *Kingsland*, 14 Cr. App. R. 8.

(*a*) The High Court of Australia refused leave to appeal from a conviction for shop-breaking, where the only evidence of identity against the accused consisted of a resemblance between his finger prints and those of the criminal; Griffith, C.J., saying "Signatures have been accepted as evidence of identity as long as they have been used. The fact of the individuality of the corrugation of the skin on the fingers of the human hand is now so generally recognised as to require very little, if any, evidence of it, although it seems to be still the practice to offer some expert evidence on the point. A finger-print is therefore in reality an unforgeable signature." *Parker* v. *R.* [1912] 14 C. L. R. 681. As to the value of finger-print evidence, see *R.* v. *Kransch* [1913] 32 N. Z. L. R. 1229, Chapman, J.

Intent.]—The intention of the party at the time when he commits an offence is often an essential ingredient in it; and, in such case, it is as necessary to be proved as any other fact or circumstance laid in the indictment. Intention, however, is not capable of positive proof: it can only be implied from overt acts. As a general rule every man is taken to intend the natural and probable consequences of his own acts. *R.* v. *Dixon*, 3 M. & Sel. 11: *R.* v. *Farrington*, R. & R. 207: *R.* v. *Harvey*, 2 B. & C. 257, at p. 264, Bayley, J.: *Scott* v. *Shepherd*, 2 W. Bl. 892: *R.* v. *Martin*, 14 Cox, 633, 637: *R.* v. *Meade* [1909] 1 K. B. 895, 899; *Director of Public Prosecutions* v. *Beard* [1920] A. C. 479; though the inference may be rebutted. This presumption does not of course extend to accidental acts. *R.* v. *Davies*, 29 T. L. R. 350; 8 Cr. App. R. 211. If it cannot be implied from the facts and circumstances which, together with it, constitute the offence, other acts of the defendant, from which it can be inferred by the jury, must be proved at the trial. *See R.* v. *Philipps*, 6 East, 464. As to what other acts are admissible, *see post*, p. 353 *et seq.*

In some cases the intent is inferred as a necessary conclusion from the act done; as if a man knowingly uttered a forged instrument as a genuine one, the intent to defraud the person to whom he utters it is a necessary inference. *R.* v. *Hill*, 2 Mood. 30; 8 C. & P. 274: *R.* v. *Cooke*, *Id.* 582. *See* further *post*, p 363.

As to presumptions, *see post*, p. 396.

As to intent to defraud in indictments for obtaining by false pretences, *see R.* v. *Carpenter*, 76 J. P. 158; 22 Cox, 618: *R.* v. *Ferguson*, 9 Cr. App. R. 113: *R.* v. *Bennett*, 9 Cr. App. R. 146; and *post*, p. 361.

Exception, Exemptions, Qualifications.]—Under the *Indictments Act*, 1915, rule 5 (2), it is not necessary in a count of an indictment charging a statutory offence to negative any exception or exemption from or qualification to the operation of the statute creating the offence. But by section 8 (1) of the Act nothing in the Act or rules is to affect the laws of evidence in criminal cases. *See ante*, p. 60. As to the duty of proving the matter contained in an exception, etc., *see* the particular offence to which it relates.

Negative Averments.]—Negative averments, it seems, must formerly have been proved in all cases by the prosecutor (*see Over* v. *Harwood* [1900] 1 Q. B. 803, 806; 69 L. J. (Q. B.) 272, Channell, J.; but the present rule upon the subject appears to be, that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence; on the other hand, if the subject of the averment does not relate personally to the defendant, or is not peculiarly within his knowledge, but either relates personally to the prosecutor, or is peculiarly within his knowledge or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. *See* 1 Taylor, Evid. (11th ed.), s. 364; 1 Hawk. c. 89, s. 17: *Apothecaries Co.* v. *Bentley*, 1 C. & P. 538; Ry. & M. 159: *Elkin* v. *Janson*, 13 M. & W. 655, 662, Alderson, B.; 2 Russ. Cr. (7th ed.) 1954. On an indict-

ment under 43 G. 3, c. 107, s. 1 (*rep.*), which made it felony to course deer in an enclosed ground without the consent of the owner—that the deer were coursed *without the consent* of the owner was held necessary to be proved on the part of the prosecution. *R.* v. *Rogers*, 2 Camp. 654. But although it was once supposed that the negative, in such cases, could only be proved by the owner, it is now fully established that it may be presumed from circumstances, or be proved by the agent of the owner. *R.* v. *Allen*, *R.* v. *Argent*, *R.* v. *Chamberlain*, 1 Mood. 154 : *R.* v. *Hazy*, 2 C. & P. 458.

Alternative averments.]—Where an indictment contains alternative averments laid conjunctively, *e.g.*, that the defendant "forged and caused to be forged," proof of either averment is sufficient. *R.* v. *Middlehurst*, 1 Burr. 399. So, a defendant may be convicted of printing and publishing a libel upon an indictment which charges him with "composing, printing, *and* publishing" it. *R.* v. *Hunt*, 2 Camp. 583; 31 St. Tr. 408 : *R.* v. *Williams*, 2 Camp. 646. And where two intentions are ascribed to one act, as that a libel was published against magistrates with intent to defame them, *and* also to bring the administration of justice into contempt, *R.* v. *Evans*, 2 Stark. (N. P.) 35, Bayley, J., or that an assault was committed on a female, with intent to abuse *and* carnally know her, *R.* v. *Dawson*, 3 Stark. (N. P.) 62, Holroyd, J., the averments are alternative and proof of either intention is sufficient. The same principle will apply where an indictment contains alternative averments laid disjunctively, as provided by the *Indictments Act*, 1915, rule 5 (*ante*, pp. 46). In larceny, it is sufficient to prove that any one of the articles enumerated in the indictment was stolen by the prisoner. 2 Hale, 302 : and *cf.* *R.* v. *Elkins*, R. & R. 188. Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it was held sufficient to prove that he extorted one shilling. *R.* v. *Burdett*, 1 Ld. Raym. 148. *See* *R.* v. *Carson*, R. & R. 303. And upon an indictment for obtaining money by false pretences, proof of part of the pretence alleged is sufficient, if the money was obtained upon that part. *R.* v. *Hill*, R. & R. 190. As to cases in which rejection of an alternative averment involves a verdict for an offence less or other than the offence alleged in the indictment, *see ante*, p. 211.

Immaterial averments—surplusage.]—Allegations which are not essential to constitute the offence, and which may be omitted, without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage. *R.* v. *Jones*, 2 B. & Ad. 611 : *R.* v. *Barraclough* [1906] 1 K. B. 201, 210; 75 L. J. (K. B.) 77.

Evidence which may not be given: General rule.]—The general rule in criminal (as in civil) cases is, that nothing may be given in evidence which does not directly tend to the proof or disproof of the matter in issue. "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which

he is being tried." *Makin* v. *Att.-Gen. for N. S. W.* [1894] A. C. 57; 63 L. J. (P. C.) 41; 17 Cox, 704 : *R.* v. *Fisher* [1910] 1 K. B. 149; 79 L. J. (K. B.) 187 : *R.* v. *Rodley* [1913] 3 K. B. 468; 82 L. J. (K. B.) 1070; 77 J. P. 465; 23 Cox, 574; 109 L. T. 476; 29 T. L. R. 700; 9 Cr. App. R. 69; and *see* also *R.* v. *Mullins*, 5 Cr. App. R. 13 : *R.* v. *Coulter*, 5 Cr. App. R. 147 : *R.* v. *Gray*, 6 Cr. App. R. 242 : *R.* v. *Ellis* [1910] 2 K. B. 746; 79 L. J. (K. B.) 841 : 22 Cox, 330 : *R.* v. *Barron*, 78 J. P. 184; 24 Cox, 83; 9 Cr. App. R. 236. Upon an indictment for an infamous crime, an admission by the defendant that he had committed such an offence at any other time with another person, and had a tendency to such practices, ought not to be received. *R.* v. *Cole*, 1 Phill. Ev. (7th ed.) 181; 2 Russ. Cr. (7th ed.) 2116. And upon the trial of a prisoner for wounding a constable, who had arrested him on suspicion of felony, it was held that the prosecutor was not entitled to ask the constable what the prisoner's previous character had been, in order to assist in showing that there were reasonable grounds for the arrest. *R.* v. *Turberfield or Tuberfield*, L. & C. 495; 34 L. J. (M. C.) 20. Acts by the defendant inconsistent with his belief in the truth of his defence may be given in evidence against him; *e.g.*, that he had induced a witness to give false evidence. *R.* v. *Watt* [1905] 70 J. P. 29; 20 Cox, 852, Phillimore, J., citing *Moriarty* v. *L. C. & D. R.*, L. R. 5 Q. B. 314; 39 L. J. (Q. B.) 109 : *Doe d. Annesley* v. *Lord Anglesea*, 17 St. Tr. 712 : *Lord Stafford's case*, 7 St. Tr. 1461, 1479; Taylor, Evid. (11th ed), s. 804; Wigmore (Anglo-American System of Evidence), vol. i., s. 278.

Exceptions.]—To the general rule, as above stated, some exceptions have been admitted by statute, and there are also some apparent exceptions to it at common law.

Treason.]—In high treason, when tried under 7 & 8 W. 3, c. 3, s. 8, no evidence is admissible of any overt act not expressly laid in the indictment. But this does not prevent overt acts, not laid, from being given in evidence, if they are direct proof of any of the overt acts which are laid : *R.* v. *Rookwood*, 13 St. Tr. 139; cas. temp. Holt, 683 : and *see R.* v. *Lowicke*, 13 St. Tr. 276, 296 : *R.* v. *Layer*, 16 St. Tr. 211, 232; 8 Mod. 82, 91 : *R.* v. *Deacon*, 18 St. Tr. 365, Fost. 9 : *R.* v. *Wedderburne*, *Id.* : *R.* v. *Watson*, 32 St. Tr. 1; 2 Stark. (N. P.) 116, 134. And if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act, though done in a foreign country, may be given in evidence. Fost. 9, 22 : *R.* v. *Deacon*, *supra* : *R.* v. *Parkyns*, 13 St. Tr. 63, 126, 127 : *Lord Strafford's case*, 3 St. Tr. 138 : *Lord Lovat's case*, 18 St. Tr. 529. Or, if the treason consist of a conspiracy, not only the acts of the defendant himself, but also any acts of the defendant's accomplices no matter when committed, if done in furtherance of the common design, although not laid as an overt act in the indictment, may be given in evidence, provided it be direct proof of an overt act laid. *R.* v. *Hardy*, 24 St. Tr. 199; 1 East, P. C. 98, 99 : *R.* v. *Horne Tooke*, 1 East, P. C. 98; 25 St. Tr. 1, 127 : *R.* v. *Frost*, 4 St. Tr. (N. S.) 85; 9 C. & P. 129, 149.

Conspiracy.]—In cases of conspiracy when acts done by some of the conspirators in the county in which the offence is laid have been proved, acts done

by others of the conspirators in other counties may be given in evidence. *R.* v. *Bowes*, 4 East, 171, *cit.* And in an indictment for conspiracy to carry on the business of common cheats, evidence was admitted of the defendants having made false representations to other tradesmen besides those named in the indictment. *R.* v. *Roberts*, 1 Camp. 399. But before such evidence can be admitted it is necessary (1) to prove the existence of the conspiracy; (2) to connect the defendants with the conspiracy; (3) to prove that the person whose acts are about to be given in evidence was connected with the defendants in the same conspiracy. The prosecutor may, however, either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties, and so prove the conspiracy. *R.* v. *Lord Lovat*, 18 St. Tr. 529. *See also R.* v. *Stone*, 6 T. R. 527; 25 St. Tr. 1155 : *R.* v. *Standley*, R. & R. 305 : *R.* v. *Gogerly*, *Id.* 343 : *R.* v. *Bingley*, *Id.* 446 : *R.* v. *Frost*, *supra: R.* v. *Shellard*, 9 C. & P. 277; 5 St. Tr. (N. S.) 1386 : *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1, 171, Bayley, J. : *Redford* v. *Birley*, 1 St. Tr. (N. S.) 1071. In *R.* v. *Hunt*, 3 B. & Ald. 566; 1 St. Tr. (N. S.) 171, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was held that the previous conduct of a portion of the assembly, in training, etc., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it, as to each particular defendant, was a distinct matter for the consideration of the jury. It was also held, that it was competent to show, as against Hunt (who though a stranger, except by political connection, had been invited to preside as chairman at the meeting), that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person : it being in its nature a declaration of his sentiments and views on the particular subject of such meetings and of the topics there discussed. But the court held, that evidence of the misconduct of the military and others in the subsequent dispersion of the meeting, was properly refused by the judge at the trial, as irrelevant and having no bearing upon the intention and objects of the meeting, which intention and objects obviously existed previously to the alleged misconduct of the military attempted to be given in evidence.

Evidence tending to prove other offences admissible because relevant.]—"The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise open to the accused." *Makin* v. *Att.-Gen. for N. S. W.* [1894] A. C. 57; 63 L. J. (P. C.) 41; 17 Cox, 704, *per* Lord Herschell, C., at p. 65. In this, the leading case on the subject, most of the prior cases are collected. In *R.* v. *Bond* [1906] 2 K. B. 389; 75 L. J. (K. B.) 693, the leading case was carefully considered. Darling, J., in the course of his judgment, said, at p. 409, "I do not suppose that Lord Herschell meant that such evidence might be called to rebut any defence possibly open, but of an intention to rely on which there was no

probability whatever. Here, however, the evidence objected to was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge. It appears that the defence adopted by the defendant in this case was that he was performing a lawful operation in using instruments adapted to procure abortion." And Bray, J., added, at p. 417, "I think, bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class, which shows that the prisoner has been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence, unless it is plainly necessary to prove something which is really in issue." (*a*). For other instances as to admissibility of such evidence, *see* *R.* v. *Wyatt* [1904] 1 K. B. 188; 73 L. J. (K. B.) 15 : *R.* v. *Mean* [1904] 69 J. P. Rep. 26; 21 T. L. R. 172 : *R.* v. *Fisher* [1910] 1 K. B. 149; 79 L. J. (K. B.) 187 : *R.* v. *Ball* [1911] A. C. 47; 22 Cox, 366; 80 L. J. (K. B.) 691 : *R.* v. *Thomson* [1912] 3 K. B. 19; 23 Cox, 187; 76 J. P. 431; 81 L. J. (K. B.) 892 : *R.* v. *Shellaker* [1914] 1 K. B. 414; 78 J. P. 159; 83 L. J. (K. B.) 413; 30 T. L. R. 194; and the cases grouped under the following sub-headings. It may also be relevant as corroborative of other evidence. *R.* v. *Chitson* [1909] 2 K. B. 945; 73 J. P. 499; 79 L. J. (K. B.) 10 : *R.* v. *Lovegrove* [1920] 3 K. B. 643; 85 J. P. 75; 15 Cr. App. R. 50.

1. *Offences connected with the transaction on which the indictment is based.*] —Even before the *Indictments Act*, 1915, where several offences were connected together and formed one entire transaction, upon an indictment for one, the others could be proved to show the character of the transaction. *R.* v. *Ellis*, 6 B. & C. 145 : *R.* v. *Egerton*, R. & R. 375 : *R.* v. *Rooney*, 7 C. & P. 517 : *R.* v. *Mansfield*, C. & Mar. 140 : *R.* v. *Bleasdale*, 2 C. & K. 765 : *R.* v. *Firth*, L. R. 1 C. C. R. 172; 38 L. J. (M. C.) 54 : 2 Russ. Cr. (7th ed.) 2101. Thus with a view to prove the identity of the defendant, it could be shown that other goods not included in the indictment, which were stolen from the premises at the same time, were found in his possession. So, it could be shown, upon an indictment for arson, that property taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner. *R.* v. *Rickman*, 2 East, P. C. 1035. Upon the trial of four men for a burglary at W., evidence of three other burglaries by the same men on the same night was admitted in order to explain why none of the property taken from W. was found upon one of the prisoners as his share of the booty. *R.* v. *Cobden*, 3 F. & F. 833. On a trial for feloniously abusing and carnally knowing a female child under the age of ten years, evidence was admitted of subsequent perpetrations of the same offence on different days, previous to the complaint, it appearing that the prisoner had threatened the child on the first occasion—on the ground that, virtually, in such a case it was all part of one and the same transaction. *R.* v. *Rearden*, 4 F. & F. 76. To prove the defendant to be the author of a libel, evidence of other libels written by the same person and concerning the same subject have been admitted. *R.* v. *Pearce*, 1 Peake (3rd ed.) 106. But it is said that they must expressly refer to the libel in the

(*a*) *Cf.*, on this point, *R.* v. *Finlayson* [1912] 14 C. L. R. 675.

indictment or at least to the same subject matter. *Finnerly* v. *Tipper*, 2 Camp. 72.

Under the *Indictments Act*, 1915 (5 & 6 Geo. 5, c. 90), s. 4, and rule 3, *ante*, p. 44, charges for more than one felony or misdemeanor and charges for both felonies and misdemeanors may now be joined in the same indictment if the charges are founded on the same facts or form or are part of a series of offences of the same or a similar character. Though the Act expressly enacts that nothing in it or the rules made under it is to affect the laws of evidence in criminal cases, it seems plain that the inclusion of offences in an indictment which could not formerly have been included must affect the evidence which may be given. Some of the cases following, grouped under different offences, may therefore not be of the same importance as heretofore, as in practice where different charges are founded on the same facts or form or are a part of a series of offences of the same or a similar character they will probably be included in one indictment. But if the offences are distinct, and not part of one scheme or transaction (subject to what is stated below), evidence of one offence is, in general, inadmissible on the trial of the prisoner for another offence : *R.* v. *Birdseye*, 4 C. & P. 386 : *R.* v. *Holt*, Bell, 280; 30 L. J. (M. C.) 11 : *R.* v. *Fuidge*, L. & C. 390; 33 L. J. (M. C.) 74 : *R.* v. *Rhodes* [1899] 1 Q. B. 77, 82, even where it is derived from the admission of the prisoner himself.

Where on cross-examination of the witnesses for the prosecution evidence is given that persons previously convicted of an offence, which is now charged by the prosecution to have been committed by the prisoners at the bar, were in fact the guilty parties, and that the prisoners at the bar were not,—the evidence of such convicted persons, to establish their own *alibi*, was held to be admissible, apparently on the ground that if the convicts were the guilty parties, the prisoners on trial could not be, and therefore the question of the guilt or innocence of the convicts became relevant to the question of the guilt or innocence of the prisoners. *R.* v. *Dytche*, 17 Cox, 39, Hawkins, J.

2. *To prove design, system, criminal intent, or guilty knowledge.*]—Where design, system, criminal intent, or guilty knowledge on the part of the defendant is to be proved, or the defence of accident or the like is to be met, the prosecutor may give in evidence other instances of the defendant's having committed offences similar to that for which he is under trial.

The principle on which this is allowed is laid down in *Makin* v. *Att.-Gen. for N. S. W.* [1894] A. C. 57; 63 L. J. P. C. 41; 17 Cox, 704 (*ante*, p. 355). See also *Blake* v. *Albion Life Assurance Society*, 4 C. P. D. 94; 48 L. J. (C. P.) 169.

The following instances illustrate its application to particular kinds of offence :—

Homicide.]—Where four indictments were found against a woman, which respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, evidence was tendered on the trial of the first indictment that arsenic had been taken by the three sons a few months after their father's death, that all the four persons when taken ill exhibited the

same symptoms: and that the prisoner had been in the habit of preparing their meals: the court held the evidence admissible for the purpose of proving that the husband died of arsenic, and that his death had not been accidental. *R.* v. *Geering*, 18 L. J. (M. C.) 215: *R.* v. *Garner*, 4 F. & F. 346. In *Makin* v. *Att.-Gen. for N. S. W.* [1894] A. C. 57; 63 L. J. (P. C.) 41; 17 Cox, 704, *R.* v. *Geering* was approved, and the Privy Council held that on an indictment for the murder of an infant, in order to prove malice or meet the defence of accident, the prosecution could properly adduce evidence that other infants had been received by the prisoners for a small sum, on a representation that they desired to adopt them, that the payments were insufficient to support the infants long, and that several bodies of infants had been found buried in the prisoner's garden. In *R.* v. *Cotton*, 12 Cox, 400, on a charge against a mother for poisoning, evidence of the death of other children by the same poison was held admissible. In *R.* v. *Roden*, 12 Cox, 630, on a charge against a mother of murdering her infant by suffocation in bed, evidence was admitted of the previous death of other children at earlier ages. In *R.* v. *Smith*, 114 L. T. 239; 80 J. P. 31; 31 T. L. R. 617; 25 Cox, 271; 11 Cr. App. R. 229, where the accused was indicted for the murder of B. M. and a *prima facie* case that the accused had committed the act charged in the indictment was made by the prosecution, evidence as to the deaths of A. B. and M. L. on dates subsequent to the death of B. M. under circumstances similar to those attending the death of B. M. was held to have been rightly allowed in order to show that the death of B. M. was not accidental but designed. So, for the same reason, former menaces or assaults of the prisoner, or expressions of malicious or vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question, are also in such a case receivable in evidence. *R.* v. *Clewes*, 4 C. & P. 221: *see R.* v. *Hopkins*, 10 Cox, 229. Thus, on the trial of an indictment for the murder of an infant child, the fact that the prisoner had said to the mother of the child, about a fortnight before the alleged murder, "The child is no good; it is eating the other children's food," was held to be admissible as evidence. *R.* v. *Hagan*, 12 Cox, 357. Archibald, J., after consultation with Pollock, B. So, on a trial for murder, the deposition of the deceased against the prisoner, taken before the magistrates on another charge against him, for which he was afterwards convicted, was held to be admissible evidence for the prosecution in order to prove malice or motive against the prisoner. *R.* v. *Buckley*, 13 Cox, 293, Lush, J. Upon an indictment for murder by poison of S., evidence is admissible of the previous death of J., and of the subsequent death of L., under like circumstances and attended by similar symptoms, to show that the poisoning was not accidental: and where it is proved that a motive for the death of S. might exist, by the fact of the prisoner having insured the life of S., evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L. by showing that their lives also had been insured by the prisoner. *R.* v. *Heesom*, 14 Cox, 40. *See also R.* v. *Flannagan*, 15 Cox, 403, a case of murder by arsenical poisoning (in which Butt, J., followed the ruling in *R.* v. *Geering*, *supra*, and disapproved *R.* v. *Winslow*, 8 Cox, 397,: *R.* v. *Neill Cream*, 116 C. C. C. Sess. Pap. 1451: *R.* v. *Klosowski*,

167 C. C. C. Sess. Pap. 471, both cases of poisoning: *R.* v. *Sarné*, 107 C. C. C. Sess. Pap. 418, a case of homicide consequent on arson; and 2 Russ. Cr. (7th ed.) 2110.

Abortion.]—Upon the trial of an indictment under 24 & 25 Vict. c. 100, s. 58, for "feloniously and unlawfully using a certain instrument, with intent to procure a miscarriage," in order to prove the intent, evidence may be given that at other times the prisoner had caused miscarriages by similar means, and had then used expressions tending to show that he was in the habit of performing similar operations for the same illegal purpose. *R.* v. *Bond* [1906] 2 K. B. 389; 75 L. J. (K. B.) 693; 21 Cox, 252 (*ante*, p. 355). In this case former decisions are fully considered. *See also R.* v. *Thomson* [1912] 3 K. B. 19; 81 L. J. (K. B.) 892; 23 Cox, 187; 76 J. P. 431; 28 T. L. R. 478; *R.* v. *Lovegrove* [1920] 3 K. B. 643 (*a*). Evidence that the accused administered drugs to one woman with intent to procure her abortion may be admissible in support of a charge of having used an instrument with the like intent on another woman, and *vice versa* in order to refute the contention of the defence that the acts were done innocently. *R.* v. *Starkie*, 28 T. L. R. 181.

Arson.]—Where the prisoner was indicted for arson with intent to defraud an insurance company, for the purpose of throwing light upon the prisoner's intention, and proving that the fire was the result of design and not of accident, evidence was admitted that the prisoner had previously occupied two houses in succession, both of which had been insured, that fires had broken out in both, and that the prisoner had made claims upon and been paid by the insurance companies in respect of the loss caused by each fire. *R.* v. *Gray*, 4 F. & F. 1102: approved in *Makin* v. *Att.-Gen. for N. S. W.*, *supra*. The same rule applies where it is necessary to prove *malice* or *intent* on the part of the prisoner. Thus, on an indictment for maliciously shooting, or for arson, where it is questionable whether the shooting or burning was by accident or design, proof may be given that at some other time the prisoner intentionally shot at the same person, or was attempting to set fire to the same building or stack. *R.* v. *Voke*, R. & R. 531: *R.* v. *Dossett*, 2 C. & K. 306. (*b*)

Burglary.]—Upon a charge of burglary with intent to commit a rape, the defence at the trial was that the prisoner went to the house for the purpose of courting the prosecutrix with her consent, that he did not break into the house, and did not intend or attempt to ravish her. Evidence was thereupon given by the prosecution that the prisoner immediately afterwards went to the house of another woman, gained access to her bedroom down the chimney, and with her consent had connection with her. It was held that this evidence had been

(*a*) See also *R.* v. *O'Shaughnessy* [1912] 31 N. Z. L. R. 928.

(*b*) In support of a charge of arson, evidence that about twelve months prior to the date of the alleged offence the accused was found under suspicious circumstances in an unoccupied house; that preparations for setting that house on fire were discovered on the premises being searched; and that the accused had been noticed at other fires occurring some twelve to fifteen months previously, was held to be inadmissible as being too remote to show system or to negative the defence of accident. *R.* v. *Willoughby* [1913] 32 N. Z. L. R. 1295.

wrongly admitted, and the conviction was quashed. *R.* v. *Rodley* [1913] 3 K. B. 468; 82 L. J. (K. B.) 1070; 23 Cox, 574; 109 L. T. 476; 77 J. P. 465; 29 T. L. R. 700; 9 Cr. App. R. 69.

Carnal Knowledge.]—On the trial of an indictment for carnal knowledge in December, 1912, of a girl under the age of sixteen years, evidence which went to show that the accused had had guilty relations with the girl in the previous April was held to have been rightly admitted as being relevant to the charge in the indictment. *R.* v. *Shellaker* [1914] 1 K. B. 414; 83 L. J. (K. B.) 413; 110 L. T. 351; 78 J. P. 159; 30 T. L. R. 194; 9 Cr. App. R. 240.

Coinage offences.]—Upon an indictment for procuring base coin with intent to utter it, evidence of the defendant having a large quantity of such coin is admissible to prove the intent. *R.* v. *Fuller*, R. & R. 308. And upon an indictment for uttering counterfeit money, it is competent to the prosecutor to prove that other pieces of such counterfeit money were found upon the defendant, or were uttered by him at different times. *R.* v. *Wylie*, 1 B. & P. (N. R.) 94: S. C. *sub nom. R.* v. *Whiley*, 2 Leach, 983; or were found in the possession of persons with whom he is proved to have been acting in concert. *R.* v. *Johnson*, 3 Cr. App. R. 168. For the same reason, proof of the defendant's conduct in such other uttering, as, for example, that he passed by different names, is admissible. Bayley on Bills, 449. So, on an indictment for having knowingly and with guilty intent the possession of coining instruments, evidence may be given of the defendant's previously uttering bad money. *R.* v. *Weeks*, L. & C. 18; 30 L. J. (M. C.) 141.

Conspiracy.]—Where several persons were indicted for conspiring by means of a mock auction to defraud the prosecutor and in defence denied the false pretences, and alleged that they were merely servants of a woman who owned the auction business, it was held that questions put to A., one of the accused, in cross-examination, to show that at the date of the offence he and the woman were living as man and wife, were held admissible as showing what were the real relations existing between them. *R.* v. *Kurasch* [1915] 2 K. B. 749; 25 Cox, 55; 11 Cr. App. R. 166.

Embezzlement.]—On an indictment for embezzlement, where the embezzlement had been effected by falsifying accounts, the prosecutor was allowed to give evidence of a number of analogous errors in the prisoner's accounts for the purpose of proving that the case on which the indictment was founded was not accidental. *R.* v. *Richardson*, 8 Cox, 448; 2 F. & F. 343. And in *R.* v. *Proud*, L. & C. 97; 31 L. J. (M. C.) 71, another case of embezzlement, the master's books, kept by the prisoner, were given generally in evidence by the prosecution, though it was objected on behalf of the prisoner that the evidence must be confined to the three particular entries referring to the three charges in the indictment, and the prisoner having been convicted, the conviction was affirmed. So where an indictment for embezzlement contained three counts, each charging a distinct act of embezzlement, it was held that the jury might

consider the evidence that had been given as to the conduct of the prisoner in relation to the matters referred to in all the counts, when considering any one of them in order to determine whether the prisoner had failed to pay over money accidentally or fraudulently. *R.* v. *Stephens*, 16 Cox, 387 (C. C. R.). *See* now the *Indictments Act*, 1915, s. 4, and rule 3, *ante*, p. 44.

False pretences and fraud.]—Where the gist of the alleged offence is fraud intent is material, and evidence of other similar offences is admissible to prove the intent. *R.* v. *Simmonds*, 2 Cr. App. R. 303. On an indictment for attempting to obtain money by false pretences, evidence is admissible of a previous obtaining or attempting to obtain money by the defendant by false pretences, not charged in the indictment, in order to prove that the defendant had a guilty knowledge of the falsehood of the pretence charged in the indictment. *R.* v. *Francis*, L. R. 2 C. C. R. 128; 43 L. J. (M. C.) 97; 12 Cox. 612: *R.* v. *Rhodes* [1899] 1 Q. B. 77, 83; 68 L. J. (Q. B.) 83: *R.* v. *Stenson*, 12 Cox, 111: *R.* v. *Cooper*, 1 Q. B. D. 19; 45 L. J. (M. C.) 15; 13 Cox, 123. And on this ground it was held that on an indictment for attempting to obtain money by falsely pretending that a ring, which in fact was composed of crystals, was composed of diamonds, evidence was admissible of a false pretence by the defendant on a prior occasion to another person that a chain was gold, whereas it was plated, and on another distinct prior occasion that a ring was of diamonds, which it was not. *R.* v. *Francis*, *supra*. If there is a sufficient *nexus* between the transactions, evidence of similar transactions *subsequent* to that charged in the indictment may be given. Where the fraud consisted of representations by the defendant that he was carrying on a *bonâ fide* dairyman's business, and the means by which the fraud was perpetrated was by advertisements in newspapers, evidence of three transactions which were all connected by the advertisement which formed part of the scheme was held admissible. *R.* v. *Rhodes*, *supra*. And *see R.* v. *Mason*, 10 Cr. App. R. 169. On a charge of obtaining money by false pretences, evidence of the defendant's obtaining, within a week after the offence charged in the indictment, other money from a different person by a similar false pretence was held inadmissible in *R.* v. *Holt*, Bell, 280; 30 L. J. (M. C.) 11; 8 Cox, 411. "The question in *R.* v. *Holt* was whether the prisoner had the authority or not which he said he had. The piece of evidence there objected to seems to me to be quite immaterial on that point, and how the reception of a perfectly immaterial piece of evidence caused the court to quash the conviction I cannot understand." *R.* v. *Francis*, 43 L. J. (M. C.) 99, Blackburn, J. The other false pretences, to be admissible in evidence, must not be isolated and distinct transactions, but must have some *nexus* or connection with the offence charged, *e.g.*, as showing part of a scheme for carrying on a bogus business. *R.* v. *Rhodes*, *supra*. In that case *R.* v. *Holt* was distinguished as dealing with distinct and separate transactions. In *R.* v. *Fisher* [1910] 1 K. B. 149; 79 L. J. (K. B.) 187, the indictment was for (a) obtaining chattels by false pretences; (b) for obtaining credit under false pretences; and (c) for obtaining credit by fraud other than false pretences. The false pretences alleged related to the obtaining of a pony and cart. Evidence of obtaining provender by means of false pretences different from those used

in obtaining the pony and cart was held to have been wrongly admitted as being irrelevant to prove the particular fraud in respect of which the defendant was charged, and only amounting to a suggestion that he was of a generally fraudulent disposition. This was cited with approval in *R.* v. *Ellis* [1910] 2 K. B. 746, at p. 760; 79 L. J. (K. B.) 841, and in *R.* v. *Wilson*, 11 Cr. App. R. 251 : *R.* v. *Baird*, 11 Cr. App. R. 186. (*a*)

R. v. *Francis* and *R.* v. *Rhodes* were followed in *R.* v. *Wyatt* [1904] 1 K. B. 188; 73 L. J. (K. B.) 15; 68 J. P. 31, where the defendant was charged with obtaining credit by fraud other than false pretences (32 & 33 Vict. c. 62, s. 13). The evidence was to the effect that he had obtained board and lodging and had not paid. The court held that evidence that he had shortly before obtained lodgings at other places and had left without paying was admissible as tending to establish *a systematic course* of conduct on the part of the accused, and as negativing any accident or mistake, or the existence of any reasonable or honest motive. This case was followed in *R.* v. *Walford* [1907] 71 J. P. 215, an indictment for incurring liability for lodgings by fraud.

In *R.* v. *Ollis* [1900] 2 Q. B. 758; 67 L. J. (Q. B.) 918; 19 Cox, 554, on an indictment for obtaining money by falsely pretending that certain cheques given by the prisoner were good and valid orders for the payment of money, it was held that to prove guilty knowledge evidence was admissible that the prisoner had given another prosecutor in another case another cheque which was dishonoured on presentation notwithstanding that the prisoner had already been indicted and acquitted on a charge of fraud in respect of this last cheque. Channell, J., in the course of his judgment, said, at p. 781, "In such cases evidence of other transactions is admitted, not for the purpose of showing that the prisoner committed other offences, but for the purpose of showing that the transaction the subject of the indictment was done with the intent to defraud, or with guilty knowledge, as the case may be. Such evidence is admitted, not because it tends to show that other offences have been committed, but notwithstanding that, in the particular case, it may happen to do so." This ruling was approved and followed by the Court of Criminal Appeal in *R.* v. *Shellaker* [1914] 1 K. B. 414; 83 L. J. (K. B.) 413; 110 L. T. 351; 78 J. P. 159; 30 T. L. R. 194; 9 Cr. App. R. 240.

Evidence of another transaction where a similar false pretence was used by the accused may also be admissible in a proper case to rebut the defence that the pretence had been used for an innocent purpose in the transaction which forms the subject matter of the indictment. *R.* v. *Wilks*, 10 Cr. App. R. 16.

Where the false pretence alleged was that the accused was carrying on a genuine and *bonâ fide* business as a manufacturer's agent and merchant, it was held that the accused was entitled to put in as evidence on his behalf to show that in fact he was carrying on a genuine business receipts sworn to by him as having been given to him for payments for other goods purchased by

(*a*) In *R.* v. *Hull* [1902] Queensland State Rep. 1, the court rejected a letter found in the possession of the accused tending to show bad character, but admitted a number of other letters written to him and found in his possession, which tended to show that he had been engaged in a long series of frauds of a character similar to that with which he was charged.

him and his bank book containing entries showing such payments. *R.* v. *Sagar* [1914] 3 K. B. 1112; 84 L. J. (K. B.) 303; 24 Cox, 500; 10 Cr. App. R. 279.

Forgery.]—Upon an indictment for uttering a forged bank-note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner at other times, before or after the commission of the offence for which he is indicted; *R.* v. *Millard*, R. & R. 245: *R.* v. *Wylie*, 1 B. & P. (N. R.) 93: *S. C. sub nom. R.* v. *Whiley*, 2 Leach. 983: *R.* v. *Tattersal*, 1 B. & P. (N. R.) 93, sit.: *R.* v. *Ball*, R. & R. 132; 1 Camp. 324; 1 Den. p. iv.; or that he had in his possession other forged notes of the same kind; *R.* v. *Hough*, R. & R. 120 (or it would seem of a different kind; Bayley on Bills, 450); in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. So also, upon an indictment for uttering a forged bill of exchange, guilty knowledge may be proved by showing that the prisoner has at different times uttered other bills forged in other names. *R.* v. *Salt*, 3 F. & F. 834. On a charge of uttering a forged deed evidence that other forged deeds of a similar character were found in the prisoner's possession on arrest is admissible to rebut the defence that the accused did not know the deed to be forged. *R.* v. *Mason*, 10 Cr. App. R. 169; 24 Cox, 305; and it makes no difference that the deeds concern acts subsequent to that which forms the subject matter of the indictment. *Id.* On an indictment for forging and uttering a will, where evidence in chief had been given by two accomplices that the accused had told them he had done the same thing eighteen years before and gave that fact as his reason for not taking a certain part in the uttering charged in the indictment, questions in cross-examination of the accused tending to show that in fact he had forged and uttered a will eighteen years ago, were held to be admissible as corroboration of the accomplices' evidence. *R.* v. *Kennaway* [1917] 1 K. B. 25; 86 L. J. (K. B.) 300; 115 L. T. 720; 81 J. P. 99; 25 Cox, 559; 12 Cr. App. R. 147. *See also R.* v. *Colclough*, 15 Cox, 92; 10 L. R. Ir. 241, as to the sufficiency of the proof of the other utterings, not the subject of the indictment, but offered in evidence to prove guilty knowledge.

Incest.]—Where a brother and sister were indicted for incest committed in July and September, 1910, and it was proved that at these times they were living together and occupying the same bed, evidence was held to have been rightly admitted which showed that they had had a child in 1908, since it went to establish the existence of sexual passion between the parties as an element in proving that they had had illicit connexion in fact on or between the dates charged, and as negativing the defence of living together innocently. *R.* v. *Ball* [1911] A. C. 47; 22 Cox, 366; 80 L. J. (K. B.) 691.

Indecency.]—The respondent was charged under the *Vagrancy Act*, 1824, with having indecently exposed his person to Miss T. on July 16, 1914. In giving evidence he denied the offence, and also denied, in cross-examination, that he had indecently exposed himself to Miss T. in May, 1914. The complainant desired to re-call Miss T. to rebut this denial and to call other

witnesses to show a systematic course of similar conduct towards other females. On a case stated, it was held that the question in cross-examination and the evidence of Miss T. were relevant on the question of identification and to show that the act was done intentionally, but that the evidence of the other witnesses was not admissible unless accident or mistake was put forward as a defence. *Perkins* v. *Jeffery* [1915] 2 K. B. 702; 25 Cox, 59; 31 T. L. R. 444.

Where the defence to a charge of gross indecency was an *alibi*, evidence of the finding of two powder puffs upon the accused on arrest and of photographs of naked boys in a drawer in one of the rooms where he lived was held to have been properly admitted. *R.* v. *Thompson* [1917] 2 K. B. 630; [1918] A. C. 221; 12 Cr. App. R., 261; 13 Cr. App. R. 61. *See also R.* v. *Twiss* [1918] 2 K. B. 853.

Larceny.]—B. was indicted under 7 & 8 G. 4, c. 29, s. 37 (*rep.*), in one count, for stealing coal from the mine of G. and from the mines of thirty other coal owners, and it appeared that the prisoner was himself the lessee of coal, and had carried workings from his own mine into the beds of forty different coal owners, from all of which he had got coal without their sanction. Erle, J., thought it better that the attention of the jury should be confined to the charge of taking the coal of one owner, G.; but in order to show that when B. took G.'s coal he knew he was out of his boundary, the learned judge permitted it to be proved that the prisoner had gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal. *R.* v. *Bleasdale*, 2 C. & K. 765. (*a*) In *R.* v. *Adamson*, 6 Cr. App. R. 205, the defendant was indicted for larceny by a trick committed on March 24, in conjunction with one A. Evidence that on March 31 both men were seen acting in an exactly similar way to that adopted on the previous date was held to have been rightly admitted.

Libel.]—*See R.* v. *Pearce*, cited *ante*, p. 356; *R.* v. *Whiley*, cited *ante*, pp. 360, 363.

Rape.]—*See R.* v. *Rodley* [1913] 3 K. B. 468; 82 L. J. (K. B.) 1070, *ante*, p. 359.

Receiving.]—The cases and statutes as to evidence on a charge of receiving are given *post*, *tit. Receiving.*

Threatening letters.]—On an indictment for sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be

(*a*) In *R.* v. *Emmett* [1905] Victoria L. R. 718, on an indictment for receiving a sheep knowing it to have been stolen, the court rejected evidence that the accused had recently stolen lambs belonging to a person other than the owner of the sheep, and that a few days after the taking of the sheep he had in his possession the lambs and another stolen sheep belonging to a third person. The grounds of rejection were (1) that the connection between the theft of the sheep and the lambs was not sufficient to warrant admission of evidence of an independent theft; (2) that the evidence could not be admitted to show that the accused was likely to steal sheep.

given in evidence to explain the meaning and intent of the particular letter upon which the indictment is framed, *R.* v. *Robinson*, 2 Leach, 749, if the intent cannot be inferred from the letter itself. *R.* v. *Boucher*, 4 C. & P. 562.

Matter of defence.]—Matter of defence, when given in evidence under the general issue (*see ante*, p. 166), is proved by parol evidence, or by records or other written evidence, according to the rules laid down in the next chapter; when pleaded, and put in issue by the replication, it is also proved in the same manner, subject to the same rules as indictments (*ante*, p. 61).

Upon an indictment for a rape, the defendant may give general evidence of the woman's character for want of chastity (or that she is a common prostitute, *R.* v. *Clay*, 5 Cox, 146), or he may prove that she had before had connection with him: *R.* v. *Riley*, 18 Q. B. D. 481; 56 L. J. (M. C.) 52: *R.* v. *Martin*, 6 C. & P. 562, and n.; but not that she had had connection with others: *R.* v. *Holmes*, L. R. 1 C. C. R. 334; 41 L. J. (M. C.) 12: *R.* v. *Cockroft*, 11 Cox, 410, *per* Martin, B., and Willes, J. (overruling *R.* v. *Robins*, 2 M. & Rob. 512): *R.* v. *Hodgson*, R. & R. 211; and *see post*, *tit. Rape*. The same rule applies to indictments for assault with intent to commit rape: *R.* v. *Clarke*, 2 Stark. (N. P.) 241: or for indecent assault: *R.* v. *Holmes*, *supra*. *See R.* v. *Barker*, 3 C. & P. 589; and 1 Russ. Cr. (7th ed.) 945; or for carnal knowledge of girls under sixteen. *See R.* v. *Cargill*, [1913] 2 K. B. 271; 77 J. P. 347; 108 L. T. 816; 82 L. J. (K. B.) 665; 23 Cox, 382. Upon an indictment for libel, the defendant has been allowed to give in evidence such other parts of the same publication as were fairly connected with the libel in question, and upon the same topic, in order to disprove the motive imputed to him by the indictment, and to show the fair construction that should be put upon the passages therein set out. *R.* v. *Lambert*, 31 St. Tr. 335; 2 Camp. 398. And in *R.* v. *Horne Tooke*, 25 St. Tr. 1; 1 East, P. C. 61, 62, it being proved by the prosecution that the defendant had distributed several publications advocating republican principles, which were offered in evidence, in order to produce a presumption that parliamentary reform (which was expected to be set up by the prisoner in his defence) was a mere pretext to cover his treasonable purposes, the defendant, in order to rebut that presumption, was allowed to give in evidence a book upon parliamentary reform, written by him, and published twelve years before.

Character.]—The prisoner is allowed to call witnesses to speak generally as to his character, but not to give evidence of particular acts, unless it tends directly to the disproof of some of the facts in issue. The proper time for calling witnesses to character is before verdict and not after verdict in mitigation of sentence. *R.* v. *Mullins*, 3 Cox, 526; 7 St. Tr. (N. S.) 1110. A witness to character is not allowed to speak to his own opinion of the prisoner's disposition, but only as to the general reputation in which the prisoner is held. *R.* v. *Rowton*, L. & C. 520; 34 L. J. (M. C.) 57. Witnesses called by the prisoner as to character may be cross-examined either as to particular facts, *R.* v. *Hodgkiss*, 7 C. & P. 298, or as to the grounds of their belief. Taylor. Evid. (11th ed.) s. 352. But it has been held that such a witness cannot be cross-

examined as to circumstances of suspicion against the accused arising on the day of the alleged offence. *R.* v. *Rogan*, 1 Cox, 291, Erle, J. General evidence of good character may be rebutted by general evidence of bad character. *R.* v. *Rowton*, *supra*. As to the proper direction to be given to the jury with regard to the effect of evidence of good character *see R.* v. *Bliss Hill*, 82 J. P. 194; 13 Cr. App. R. 125. And if the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions. *R.* v. *Gadbury*, 8 C. & P. 676 : *R.* v. *Shrimpton*, 2 Den. 319; 21 L. J. (M. C.) 37. (*a*) And where he is himself called as a witness he may be cross-examined as to his character or previous offences, charges, or convictions, if the proof that he has committed or been convicted of another offence is admissible to prove that he is guilty of the offence charged or if he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his good character, or has given evidence of his good character, or if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or he has given evidence against any other person charged with the same offence. 61 & 62 Vict. c. 36, s. 1 (*f*) (ii.), (iii.), *post*, pp. 458 *et seq*. The statute does not refer to mere assertions of innocence on the part of the accused nor to reasons given by him for such assertions, but to cases where evidence as to character is given by the accused, or where evidence of the good character of the accused is sought to be elicited from the witnesses for the prosecution. *R.* v. *Ellis* [1910] 2 K. B. 746; 22 Cox, 330; 79 L. J. (K. B.) 841. *Cf. R.* v. *Ferguson*, 2 Cr. App. R. 250; and *see* further, *post*, p. 462. The same course may be adopted if proof of the commission or conviction of another offence is admissible evidence to show that he is guilty of the offence charged (*ante*, pp. 355 *et seq*.). And apparently the previous convictions can now be put in evidence under 28 & 29 Vict. c. 18, s. 6 (*post*, p. 474).

The several cases just mentioned, when carefully considered, will be found to be not exceptions to, but rather illustrations of, the rule that nothing may be given in evidence which does not tend directly to the proof or disproof of the matter in issue. In most of them, the evidence admitted tended directly to the proof of the knowledge or intention of the defendant at the time of the commission of the offence, which was a material ingredient in the crime imputed (*ante*, p. 355). In the case of rape (*ante*, p. 365, under heading "Matter of Defence") the evidence tended to show the great improbability of any resistance upon the part of the woman, and also that she was not entitled to credit as a witness.

(*a*) As to the mode of proof, *see* 28 & 29 Vict. c. 18, s. 6, *post*, p. 496; 24 & 25 Vict. c. 96, s. 116; and 34 & 35 Vict. c. 112, s. 18.

CHAPTER II.

THE MANNER OF PROVING THE MATTERS PUT IN ISSUE.

SECT. 1.

PRELIMINARY MATTERS.

EVIDENCE may be classed under three heads: (1) admissions or confessions, (2) presumptions, and (3) proofs. These will be considered in detail in the several sections of this chapter. But before entering on particular consideration of the subject, it may be necessary first to notice one or two general rules relating to evidence. Generally speaking, at common law the rules of evidence in criminal cases are the same as in civil cases, *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1; 3 B. & Ald. 717; subject to certain specific statutory modifications, and to the rule of practice that more evidence is required to justify conviction of crime than a verdict for the plaintiff in a civil action for trespass arising out of the same circumstances. *See R.* v. *White*, 4 F. & F. 383, and *note*; 2 Russ. Cr. (7th ed.) 2055; *and see post*, p. 396, *Presumptions*.

Primary evidence.]—It is a general rule that the best evidence of which the nature of the case will admit must be produced, if it can possibly be obtained; if not, then the next best evidence that can be obtained is admitted. This means that, as a general rule, where a written document is to be used as proof, the original document must be itself produced, and where a fact can be proved by persons who actually saw or heard it they must be called (but *see post*, p 370). For if it appears that there is any better evidence existing than that which is produced, the non-production of such evidence creates a presumption that, if produced, it would have revealed some falsehood which at present is concealed. 3 B. Com. 368; Gilb. Evid. 16; Taylor, Evid. (11th ed.) s. 391: *R.* v. *James*, 1 Show. 397; Carth. 220; cas. temp. Holt, 284; *R.* v. *Paine*, 1 Ld. Raym. 729; 1 Salk. 281: *Williams* v. *H. E. I. Co.*, 3 East. 192. Therefore, before secondary evidence is offered, a foundation for it must first be laid,

by proving that evidence at first hand cannot be obtained. The best evidence of the contents of a deed or other written instrument is the written instrument itself; secondary evidence is a true copy, or parol evidence of the contents, of the original. Therefore, before a copy of a written instrument, or parol evidence of its contents. can be received as proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or that it is in possession of the opposite party. Thus, where it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, it is necessary that the original message handed to the post office should be produced, and the copy received by the witness cannot be given in evidence unless it is proved that such original has been lost or destroyed. *R.* v. *Regan*, 16 Cox, 203, Field, J. The declarations or admissions of the opposite party, however, are always receivable in evidence against him, although they relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the suit. *Slatterie* v. *Pooley*, 6 M. & W. 664; 10 L. J. (N. S.) Ex. 8 : *Howard* v. *Smith*, 3 Scott (N. R.) 574; 10 L. J. (N. S.) C. P. 245. *See post*, *Admissions*, p. 379.

Records are an exception to the rule as to primary evidence, for they may be proved by exemplifications or other copies, in all cases, unless they are records of the court in which they are to be produced, and the matter of record forms the gist of the pleading to be proved. *See Reid* v. *Margison*, 1 Camp. 469; and *Burnand* v. *Nerot*, 1 C. & P. 578. This exception has been adopted from necessity because of the difficulty or impossibility of removing the record from its proper custody. To require the record itself to be given in evidence would be productive of great inconvenience, for it probably might be wanted for that purpose in several parts of the kingdom at the same time; besides, by removing it from the place in which it was deposited, there would necessarily be great danger of its being lost. Gilb. Evid. 7, 8. For the same reasons, journals of the House of Lords or House of Commons, libels, answers, depositions, etc., in the ecclesiastical courts in most cases—the rolls of a court baron, and other inferior courts—parish registers—entries in corporation books, or the books of public companies, *relating to things public and general*, or entries in foreign registers which may not be removed from their proper place of custody, may all be proved by copies duly certified. See *Lyall* v. *Kennedy*, 14 App. Cas. 437; 59 L. J. (Q. B.) 268. As to the modes of proving such documents, *see post*, pp. 448 *et seq.*; and as to evidence of entries in bankers' books, *see post*, p. 448.

When the copy of a document, the original whereof is not evidence at common law, is made evidence by Act of Parliament, a copy must be produced; the original is not made admissible evidence by implication. *Burdon* v. *Rickets*, 2 Camp. 121, n.

Notice to produce.]—Where a written instrument is in the hands of the opposite party, it is necessary to serve him or his solicitor with a notice to produce it : and if he does not produce it at the trial, in pursuance of the notice, then, upon proving the service of the notice, secondary evidence of its contents may be given. The rule in this respect is the same in criminal as in civil cases : *Att.-Gen.* v. *Le Marchant*, 2 T. R. 201, n.; subject to the qualification that the

rules for compelling discovery of documents by the defendant do not apply to criminal cases, save in the case of proceedings under the *Crown Suits Acts* and of indictments on which a civil right is in issue. *See Spokes* v. *Grosvenor Hotel Co.* [1897] 2 Q. B. 124; 66 L. J. (Q. B.) 572. The notice to produce must be served a reasonable time before the trial. What is such reasonable time must of course depend on the circumstances of each case. In general, when the parties live at a distance from the assize town, notice must be served before the commission day: *R.* v. *Ellicombe*, 1 M. & Rob. 260: *see Trist* v. *Johnson*, *Id.* 259; but this will depend on the nature of the document and the knowledge or probability of its being in the hands of the parties at the assize town, or the contrary. *See* the cases collected, Roscoe, Nisi Prius (18th ed.); 2 Russ. Cr. (7th ed.) 2074. In cases where the nature of the pleading gives sufficient notice to the defendant of the subject of inquiry, so that he may prepare himself to produce the written instrument, if necessary for his defence, a notice to produce it is not required. Thus, it has been held that in trover for a bond the plaintiff may give parol evidence of it, to support the general description of it in the declaration, without having given the defendant previous notice to produce it. *How* v. *Hall*, 14 East, 274. So. upon an indictment for stealing a bill of exchange, parol evidence of it was admitted without a notice to produce it. *R.* v. *Aickles*, 1 Leach, 294; 2 East, P. C. 675. And on an indictment for stealing a post letter described as addressed in a certain way, Pollock, C.B., held that a witness might be asked how the letter was addressed, although no notice to produce it had been given. *R.* v. *Clube*, 3 Jur. (N. S.) 698. So upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant in fact said was held sufficient, without giving him notice to produce the paper. *R.* v. *Moors*, 6 East, 419, n., 421, n. So, where a seditious meeting came to certain resolutions, and the defendant, who was chairman, gave a copy of these resolutions to another person it was held that this copy might be given in evidence, without a notice to produce the original. *R.* v. *Hunt*, 1 St. Tr. (N. S.) 171; 3 B. & Ald. 566. In the same case it was also held that it was not necessary to produce or account for banners bearing certain inscriptions, etc., exhibited at such meeting, but that parol evidence of such matters by eye-witnesses was perfectly admissible to show the general character and intention of the assembly. But upon an indictment for setting fire to a house, with intent to defraud an insurance office, secondary evidence of the policy of insurance cannot be given, without proof of proper notice to produce the original. *R.* v. *Kitson*, Dears, 187; 22 L. J. (M. C.) 118. And upon an indictment for perjury in falsely swearing that there was no draft of a statutory declaration which had been prepared by the defendant, the materiality of the existence of such draft turned upon its contents and the fact of certain alterations having been made upon it. Parol evidence of the contents of the draft and of the alterations made in it was held inadmissible, no notice to produce such draft having been given to the defendant. *R.* v. *Elworthy*, L. R. 1 C. C. R. 103; 37 L. J. (M. C.) 3. On the trial of an indictment for stealing a ring which had not been recovered, Channell, B., refused to allow evidence to be given of the contents of an inscription upon it, as no notice had been given to the

prisoner to produce the ring, although his lordship admitted evidence of the fact that the ring bore *some* inscription. *R.* v. *Farr*, 4 F. & F. 336. But it is submitted that this case is inconsistent with those above cited. And in *R.* v. *Francis*, L. R. 2 C. C. R. 128; 43 L. J. (M. C.) 97, it was decided by the Court for Crown Cases Reserved that although where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until its non-production is excused, no secondary evidence can be received, there is no case whatever deciding that when the issue is as to the state of a chattel, *e.g.*, the soundness of a horse, or the equality of the bulk of goods to the sample, the production of the chattel is primary evidence, and that no evidence can be given in regard to it, unless it is produced in court, or its absence is accounted for. And therefore on the trial of an indictment for obtaining money by false pretences, evidence was held to have been properly admitted that the prisoner had on a previous occasion endeavoured to obtain money by pretending that a ring, which was not produced at the trial, was a diamond ring, which it was not. *Id.*

Hearsay, generally.]—It is a general rule that hearsay is no evidence and for two reasons: (a) what the other person said was not put upon oath: (b) the party who is to be affected by it had no opportunity of cross-examining him. *R.* v. *Gunnell*, 16 Cox, 154 (C. C. R.): *R.* v. *Saunders* [1899] 1 Q. B. 490; 68 L. J. (Q. B.) 296; 1 Roscoe, Nisi Prius (18th ed.) 44. The rule applies with equal force to such evidence tendered on behalf of the defence as it does with regard to evidence for the prosecution. *R.* v. *Thomson* [1912] 3 K. B. 19; 81 L. J. (K. B.) 892; 23 Cox, 187; 76 J. P. 431; 28 T. L. R. 478. To this rule, however, there are some exceptions, arising from necessity:—

(1) Hearsay is admissible to prove the death of a person beyond sea. Bull. (N. P.) 294; *Doe* v. *Griffin*, 15 East, 293.

(2) Hearsay is good evidence to prove a prescription, Bull. (N. P.) 295; or custom, *Nicholls* v. *Parker*, 14 East, 331, n.: *Doe* v. *Sisson*, 12 East, 62: *see* *R.* v. *Antrobus*, 2 A. & E. 788: *Pim.* v. *Currell*, 6 M. & W. 234; or public right; *R.* v. *Bedfordshire* 4 E. & B. 535, 541; 24 L. J. (Q. B.) 81; and for this purpose old witnesses are usually called to prove what they heard in their youth, from old persons since deceased, on the subject. *See* Roscoe, Nisi Prius (18th ed.) 48; Taylor, Evid. (11th ed.) s. 607.

(3) What a witness has been heard to say at another time may, it is said, be given in evidence, in order to invalidate or confirm the testimony he gives in court. 2 Hawk. c. 46, s. 23; but *see* Taylor, Evid. (11th ed.) s. 1443. Where a witness has been cross-examined with a view to showing that his evidence on a material matter was a mere afterthought, evidence that he had previously made a similar statement may be given, though it is but hearsay, in order to rebut the allegation. *R.* v. *Benjamin*, 8 Cr. App. R. 146.

(4) *Res gestæ.*]—When hearsay is introduced not as a medium of proof to establish a distinct fact, but as being part of the transaction in question, it is admissible. *R.* v. *Gordon*, 21 St. Tr. 485, 535; 2 Doug. 591. This kind of evidence is usually described as *res gestæ*: and it does not seem quite accurate

to class it as hearsay. *See* Roscoe, Nisi Prius (18th ed.) 51; Taylor, Evid. (11th ed.) s. 583. Under this head declarations made by an agent, acting at the time within the scope of his authority, are received against his principal. *R.* v. *Hall*, 8 C. & P. 358. It would seem that the conduct of a person against whom an offence is committed, and especially the *fact* that he complained soon after the offence to persons to whom he would naturally complain, is relevant and admissible. Steph. Dig. Evid. (5th ed.) art. 8, p. 11; *R.* v. *Nicholas*, 2 C. & K. 246; *and see infra*.

Homicide.]—On an indictment for murder or manslaughter, a statement made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible. *R.* v. *Foster*, 6 C. & P. 325, Park, J., Patteson, J., and Gurney, B.; *R.* v. *Lunny*, 6 Cox, 477 (Ir.), Monahan, C.J. In *R.* v. *Bedingfield*, 14 Cox, 341, on an indictment for murder, a statement made by the deceased almost immediately after the fatal wound was inflicted, on coming out of the house where it had been inflicted, and in which house the prisoner was directly afterwards found lying with his throat cut and speechless, was rejected by Cockburn, C.J., as not being part of the *res gestæ*. *See* Taylor, Evid. (11th ed.), s. 583, n. (*a*). *R.* v. *Bedingfield* was followed in *R.* v. *Goddard*, 15 Cox, 7, by Hawkins, J., in which case the deceased shortly after the occurrence which resulted in her death was found in a fainting condition and apparently dying. It was proposed to give in evidence, as part of the *res gestæ*, a statement which she then made as to the cause of her injuries. The judge, however, refused to receive it in evidence as part of the *res gestæ*, but it afterwards appearing that the deceased had prefaced her statement by the words "I'm dying, look to my children," he admitted the statement as a dying declaration. In *R.* v. *Lunny*, 6 Cox, 477 (Ir.), statements made by a deceased person to the first person who came up after the fatal wound was inflicted were held admissible as part of the *res gestæ*. Where on the trial of a prisoner for the murder of his wife, a neighbour swore that a week before the alleged crime was committed the deceased visited her house, bring an axe and carving-knife, and handed them to the witness, evidence was admitted of what was said by the deceased to the witness on handing her the instruments. *R.* v. *Edwards*, 12 Cox, 230, Quain, J. Where on a trial for murder it was proposed by the prosecution to ask a witness what the deceased said on leaving her lodgings, that being the last occasion on which she was seen alive, Cockburn, C.J., refused to allow the question to be put, on the ground that what the deceased said was no part of the act of leaving, but only an incidental remark or statement of intention, which might or might not have been carried out. *R.* v. *Wainwright*, 13 Cox, 171. *See also R.* v. *Pook*, *Id.* 172 n.; 2 Russ. Cr. (7th ed.) 2082.

Except in the class of cases next to be considered only the *fact* and not the terms of the complaint may be proved. Steph. Dig. Evid. (5th ed.), p. 11.

(*a*) For a discussion of the English authorities, *see Gilbert* v. *R.*, 38 Canada Sup. Ct. 284; 2 Russ. Cr. (7th ed.) 2083: *Brown* v. *R.* [1913] 17 C. L. R. 570.

Rape, etc.]—In *R.* v. *Lillyman* [1896] 2 Q. B. 167; 65 L. J. (M. C.) 195; 18 Cox, 346; 60 J. P. 536, it was held after consideration of the earlier authorities that upon the trial of an indictment for rape or other kindred offences against women or girls (including indecent assault and offences within 48 & 49 Vict. c. 69, ss. 4, 5) the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence by the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part. (*a*).

The court accepted *R.* v. *Brazier*, 1 Leach, 199; 1 East, P. C. 443, as correctly deciding that the mere complaint is no evidence of the facts complained of, and that its admissibility depends on proof of the facts by sworn or other legalized testimony; and it also accepted the ruling of Bramwell, L.J., in *R.* v. *Wood*, 14 Cox, 46, and the opinion of Sir James Stephen, Dig. Evid. (5th ed.), art. 8, note v.; and *see* 1 Hawk. c. 41, s. 9; 4 Bl. Com. 211, 213.

In *R.* v. *Lillyman* (*supra*) the charges in the indictment were—

(1) Attempt to have carnal knowledge of a girl of the age of 13 and under 16: (2) Assault on the same girl with intent to ravish (*vide R.* v. *Brazier*, *supra*): and (3) Indecent assault. The defendant was convicted on the first count only. On the first charge consent was immaterial, on the second and third it was material.

Some differences of judicial opinion arose as to the extent of the application of the rule laid down in *R.* v. *Lillyman*. These differences have been for the most part settled by *R.* v. *Osborne* [1905] 1 K. B. 551; 74 L. J. (K. B.) 311; 92 L. T. 393; 69 J. P. 189; 53 W. R. 494; 21 T. L. R. 288. In that case the indictment was for an indecent assault on a girl under 13, and consent was immaterial. It was held that in the case of charges of sexual offences against females, evidence of fresh complaint is admissible "whether non-consent is legally a necessary part of the issue or whether on the other hand it is what may be called a collateral issue of fact," in consequence of the story told by the complainant in the witness box, and the complaint is not admissible merely as negativing consent, but as being consistent with the sworn evidence of the complainant (*b*). In *R.* v. *Folley*, 60 J. P. 569, Hall, Recorder, held that the rule was applicable to all criminal cases, and applied it to a charge of felonious wounding with intent to do grievous bodily harm. But it is very doubtful whether this view can be sustained, so as to admit the particulars of the complaint.

(*a*) This decision overrules certain earlier authorities so far as they excluded proof of the particulars of the complaint. *R.* v. *Clarke*, 2 Stark. (N. P.) 241; 1 Phillips and Amos on Evidence, p. 204 (2): *R.* v. *Walker*, 2 M. & Rob. 212: *R.* v. *Megson*, 9 C. & P. 420: *R.* v. *Wink*, 6 C. & P. 397; *R.* v. *Osborne*, C. & Mar. 622. But the C. C. R. to some extent distinguished these authorities as deciding no more than that the complaint was not part of the *res gestæ*, but only confirmatory evidence. For colonial decision on this subject, *see R.* v. *Jenkinson* [1904] 21 Cape Sup. Ct. 233: *R.* v. *McNeill* [1907] Victoria L. R. 265; and 1 Russ. Cr. (7th ed.) 943.

(*b*) This decision appears to overrule *R.* v. *Rowlands*, 62 J. P. 459, and *R.* v. *Kingham*, 66 J. P. 393, and to approve *R.* v. *Kiddle*, 19 Cox, 77.

The rule as to fresh complaint has not been applied in the temporal courts to charges of sexual misconduct with males. *R.* v. *Hoodless*, 64 J. P. 282. As to ecclesiastical courts, *see Chesney* v. *Newsholme* [1908] Prob. 301.

To be admissible the complaint must be made on the first opportunity which reasonably offers itself after the offence (*R.* v. *Lillyman* and *R.* v. *Osborne*, *supra*), which is for the court before which the complaint is offered in evidence. *R.* v. *Ingrey*, 64 J. P. 107, Russell, L.C.J.: *R.* v. *Lee*, 7 Cr. App. R. 31. If a considerable time has elapsed between the commission of the offence charged and the complaint, it is inadmissible. *R.* v. *Rush*, 60 J. P. 777, Wright, J. In this case a day elapsed between the alleged assault and the complaint, and it was elicited by questions put by the girl's mother. In *R.* v. *Ingrey*, *supra*, a complaint of an offence committed on a Saturday was rejected because it was not made till the Tuesday following; and in *R.* v. *Pantaney*, 71 J. P. 101 (C. C. R.), on a charge of indecent assault, a statement made by a girl to her sister on the day of the alleged assault as to something alleged to have been done by the defendant three weeks before was held inadmissible; and *see* 1 Russ. Cr. (7th ed.) 944. But the complaint need not be on the very earliest opportunity. *R.* v. *Kiddle*, 19 Cox, 77. In *R.* v. *Guttridge*, 9 C. & P. 471, where the prosecutrix was not called, it was sought to put in her complaint, but it was rejected by Parke, B., on the ground that, not being part of the *res gestæ*, but only confirmatory evidence, it could not be used, as the prosecutrix had given no evidence. Where the complaint is made by the female alleged to have been wronged, not on her own initiative, but in answer to questions, it is not admissible if it was elicited by questions of a leading and inducing or intimidating character. *R.* v. *Osborne* [1905] 1 K. B. 551, 561; 74 L. J. (K. B.) 311. The mere fact that the statement is made in answer to a question is not in itself sufficient to make it inadmissible as a complaint. The question for the court is whether the statement is spontaneous in the sense that it is an unassisted and unvarnished story of what happened. In each case the questions as to the character of any questions put, the relationship between the questioner and the complainant, as well as the other circumstances, are matters within the discretion of the judge. *R.* v. *Norcott* [1917] 1 K. B. 347; 86 L. J. (K. B.) 78; 81 J. P. 123; 25 Cox, 698; 12 Cr. App. R. 166; and *see R.* v. *Wilbourne*, 12 Cr. App. R. 280.

(5) *Statements as to bodily or mental feelings.*]—Whenever the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible. *Areson* v. *Lord Kinnaird*, 6 East, 188; Taylor, Evid. (11th ed), s. 580: *Aylesford Peerage Claim*, 11 App. Cas. 1; and *see* Roscoe, Nisi Prius (18th ed), p. 52. Thus the representations by a sick person of the nature and effects of the malady under which he is labouring are receivable. *R.* v. *Blandy*, 18 St. Tr. 1117, 1135-1138: and *see R.* v. *Guttridge*, 9 C. & P. 471, 472, Parke, B. But written communications from a patient to his doctor describing his symptoms have been held inadmissible. *Witt* v. *Witt*, 3 Sw. & Tr. 143; 32 L. J. (P. & M.) 179, Cresswell, J. On a trial for murder by poisoning, statements by the deceased, shortly before he took poison, are admissible to prove the state of his health

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at that time. *R.* v. *Johnson*, 2 C. & K. 354; 15 L. J. (M. C.) 7 : *R.* v. *Blandy*, *supra*. On an indictment for murder alleged to have been committed by withholding proper food from a child, a complaint by the child of being hungry is admissible. *R.* v. *Conde*, 10 Cox, 547. But such expressions, statements, and complaints, although admissible in evidence so far as they show the bodily condition of the person making them, at the time when they were made, cannot be given in evidence to show who caused such condition, or how it was caused. *R.* v. *Gloster*, 16 Cox, 471, Charles, J. : *R.* v. *Abbott*, 67 J. P. 151, Kennedy, J. : *R.* v. *Thomson* [1912] 3 K. B. 19; 81 L. J. (K. B.) 892; 28 T. L. R. 478; 76 J. P. 431. As to dying declarations, *see infra*.

(6) *Declarations against interest by deceased persons.*]—Declarations made by persons since deceased against their pecuniary or proprietary interest are admissible. *Higham* v. *Ridgway*, 10 East, 109 : *Sturla* v. *Freccia*, 5 App. Cas. 643; Taylor, Evid. (11th ed.), s. 668 *et seq.* Roscoe, Nisi Prius (18th ed.), p. 55; 2 Smith, L. C. (12th ed.), 301 *et seq.* The rule laid down in *Higham* v. *Ridgway* does not make the books of a firm evidence merely because one partner is dead. *Re Fountaine* [1909] 2 Ch. 382, 390, 396; 78 L. J. Ch. 648.

(7) *Declarations by deceased persons in course of duty or business.*]—A statement (whether written or oral, *R.* v. *Birmingham*, 1 B. & S. 763; 31 L. J. (M. C.) 63) or entry, which it is the duty of a person to make in the ordinary course of his business or professional employment, is admissible in evidence after his decease, *Price* v. *Earl of Torrington*, 1 Salk. 285; 2 Smith, L. C. (12th ed.), 294, provided it be made contemporaneously with the act to which it relates. *Doe* v. *Turford*, 3 B. & Ad. 890. On this principle field-book entries by a deceased surveyor made on a survey in which he was professionally employed have been held admissible. *Mellor* v. *Walmesley* [1905] 2 Ch. 164 (C. A.); 74 L. J. (Ch.) 475. It is essential to show that the statements were made contemporaneously and in pursuance of an ascertained duty or definite instructions. *Mercer* v. *Denne* [1905] 2 Ch. 538, 558; 74 L. J. (Ch.) 723. But such statement or entry is only admissible to prove those facts which it was the duty of the person making the statement or entry to include in it, *Chambers* v. *Bernasconi*, 1 C. M. & R. 347, 368; 3 L. J. (N. S.) Ex. 373, and of which he had personal knowledge. *Brain* v. *Preece*, 11 M. & W. 773 : *R.* v. *Clapham*, 4 C. & P. 29; *and see* Stephen, Evid. (5th ed.), p. 36; Taylor, Evid. (11th ed.), s. 697 : and *Re Fountaine* [1909] 2 Ch. 382, 396; 78 L. J. (Ch.) 648 *et seq.* In accordance with this exception to the general rule excluding hearsay, where on a trial for murder it appeared that the deceased, a constable, in the course of his duty had made, shortly before his death, a verbal statement to his superior officer as to where he was going, and what he was going to do, it was held that such statement, which was to the effect that deceased was going to watch the prisoner, was admissible. *R.* v. *Buckley*, 13 Cox, 293, Lush and Mellor, JJ.

(8) *Dying declarations.*]—Upon an indictment for murder or manslaughter, the dying declarations of the deceased are receivable in evidence, if it appears to the satisfaction of the judge (*R.* v. *John*, 1 East, P. C. 357, 358; 1 Leach, 504 n. :

R. v. *Welbourn*, 1 East, P. C. 358, 360; *R.* v. *Hucks*, 1 Stark. (N. P.) 521) that the deceased was conscious of his being in a dying state at the time he made them (*R.* v. *Woodcock*, 1 Leach, 502; 1 East, P. C. 354, 356: *R.* v. *Welbourn*, 1 East, P. C. 358: *R.* v. *Christie*, Carr. Supp. 302: *R.* v. *Van Butchell*, 3 C. & P. 629: *R.* v. *Forester*, 4 F. & F. 857; 10 Cox, 368: *R.* v. *Goddard*, 15 Cox, 7, *ante*, p. 371), and was sensible of his awful situation (*R.* v. *Pike*, 3 C. & P. 598: *R.* v. *Crockett*, 4 C. & P. 544: *R.* v. *Hayward*, 6 C. & P. 157: *R.* v. *Spilsbury*, 7 C. & P. 187: *R.* v. *Perkins*, 2 Mood. 135; 9 C. & P. 395: *R.* v. *Howell*, 1 Den. 1; 1 C. & K. 689; 1 Cox, 151: *R.* v. *Mackay*, 11 Cox, 148), even though he did not actually *express* any apprehension of danger (*R.* v. *Woodcock*, 1 Leach, 500, 503: *R.* v. *Dingler*, *Id.* 504 n.: *R.* v. *Bonner*, 6 C. & P. 386), and his death did not ensue until a considerable time after the declarations were made. *R.* v. *Mosley*, 1 Mood. 97; 1 Lew. 79: *R.* v. *Bernadotti*, 11 Cox, 316: *R.* v. *Reaney*, Dears. & B. 151; 26 L. J. (M. C.) 43; 7 Cox, 209. (*a*).

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." Eyre, C.B., in *R.* v. *Woodcock*, 1 Leach. 500, cited and approved in *R.* v. *Perry* [1909] 2 K. B. 697, 701; 78 L. J. (K. B.) 1034.

The result of the decisions is that there must be a settled hopeless expectation of imminent death, *i.e.*, that the declarant must have abandoned all hope of living; but that the declarant need not be expecting immediate death, *i.e.*, within the day, though he must be expecting to die within a very short distance of time. *R.* v. *Peel*, 2 F. & F. 21, Willes, J., adopted in *R.* v. *Gloster*, 16 Cox, 471, Charles, J., and approved in *R.* v. *Perry*, *supra*. (*b*) *See also* *R.* v. *Austin*, 8 Cr. App. R. 27.

"There must be an expectation of impending and almost immediate death, from the causes then operating. The authorities show that there must be no hope whatever." *R.* v. *Jenkins*, L. R. 1 C. C. R. 187; 38 L. J. (M. C.) 82; 11 Cox, 250. "Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious care," *Id. per* Byles, J., and *see* *R.* v. *Brooks*, 1 Cox, 6: *R.* v. *Dalmas*, 1 Cox, 95: *R.* v. *Peel*, 2 F. & F. 21: *R.* v. *Mooney*, 5 Cox, 318 (Ir.): *R.* v. *Nicolas*, 6 Cox, 120: *R.* v. *Qualter*, *Id.* 357. It must be shown for the prosecution that the deceased, when he made the statement, was under the impression that death was impending, not merely that he had received an injury from which death must ensue, but that he then believed that he was at the point of death. *R.* v. *Forester*, 4 F. & F. 857; 10 Cox, 368: *R.* v. *Smith*, 16 Cox, 170: *R.* v. *Mitchell*, 17 Cox, 503: *R.* v. *Whitmarsh*, 62 J. P. 680, 711: *R.* v. *Perry*, *supra*. A mere sense of danger

(*a*) *See* discussion of those authorities in *R.* v. *Orpen*, 16 N. Z. L. R. 611; 17 N. Z. L. R. 402; *R.* v. *Hope* [1909] Victoria L. R. 149.

(*b*) *R.* v. *Osman*, 15 Cox, 1, is overruled on this point.

is not enough. *R.* v. *Thomas*, 1 Cox, 52; *R.* v. *Errington*, 2 Lew. 148. Where the party expressed an opinion that she should not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible. *R.* v. *Fagent*, 7 C. & P. 238 : *see R.* v. *Megson*, 9 C. & P. 418 : *R.* v. *Welbourn*, 1 East, P. C. 358. Where, however, it is clearly proved that the declaration was made under the solemn belief of impending death it was held admissible, although the declarant at a later period of the same day thought that she should recover. *R.* v. *Hubbard*, 14 Cox, 565, Hawkins, J. : *R.* v. *Austin*, 8 Cr. App. R. 27 : and *cf. R.* v. *Taylor*, 3 Cox, 84. Where the declaration was reduced into writing, and in it the declarant was represented in the first instance as saying, "I have made the above statement with the fear of death before me, and with no hope of my recovery," but on its being read over to her, and on her being asked to correct any mistake, she said, "no hope at present of my recovery," and the writer then inserted the words "at present," it was held that this declaration was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death. *R.* v. *Jenkins*, *ante*, p. 375. So, where a declarant within half an hour before making her declaration said, "I do not think I shall be long with you," and after the declaration, at the request of a doctor, had been made, said "Yes," in answer to the doctor's question, "Do you make this statement with the fear of death before your eyes?" it was held that these circumstances did not warrant the conclusion that the declaration had been made under such a settled, hopeless expectation of immediate death as to render it admissible. *R.* v. *Gloster*, 16 Cox, 471, Charles, J.; and *cf. R.* v. *Abbott*, 67 J. P. 151, Kennedy, J. If the declarant believed himself to be in a dying state when he made the declaration, the fact that the surgeon thought him likely to recover will not render the declaration inadmissible. *R.* v. *Peel*, 2 F. & F. 21, Willes, J. : *R.* v. *Whitworth*, 1 F. & F. 382. The dying declarations of a boy ten years old have been held admissible. *R.* v. *Perkins*, 9 C. & P. 395; 2 Mood. 135. Those of a child of four have been held not so. *R.* v. *Pike*, 3 C. & P. 598.

In *R.* v. *Cleary*, 2 F. & F. 850, Erle, J., said that he could not, in the face of a statement by the deceased, from which it appeared that he did not think he should die, presume that a man who had been shot through the body must necessarily feel that he was about to die. In *R.* v. *Morgan*, 14 Cox, 337, 389, Denman, J., acting, it would seem, upon a misconception of the ruling in *R.* v. *Cleary* (*supra*), said that there was no case in which the consciousness of the deceased that he was in a dying state at the time he made the declaration had been founded entirely upon an inference drawn from the nature of the wound itself, and from giving the deceased credit for ordinary intelligence as to its natural results; but the attention of Denman, J., was not drawn to *R.* v. *Woodcock*, 1 Leach, 500; 1 East, P. C. 354, 356 : *R.* v. *Dingler*, 1 Leach, 504 n. : and *R.* v. *Bonner*, 6 C. & P. 386, in which the contrary was expressly held. Nor were those cases referred to, nor was the question to which they relate raised in *R.* v. *Bedingfield*, 14 Cox, 341 (*ante*, p. 371), where Cockburn, C.J., rejected the declaration of a woman made almost immediately after her throat

had been cut, and a few minutes before her death, there being nothing beyond the nature of the wound to show that she was under the sense of impending death. It would seem to be clear from *R.* v. *Woodcock*, *R.* v. *Dingler*, *R.* v. *Bonner*, and *R.* v. *Cleary* (*supra*) that the nature of the wound may be of itself sufficient evidence of impending death: *see* the reporters' notes to *R.* v. *Morgan* and *R.* v. *Bedingfield* (*supra*).

A statement made by a person under circumstances which would not render it admissible as a dying declaration becomes admissible as such if subsequently repeated in his presence and at his request by the person to whom it was previously made, and if assented to by him, if at the time of such repetition he was in such a state that if he had made a statement it would have been admissible as a dying declaration. *R.* v. *Steele*, 12 Cox, 168, *per* Lush, J. (*a*)

Dying declarations are only admissible where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. A dying declaration is not admissible to disprove a fact upon which perjury is assigned: *R.* v. *Mead*, 1 L. J. (K. B.) 88; 2 B. & C. 605; 4 D. & R. 120, Abbott, C.J.; nor to prove rape: *R.* v. *Newton*, 1 F. & F. 641; or robbery: *R.* v. *Lloyd*, 4 C. & P. 233. So upon an indictment for administering savin or using instruments to procure abortion, or for using instruments with intent to procure miscarriage, the woman's dying declarations are not admissible, though they relate to the cause of her death. *R.* v. *Hutchinson*, 2 B. & C. 608 n.: *R.* v. *Hind*, Bell, 253; 29 L. J. (M. C.) 147; 8 Cox, 300. And where a man was robbed, and died before the trial of the person charged with the robbery. Bolland, B., refused to receive his dying declarations respecting the robbery, holding that such declarations were evidence only in cases where the death of the party is the subject of the inquiry. *R.* v. *Lloyd*, 4 C. & P. 233. But on an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. *R.* v. *Baker*, 2 M. & Rob. 53. On an indictment for manslaughter, the declaration of the deceased at the time when she believed herself dying was admitted in evidence, although it related generally to the conduct of the prisoner, and not to the particular violence. *R.* v. *Murton*, 3 F. & F. 492. The dying declarations of an accomplice have been held to be admissible in evidence. *R.* v. *Tinckler*, 1 East, P. C. 354, 356 (more correctly reported 1 Den. v., vi.), provided he were at the time such a person as would be competent as a witness. *R.* v. *Drummond*, 1 East, P. C. 353 (a); 1 Leach, 378. And as dying declarations are only admissible where the death of the deceased is the subject of the charge (*R.* v. *Mead*, *supra*), it would seem that the only case in which the dying declaration of an accomplice can be given in evidence against the prisoner is where the prisoner is charged in assisting in the self-destruction of the accomplice. 2 Russ. Cr. (7th ed.) 2085. In *R.* v. *Jessop*, 16 Cox, 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, Field, J., admitted statements by the deceased made when purchasing poison in the absence of the prisoner, on the ground that the

(*a*) *See* hereon *R.* v. *Stevens* [1904] 4 N. S. W. State Rep. 727, where it is suggested that the judge should examine on the *voire dire* before admitting such statements.

acts and words of the deceased in carrying out a pre-arranged plan were evidence against the prisoner. Dying declarations in *favour* of the party charged with the death are admissible in evidence, as they may have an influence on the amount of punishment. *R.* v. *Scaife*, 2 M. & Rob. 551; 2 Lew. 150. Where two such declarations were made, the second of which alone was reduced into writing in the presence of a magistrate, this written declaration not being forthcoming at the trial, the judges held that, in the absence of it, the first declaration was admissible. *R.* v. *Tranter and Reason*, 16 St. Tr. 1; 1 Str. 499; Fost. 292. But where a declaration *in articulo mortis* was reduced into writing and signed by the party, the judge required production of the original and refused to receive either a copy of the paper or parol evidence of the declaration. *R.* v. *Gay*, 7 C. & P. 230 : *R.* v. *Trowter*, 1 East, P. C. 356 : *R.* v. *Woodcock*, 1 Leach, 500. (*a*) The declaration need not be on oath, *R.* v. *Bernadotti*, 11 Cox, 316 : it is equivalent to sworn evidence, *R.* v. *Ashton*, 2 Lew.147; but no statement in the declaration is admissible which would not have been so if the declarant had been examined on oath. *R.* v. *Sellers*, Carr. Supp. 233. Declarations taken under *Russell Gurney's Act* (30 & 31 Vict. c. 35), s. 6, are distinct from dying declarations. *See post*, p. 435.

It was formerly held to be no objection against a declaration which had been reduced into writing that it was made in answer to questions put to the deceased, and was not a continuous statement made by him, *R.* v. *Fagent*, 7 C. & P. 238, nor, apparently, that it was made in answer to *leading* questions. *R.* v. *Smith*, L. & C. 607; 34 L. J. (M. C.) 153; 10 Cox, 82. In *R.* v. *Mitchell*, 17 Cox, 503, Cave, J., held that a statement which had been reduced into writing must, to be admissible as a dying declaration, be *in the actual words of the deceased*, and if questions are put the questions and answers must both be given. But in *R.* v. *Bottomley* [1903] 38 L. J. Newsp. 311; 115 L. T. J. 88, Lawrance, J., ruled that a dying deposition in the form of question and answer was admissible, although the answers only and not the questions had been taken down. (*b*) In *R.* v. *Mann*, 49 J. P. 743, Denman, J., is reported to have held that a statement, although not admissible as a deposition or a dying declaration, was admissible as a statement made by the deceased in the presence of the prisoner; but in *R.* v. *Mitchell* (*supra*), Cave, J., expressly dissented from *R.* v. *Mann* (*supra*), saying that he thought Denman, J., must have been misreported.

(*a*) On these cases *see R.* v. *Wallace* [1898] 19 N. S. W. Rep. (Law) 155.

(*b*) In *R.* v. *Corbett* [1903] Queensland St. Rep. 246, Griffith, C.J., said, that *R.* v. *Mitchell* unsettled what had before been the law, and followed *R.* v. *Smith*, saying further, that it was not essential that a dying declaration should be proved by writing.

SECT. 2.

ADMISSIONS AND CONFESSIONS.

ADMISSIONS and confessions fall into two classes, judicial and extra-judicial :—

I. Judicial confessions.]—These may be subdivided into four kinds—1.) Where the defendant in open court freely and voluntarily confesses that he s guilty of the offence of which he is charged in the indictment. *See Powlter's ase*, 11 Co. Rep. 29. This admission may be of guilt as to the facts, subject to he view of the court as to whether admission of the facts amounts to a plea of uilty in law. *See R.* v. *Brown*, 17 L. J. (M. C.) 145; and *ante*, p. 168. Where he defendant pleads guilty, and the court accepts the plea, further proof or trial s needless, and the plea is recorded by the proper officer, and the court proceeds o judgment on the prisoner's own confession. This rule applies to treason and nisprision of treason, where the accused confesses "willingly, without violence, n open court." 7 & 8 W. 3, c. 3, s. 2; Fost. 241. Confession may be made n arraignment, or at any subsequent stage of the proceedings on the trial, by withdrawal (*retraxit*), with the consent of the court, the plea of not guilty, and substitution of a plea of guilty (*postea cognovit indictamentum*). 1 Chit. Cr. L. 429. In *Sir Hardres Waller's case* [1660] Kelyng. (ed. Loveland), p. 13, an ndictment for treason was found and the next day delivered at the gaol delivery at the Old Bailey Sessions House, on which day all the prisoners were arraigned and pleaded not guilty, but afterwards some of them withdrew their plea and confessed the indictment, viz., Sir H. Waller and George Fleetwood, which was accordingly recorded by the court: and it was agreed by all the judges that his might be done, although the clerk had recorded their plea of not guilty, for the entry is that such a one *postea*, or *relictâ verificatione*, *cognovit indictamentum*. The report in Howell, 5 St. Tr. 998, 1006, if complete, shows that Waller pleaded guilty before he was given in charge to the jury. The above ruling in Kelyng, was followed in *Holdsworth's case* [1832] 1 Lew. 279. As to the procedure where the trial is in the High Court, *see* Crown Office Rules, 1906, rr. 149, 150: Short and Mellor, Cr. Pr. (2nd ed.), 119, 120. The court will not allow a criminal case to be tried on admissions by the solicitors on both sides, nor unless the admissions are made at the trial by the defendant or his counsel. *R.* v. *Thornhill*, 8 C. & P. 575.

(2.) Where the defendant, upon an indictment for misdemeanor, yields himself to the King's mercy, and desires to submit to a small fine: the court may accept such submission if they think fit, without putting the defendant to a direct confession. 2 Hawk. c. 31, s. 3; 1 Chit. Cr. L. 430, 431. If the plea is accepted the procedure is as in case 1. Lambarde, Eirenarcha, Book IV. c. 9.

(3) Where the defendant, upon the preliminary inquiry as to any indictable offence, before justices of the peace, under the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), ss. 17, 18, admits either his guilt or any fact which may tend to prove it at the trial.

(4.) Where in other legal proceedings the defendant has made admissions criminating himself. *See post*, p. 382.

Confession, etc., to justices.]—What may be termed *magisterial* confessions are admissions either of guilt or of any fact which may tend to prove guilt at the trial made by a defendant on a preliminary inquiry before a justice of the peace in respect of any indictable offence under the *Indictable Offences Act*, 1848. A distinction has been drawn in the books between treason and misprision of treason on the one side, and felony and misdemeanor on the other. *See Berwick's case*, Fost. 10; 18 St. Tr. 367: *R.* v. *Willis*, 15 St. Tr. 613, 624. But the Act above cited applies to all indictable offences. As to the old mode of proof of a magisterial confession in cases of treason and misprision, *see post*, p. 395.

The *Indictable Offences Act*, 1848, provides (s. 18) that, after the examinations of all the witnesses on the part of the prosecution of a person brought before any justice or justices of the peace, charged with any indictable offence, shall have been completed, "the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned, and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person." (*a*)

(*a*) Before this Act it was a common practice for justices to question or examine the accused: and confessions elicited by such questions were held admissible against him on the trial if no undue influence was exercised. 2 Hawk. c. 46, ss. 31—45: *R.* v. *Ellis*, Ry. & M. 432. But since the Act of 1848, the magistrate appears not to be entitled to question the accused at all (*R.* v. *Pettit*, 4 Cox, 164, Wilde, C.J.); and answers to questions put to him are inadmissible at the trial (*R.* v. *Berriman*, 6 Cox, 388, Erle, J.) unless he elects to be sworn as a witness under 61 & 62 Vict. c. 36, s. 1, *post*, p. 458. Even before 11 & 12 Vict. c. 42, it was established that where a prisoner is willing to make a statement, the justice ought to receive it, but ought, before doing so, entirely to

The *second* caution contained in the above proviso is not strictly necessary nless it appears that some inducement or threat had previously been held out o the accused, but it is prudent always to give it. *R.* v. *Sansome*, 1 Den. 545; 9 L. J. (M. C.) 143. 11 & 12 Vict. c. 42, s. 28, declares, that the forms given n the schedule to that Act are to be deemed good, valid, and sufficient in law. The form (N.) of the prisoner's statement before the magistrate contains the rst caution, but not the second. And it has accordingly been held that, if the risoner's statement be returned purporting to be signed by the magistrate, nd bearing on the face of it the *first* caution, it is admissible, by virtue of ection 18, without further proof. *Id.* But it will always be prudent in the nagistrate to give the prisoner the second caution, as being the only course vhich will preclude all possibility of question as to the admissibility of his tatement; for as it has not been decided whether that caution is not absolutely equisite when a previous inducement or threat has been held out, and as the nagistrate can never be certain whether such previous inducement or threat as or has not been held out, a perplexing question might arise as to the suffiiency of the first caution to remove the effect on the prisoner's mind of such nducement or threat, should it turn out in fact that it had been held out. *See per* Erle, J., *R.* v. *Sansome*, *supra*. A prisoner, having been once xamined before a justice, and cautioned by him in the manner prescribed y this statute, made a statement, which was taken down in writing but not igned by him or by the justice; he was then remanded, and on a subsequent lay was brought again before the justice; no new witnesses were then examined, ut the prisoner's solicitor put some questions to a witness, who had been xamined before; the prisoner was again cautioned, but declined to make any urther statement; the statement made by him on the first occasion was held dmissible against him on his trial. *R.* v. *Bond*, 1 Den. 517; 19 L. J. (M. C.) 38; *see R.* v. *Stripp*, Dears. 648; 25 L. J. (M. C.) 109. Where the prisoner as been duly cautioned by the magistrate in pursuance of 11 & 12 Vict. c. 42, . 18, anything said by him thereupon is admissible in evidence against him, lthough there may have been a previous promise or threat held out to him o induce him to confess. *R.* v. *Bate*, 11 Cox, 686, Montague Smith, J. That he caution has been given requires no further proof than the fact of its appearng to have been so given on the face of the prisoner's statement, returned ogether with the depositions. *Id.* Oral evidence may be given against a risoner at his trial, of statements made by him while cross-examining a witness efore the magistrate; unless they have been reduced to writing as part of the epositions, in which case they must be proved by the depositions, and not by he witness so cross-examined. *R.* v. *Taylor*, 13 Cox, 77, Brett, J.

At common law examinations of a prisoner taken *upon oath* before justices especting a criminal charge then made against him were not admissible. Hale, 585; 2 Hawk. c. 46, s. 37. This rule did not apply to depositions made

o rid of any impression on the prisoner's mind, that the statement may be used for s own benefit; and the justice ought also to tell him, that what he thinks fit to say ll be taken down, and may be used against him on his trial. See *R.* v. *Arnold*, C. & P. 621, Denman, C.J. And the rule is now expressed in 11 & 12 Vict. c. 42, s. 18, *ra*.

by him as a witness in another case. Depositions made by the accused before a magistrate under the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36), are admissible against him at the trial, even though he declines to give evidence on his trial. *R.* v. *Bird*, 62 J. P. 760; 15 T. L. R. 26 (C. C. R.): *R.* v. *Boyle*, 20 T. L. R. 192: *R.* v. *Chapman*, 29 T. L. R. 117.

Statements by prisoner before coroners.]—It is now the practice to admit statements or depositions of the prisoner before the coroner if properly proved. These depositions are not taken under 11 & 12 Vict. c. 42, and that Act does not apply to them, but are taken under 50 & 51 Vict. c. 71, s. 4 (*ante*, p. 144). Formerly there was some doubt as to their admissibility, and the cases on the subject were conflicting. *See* 2 Russ. Cr. (7th ed.) 2244: *R.* v. *Wheeley*, 8 C. & P. 250: *R.* v. *Owen*, 9 C. & P. 83, 238; *R.* v. *Haworth*, Greenw. Coll. Stat. 137: *R.* v. *Sandys*, C. & Mar. 345; 2 Mood. 229. In 1886, Martin, B., after consulting with Willes, J., on a trial for manslaughter, admitted as evidence against the prisoner his deposition on oath taken by the coroner upon the inquest held on the deceased. *R.* v. *Bateman*, 4 F. & F. 1068: *cf. R.* v. *Colmer*, 9 Cox, 506, and the cases *ante*, p. 148; and *see R.* v. *Marriott*, 75 J. P. 288; 22 Cox, 211. By statutes of Quebec, commissioners were appointed to investigate the origin of any fires in the city of Quebec, with power to compel the attendance of witnesses and to examine them on oath. The prisoner being indicted for arson, it was held that his deposition taken on oath upon an inquiry before the commissioners into the cause of the fire was admissible as evidence against him. *R.* v. *Coote*, L. R. 4 P. C. 599; 42 L. J. (P. C.) 45.

Admissions in other cases.]—Admissions by the prisoner on oath in another case are admissible against him, except as to questions which he was improperly compelled to answer, if he was under no obligation to criminate himself. Thus in *R.* v. *Chidley*, 8 Cox, 365, Cockburn, C.J., admitted as evidence against a prisoner a deposition made by him before a justice while under examination as a witness, another person being at that time charged with the crime; and this case was followed in *R.* v. *Laurent*, 62 J. P. 250, where admissions of indecent acts made by L. in his evidence on the prosecution of another for larceny were held admissible against him on a charge under 48 & 49 Vict. c. 69, s. 11. In *R.* v. *Chapman*, 29 T. L. R. 117, admissions by the accused when before the magistrates on a charge of carnal knowledge of a girl between thirteen and sixteen, that he had had carnal knowledge of her when she was under thirteen, were admitted on an indictment against him for carnal knowledge of her when under thirteen. But this rule does not usually apply to a compulsory examination in which he is bound to answer incriminating questions. *See infra.*

Examinations in bankruptcy.]—The examination of a person taken on oath before commissioners of bankruptcy, he having been cautioned, and allowed to elect what questions he would answer, was held admissible against him on a charge of forgery. *R.* v. *Wheater*, 2 Mood. 45. So, where a bankrupt was examined touching a matter *not* relating to his trade, dealings, or estate, and did not refuse to answer on the ground that the answers would tend to

criminate him, but answered without objection, his answers were held voluntary, and his examination admissible against him on a criminal charge. *R.* v. *Sloggett*, Dears. 656; 25 L. J. (M. C.) 93. And it has since been held, that where a bankrupt was examined under s. 117 of the *Bankruptcy Act of* 1849 (12 & 13 Vict. c. 106, now repealed, but in substance re-enacted in ss. 15 and 25 of the *Bankruptcy Act*, 1914, 4 & 5 Geo. 5, c. 59), he was bound to answer all questions, touching matters relating to his trade, dealings, or estate, or which might tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers might criminate him; and such answers, though they do tend to criminate him, may be given in evidence against him on a criminal charge; *R.* v. *Scott*, Dears. & B. 47; 25 L. J. (M. C.) 128: *R.* v. *Cross*, Dears. & B. 68: *R.* v. *Robinson*, L. R. 1 C. C. R. 80; 36 L. J. (M. C.) 78: *R.* v. *Hillam*, 12 Cox, 174, even though a promise may have been made to the bankrupt before his examination that it should not be used against him or filed; *R.* v. *Cherry*, 12 Cox, 32, Martin, B. These decisions do not apply to a proceeding in respect of the offences referred to in 24 & 25 Vict. c. 96, s. 85 (*see* 4 & 5 Geo. 5, c. 59 (*Bankruptcy Act*, 1914), s. 166), and in 6 & 7 Geo. 5, c. 50 (*Larceny Act*, 1916), s. 43 (3): *see post*, p. 506. But on an indictment of a trader for obtaining property on credit, under the false pretence of dealing in the ordinary way of his trade, within four months before his liquidation, contrary to s. 11 (14) of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), now repealed, but in substance re-enacted by s. 154 (14) of the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59), an examination of the trader in liquidation taken under ss. 96 and 97 of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71, now repealed, but analogous provisions to which are contained in s. 25 of the *Bankruptcy Act*, 1914, 4 & 5 Geo. 5, c. 59), was held admissible in evidence against him; *R.* v. *Widdop*, L. R. 2 C. C. R. 3; 42 L. J. (M. C.) 9; although the summons to the trader to come up for examination might have been irregularly issued, as the trader by appearing, and submitting to be examined, waived the irregularity: *Id.* But a witness *other than the bankrupt* examined under the Acts is entitled to refuse to answer questions on the ground that his answers may criminate him; *Ex parte Schofield*, 6 Ch. D. 230 (C. A.). The *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59), s. 15 (1), enacts that where the court makes a receiving order, it shall hold a public sitting for the examination of the debtor as to his conduct, dealings, and property; and sub-s. 8 of the same section enacts that "the debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put, or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to, *or by the debtor*, and signed by him, *and may thereafter*, save as in this Act provided, *be used in evidence against him*." This sub-section does not exclude other modes of proving the debtor's admissions: *R.* v. *Erdheim* [1896] 2 Q. B. 260; 18 Cox, 355: *R.* v. *Hirschfield*, 61 J. P. 520. Section 25 of the Act of 1914 also authorizes other examinations of the debtor, but they contain no provision like that above cited in s. 15, sub-s. 8, for using the examination in evidence against him. It would appear, however, from the cases above mentioned, decided under former bankruptcy statutes containing enactments

similar to s. 25, that examinations under that section, as well as under s. 15, may be so used. But by s. 166 of the *Bankruptcy Act*, 1914, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in 24 & 25 Vict. c. 96, s. 85. A similar protection is afforded by s. 43 (3) of the *Larceny Act*, 1916 (*post*, p. 506), in respect of the offences therein referred to. A statement of affairs filed by a bankrupt under s. 16 of the *Bankruptcy Act*, 1883 (now repealed and replaced by s. 14 of the *Bankruptcy Act*, 1914) has been held not to be within 53 & 54 Vict. c. 71, s. 27, sub-s. 2 (now s. 166 of the Act of 1914), and is therefore admissible in evidence against him on a charge of misappropriation of trust moneys under s. 21 of the *Larceny Act*, 1916. *R.* v. *Pike* [1902] 1 K. B. 552; 71 L. J. (K. B.) 287; 20 Cox, 164; 66 J. P. 296 : and *see R.* v. *Oliver*, 3 Cr. App. R. 246. The answers of a promoter or director or other officer of a company on his examination in proceedings to wind up the company may be used in evidence against him. 8 Edw. 7, c. 69 (*Companies (Consolidation) Act*, 1908), s. 175 (7). The answer of the defendant in a suit in equity, instituted against him by the prosecutor, is admissible on an indictment against him : *R.* v. *Goldshede*, 1 C. & K. 657, except in cases where it is otherwise provided by statute; *see* 24 & 25 Vict. c. 96, s. 85; 6 & 7 Geo. 5, c. 50, s. 43 (2). But on an indictment against a bankrupt for concealing his effects, where it was proposed to prove the petitioning creditor's debt by putting in the bankrupt's balance-sheet delivered upon oath, Alderson, B., and Patteson, J., held that it was not receivable for that purpose; *R.* v. *Britton*, 1 M. & Rob. 297; because, as explained by Patteson, J., in *R.* v. *Wheater*, 2 Mood. 45, 51, the balance-sheet was only admissible in the event of the commission being valid, and therefore it could not itself be given in evidence to prove the petitioning creditor's debt as a part of the commission.

Where the defendant on cross-examination in a civil action has been *compelled* to answer questions tending to criminate him, the admission so obtained cannot be used against him upon his trial on a criminal charge. *R.* v. *Garbett*, 1 Den. 236; 2 C. & K. 474. *Cf. R.* v. *Noel* [1914] 3 K. B. 848, 10 Cr. App. R. 255 (*post*, p. 561). But declarations of a defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, was held by Abbott, C.J., in *R.* v. *Merceron*, 2 Stark. (N. P.) 366, to be admissible against him upon an indictment for corruptly granting licences to public-houses.

Confessions excluded by statute.]—By certain statutes admissions by a person on a former trial or inquiry in which he was examined as a witness cannot be given in evidence against him on a criminal charge. Thus, by 46 & 47 Vict. c. 51 (*Corrupt and Illegal Practices Prevention Act*, 1883), s. 59, sub-s. 1 (*b*), " an answer by a person to a question put by or before any election court shall not, *except in the case of any criminal proceeding for perjury in respect of such evidence*, be in any proceeding, civil or criminal, admissible in evidence against him." This provision, which applies primarily to inquiries before an election court respecting parliamentary elections, is extended to similar inquiries respect-

ing municipal elections by 47 & 48 Vict. c. 70, ss. 30, 35, and respecting certain other elections to public offices. *Id.* s. 36. *See R.* v. *Buttle*, L. R. 1 C. C. R. 248; 39 L. J. (M. C.) 115: *R.* v. *Slator*, 8 Q. B. D. 267; 51 L. J. (Q. B.) 426. Provisions of a similar nature are contained in 26 & 27 Vict. c. 119 (*Exhibition Medals Act*, 1863), s. 5, in 38 & 39 Vict. c. 87 (*Land Transfer Act*, 1875), s. 103, in 50 & 51 Vict. c. 28 (*Merchandise Marks Act*, 1887), s. 19, sub-s. 2, and in 46 & 47 Vict. c. 3 (*Explosive Substances Act*, 1883), s. 6, sub-s. 2. Subject, however, to any exceptions introduced by statute, the general rule deducible from the modern cases seems to be that any statement made by a person upon oath, *when being examined as a witness*, either before a civil tribunal, a coroner, or a magistrate, may be afterwards used against him on his trial on a criminal charge, unless, indeed, at the time of his examination he objected to answer the questions on the ground that the answers would tend to criminate him, and yet was improperly compelled to answer them. Taylor, Evid. (11th ed.), s. 900; 2 Russ. Cr. (7th ed.) 2189, 23-48; 61 & 62 Vict. c. 36, s. 1 (*post*, p. 458). *And see R.* v. *Coote*, L. R. 4 P. C. 599, *ante*, p. 382: *R.* v. *Erdheim* [1896] 2 Q. B. 260, at p. 270, *per* Russell, C.J.: *R.* v. *Colpus* [1917] 1 K. B. 574; 86 L. J. K. B. 459; 81 J. P. 135; 25 Cox, 716; 33 T. L. R. 184.

II. Extrajudicial confessions.]—An extrajudicial confession is made where the defendant makes an admission or confession of his guilt, or of any fact which may tend to the proof of it, to any person other than a judge or magistrate seised of the charge against him; or assents to what is said in his presence and hearing, relative to a fact within his knowledge. Thus, upon the trial of a prisoner for receiving stolen property, a list of the stolen articles which the prisoner had bought was received in evidence in order to show that he had bought at an under-value. The circumstances under which the list was written were that a constable asked the prisoner to say when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife in her husband's presence handed to another constable the list tendered in evidence, saying in her husband's hearing, "This is a list of what we bought and what we gave for them." It was held that this list was clearly admissible in evidence. *R.* v. *Mallory*, 13 Q. B. D. 33; 53 L. J. (M. C.) 134.

Confessions must be voluntary.]—These several species of confession, in order to be admissible, must be free and voluntary. And in the case of a confession before a magistrate (who before 1848 exercised inquisitorial as well as judicial functions, 1 Steph. Hist. Cr. L. 221), or before any other person, unless it be shown affirmatively on the part of the prosecution that it was made without the defendant's being induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him. 2 Hale, 285: *R.* v. *Thompson* [1893] 2 Q. B. 12; 62 L. J. (M. C.) 93; 17 Cox, 641: and *see* generally on this question, *R.* v. *Baldry*, 2 Den. 430; 21 L. J. (N. S.) M. C. 30: *Ibrahim* v. *Rex* [1914] A. C. 599, at p. 609; 83 L. J. P. C. 185; 24 Cox, 14; 30 T. L. R. 383: *R.* v. *Colpus* (*supra*). "If it proceeds from remorse or a desire to make reparation for the crime, it is admissible; if it flows

from hope or fear excited by *a person in authority* it is inadmissible. On this point the authorities are unanimous." *R.* v. *Thompson* [1893] 2 Q. B. at p. 15; 62 L. J. (M. C.) 93, Cave, J. Therefore a confession will be inadmissible if it be said to the defendant that it will be better or worse for him if he does or does not confess; 2 East, P. C. 659; or if the confession is procured by a threat to take the defendant before a magistrate if he does not give a more satisfactory account: *R.* v. *Thompson*, 1 Leach, 291: *R.* v. *Parratt*, 4 C. & P. 570; or to send a constable for that purpose: *R.* v. *Richards*, 5 C. & P. 318: *R.* v. *Hearn*, C. & Mar. 109; or a promise that if the defendant will confess there will be no prosecution: *R.* v. *Boughton*, 6 Cr. App. R. 8; or by saying, "Tell me where the things are, and I will be favourable to you": *R.* v. *Cass*, 1 Leach, 293 n.; or, "You had better tell all you know": *R.* v. *Kingston*, 4 C. & P. 387; or "You had better tell where you got the property": *R.* v. *Dunn*, 4 C. & P. 543; or, "You had better split, and not suffer for all of them": *R.* v. *Thomas*, 6 C. & P. 353; or, "It would have been better if you had told at first"; *R.* v. *Walkley*, 6 C. & P. 175; or, "I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing": *R.* v. *Partridge*, 7 C. & P. 551; or, "It will be best for you if you tell me how it was transacted": *R.* v. *Warringham*, 2 Den. 447 n.; or "It might be better for you to tell the truth and not a lie": *R.* v. *Bate*, 11 Cox, 686; or, "You had better tell the truth, it may be better for you": *R.* v. *Fennell*, 7 Q. B. D. 147; 50 L. J. (M. C.) 126; or, "You had better tell me all about the corn that is gone": *R.* v. *Rose*, 67 L. J. (Q. B.) 289; 18 Cox, 717. Where the prosecutor asked the defendant for the money which he had taken, and, before it was produced, said, "I only want my money, and if you give me that you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. *R.* v. *Jones*, R. & R. 152.

In *R.* v. *Brown* [1903] 68 J. P. 15, on a trial for murder, the prosecutor proposed to put in evidence answers given by one of the prisoners—a soldier, to a commanding officer of military police. The officer had come to the barracks of the prisoner's regiment, and a parade of the regiment was ordered. The prisoner was arrested and taken to the guard-room, where the officer asked him certain questions at the suggestion of the superintendent of the police. After the prisoner had answered a few questions, the superintendent stopped the officer from asking more, and arrested the prisoner. Wills, J., held that the answers were admissible, as the officer had held out no threat nor inducement, and there was no compulsion, and nothing to force the prisoner into a position in which he would be likely to make an untruthful answer. In *R.* v. *Colpus* [1917] 1 K. B. 574, it was held that admissions made before a military court of inquiry may be given in evidence at the trial on indictment of the person making the admissions. In *R.* v. *Godinho*, 76 J. P. 16; 28 T. L. R. 3, a statement in the nature of a confession made by a person accused of murder on the high seas to a police officer in charge of him at Bow Street Police Station, just before being brought before a magistrate, without any hope of pardon having been held out to him, was held to be admissible.

The prisoner made a confession which was inadmissible in evidence in conse-

quence of its having been made after a promise held out by the person to whom it was made. That person, shortly after the confession so made to her, sent for a neighbour and informed him of the confession, and he then had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then made a confession to him. It was held that this second confession was so connected with the promise held out by the person to whom the first confession was made as to be inadmissible. *R.* v. *Rue*, 13 Cox, 209, Denman, J., after consulting Kelly, C.B. Where a prisoner was told by the constable at 10 o'clock a.m. that it would be better for him to tell the truth, an admission by the prisoner to another constable after 6 o'clock in the evening of the same day was not allowed to be given in evidence, although the second constable had, before the prisoner made the admission, cautioned him not to say anything to criminate himself. This decision proceeded on the ground that the caution given by the second constable might not have had the effect of removing the expectation which might have been raised by the language of the first constable. *R.* v. *Doherty* (1), 13 Cox, 23, Whiteside, C.J.: *R.* v. *Doherty* (2), 13 Cox, 24, Fitzgerald, B.

A confession, made with a view, and under a hope, of being thereby permitted to turn King's evidence, or of obtaining a pardon or reward, has been held inadmissible. *R.* v. *Hall*, 2 Leach, 559: *R.* v. *Blackburn*, 6 Cox, 333, Talfourd, J. And it is clearly so where such hope is the reasonable result of a communication from, or the conduct of, a person in authority. *R.* v. *Gillis*, 11 Cox, 69. *See R.* v. *Burley*, 2 Russ. Cr. (7th ed.) 2284: *R.* v. *Boswell*, C. & Mar. 584. But *cf. R.* v. *Dingley*, 1 C. & K. 637.

Promise or threat by one without authority.]—To exclude a confession made under the influence of a promise or threat, the promise or threat must be of a description which may be presumed to have had such an effect on the mind of the defendant as to induce him to confess; and therefore an exhortation, admonition, promise or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. *R.* v. *Row*, R. & R. 153: *R.* v. *Hardwick*, 1 Phill. Evid. (7th ed.) 111: *R.* v. *Gibbons*, 1 C. & P. 97: *R.* v. *Tyler*, *Id.* 129: *R.* v. *Clewes*, 4 C. & P. 221. It seems that there was at one time a difference of opinion among the judges on this point—whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable or not. *R.* v. *Spencer*, 7 C. & P. 776. It has, however, been long settled that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office or authority holds out to the accused party an inducement to confess, this will not exclude a confession made to that party. *R.* v. *Taylor*, 8 C. & P. 733: *R.* v. *Moore*, 2 Den. 526; 21 L. J. (M. C.) 199.

It is immaterial whether the inducement is held out by the person in authority or in his presence without his dissent by a third person. Thus, where such a person held out an inducement in the presence of the prosecutor's wife, who expressed no dissent, the confession was held not to be receivable. *R.* v. *Taylor*,

supra. And *see R.* v. *Hewett*, C. & Mar. 534 : *R.* v. *Garner*, 1 Den. 329; 2 C. & K. 920; 18 L. J. (M. C.) 1 : *R.* v. *Luckhurst*, Dears. 245; 23 L. J. (M. C.) 18. So where the prisoner was taken by the constable to an inn, and the innkeeper, in the constable's hearing, held out an inducement to him to confess, and the prisoner, in the constable's hearing, made a confession to the innkeeper, which the constable was called to prove, Alderson, B., thought the evidence inadmissible. *R.* v. *Pountney*, 7 C. & P. 302. And *see R.* v. *Dunn*, 4 C. & P. 543 : *R.* v. *Slaughter*, *Id.* 544 n. : for the fact of the constable being present and not dissenting from what was said places the expressions used on the same footing as if they had been used by the constable. *R.* v. *Laugher*, 2 C. & K. 225, Pollock, C.B. Where one of two defendants charged with larceny said to the other (a constable, and the owner of the property, W., being present), "You had better tell Mr. W. the truth," neither the policeman nor W. saying anything, a confession made thereupon by the other defendant was held admissible. *R.* v. *Parker*, L. & C. 42; 30 L. J. (M. C.) 144. Where a girl, being apprehended for the murder of her child, was left by the constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her and the man would go free, upon which she made a confession : Parke, J., and Taunton, J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. *R.* v. *Enoch*, 5 C. & P. 539. A woman in custody on a charge of murder was placed in a room alone with E. to be searched. E. was a "searcher" of female prisoners, but had no other duties or authority in the gaol. Whilst the search was being made, the prisoner said, "If I tell the truth, shall I be hung?" to which E. answered, "No, nonsense, you will not be hung." It was held that a statement made by the prisoner to E. immediately afterwards was not receivable. *R.* v. *Windsor*, 4 F. & F. 361. And confessions obtained from a servant through hopes and threats held out by the wife or by the relations and neighbours of her master and prosecutor (or, in the case of an offence committed against several persons in partnership, by the wife, etc., of any of them, *R.* v. *Warringham*, 2 Den. 447 n.), have been held inadmissible by all the judges. *R.* v. *Simpson*, 1 Mood. 410 : *R.* v. *Upchurch*, *Id.* 465. This, however, does not apply to a case where the charge against the servant has no relation to the persons or property of the master or his family; *e.g.*, to a case of child murder or concealment of birth. *R.* v. *Moore*, 2 Den. 522; 21 L. J. (M. C.) 199.

The subject matter of the inducement.]—The inducement must refer to a *temporal benefit;* for hopes which are referable to a future state merely are not within the principle which excludes confessions obtained by improper influence. *R.* v. *Gilham*, 1 Mood. 186. Where the inducements merely amount to a moral exhortation and do not refer to a temporal benefit, the confession is admissible. Thus where the defendant being in custody on a charge of setting fire to her master's farm-building, her master's married daughter said to her, "I am very sorry for you; you ought to have known better; tell me the truth, whether you did it or no"; the defendant replied, "I am innocent"; whereupon the other said, "Don't run your soul into more sin, but tell the

truth"; a confession thereupon made by the defendant was held admissible. *R.* v. *Sleeman*, Dears. 249; 23 L. J. (M. C.) 19. And *see* 2 Russ. Cr. (7th ed.) 2166. Where one of the prisoner's employers, having called him up into his private room, said, "I think it right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise you that, to any questions that may be put to you, you will answer truthfully, *so that if you have committed a fault you may not add to it by stating what is untrue*"; and having shown a letter to him, which he denied having written, added, "Take care; we know more than you think we know," and the prisoner thereupon made a confession; it was held that such confession was admissible. *R.* v. *Jarvis*, L. R. 1 C. C. R. 96; 37 L. J. (M. C.) 1. So where the mother of a little boy in custody on a criminal charge said to him and another little boy also in custody on the same charge, in the presence of the mother of the latter and of the policeman, "You had better, *as good boys*, tell the truth," whereupon both boys confessed, it was held that the confession was admissible. *R.* v. *Reeve*, L. R. 1 C. C. R. 362; 37 L. J. (M. C.) 92. That case, as well as *R.* v. *Jarvis*, *supra*, is shaken, if not overruled, by *R.* v. *Thompson* [1893] 2 Q. B. 12; 62 L. J. (Q. B.) 93; 17 Cox, 641 (*ante*, p. 385), unless the inducements are treated as amounting only to moral exhortations, as in *R.* v. *Sleeman* (*supra*). *See* 2 Russ. Cr. (7th ed.) 2166. But in *R.* v. *Stanton*, 6 Cr. App. R. 198, where a mistress had said to a servant accused of larceny, "Now, Ellen, have you seen my rings? Be a good girl and tell the truth"; whereupon the girl said she had taken the rings and given them to her mother, it was held that no inducement had been held out and the confession was therefore admissible, and *R.* v. *Reeve* (*supra*) was not apparently doubted.

So, where a prisoner under fourteen years of age, charged with murder, was told by a man, who was present when he was apprehended, "Now, kneel down; I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner in consequence made a statement, this was held (strictly) admissible. *R.* v. *Wild*, 1 Mood. 452. But where a constable, after having asked the prisoner what he had done with the stolen property, said, "You had better not add a lie to the crime of theft," Gaselee, J., refused to receive a statement thereupon made by the prisoner in evidence. *R.* v. *Shepherd*, 7 C. & P. 579.

The only proper questions are, whether the inducement held out to the prisoner was calculated to make his confession an *untrue* one, and whether the inducement continued to operate at the moment of the confession: if not, it will be admissible. Thus, where a prisoner asked of a witness with whom he was in conversation whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. *R.* v. *Thomas*, 7 C. & P. 345. This rule was approved in *R.* v. *James*, 2 Cr. App. R. 319, 320.

It is no objection to the admissibility of a confession that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice, with a view to obtain the

confession. *R.* v. *Burley*, 1 Phill. Evid. (7th ed.) 111. A statement made by a prisoner when drunk has been held admissible, even though the liquor was given him in the hope that he would make admissions. *R.* v. *Spilsbury*, 7 C. & P. 187 : but *see* 2 Russ. Cr. (7th ed.) 2168 n. A letter given by a defendant to the gaoler to put into the post is evidence against him. *R.* v. *Derrington*, 2 C. & P. 418.

If the promise, or menace, etc., has been made before the prisoner is brought before the magistrate, the court will, in general, refuse to admit the confession in evidence, unless it appears that the prisoner was undeceived by the magistrate, and cautioned by him not to expect the favour, or not to regard the menaces held out to him; 2 East, P. C. 658 : and *see R.* v. *Lingate*, 1 Phill. Evid. (7th ed.) 414; Taylor, Evid. (11th ed.) 878. But where (before 11 and 12 Vict. c. 42) a defendant having been told by a constable that he might do himself some good by confessing, afterwards asked the magistrate if it would benefit him to confess, and the magistrate saying he could not say it would, the defendant then declined to confess, but afterwards, when going to prison, made a confession to the constable, the judges held the confession to be admissible, because the answer of the magistrate was sufficient to remove any expectation which the constable might have caused. *R.* v. *Rosier*, 2 Phill. Evid. (7th ed.) 112. *See* 2 Russ. Cr. (7th ed.) 2182 : *R.* v. *Green*, 5 C. & P. 312 : *R.* v. *Clewes*, 4 C. & P. 221 : *R.* v. *Richards*, 5 C. & P. 318 : *R.* v. *Howes*, 6 C. & P. 404 : *R.* v. *Dingley*, 1 C. & K. 637.

The only questions in these cases really are—was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess? and if so, was the prisoner induced by such promise or menace, etc., to make the confession attempted to be given in evidence? If the judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appears to him, from the circumstances, that, although such promises or menaces were held out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biased by such impression in making it, the judge will admit the evidence. *See* 2 East, P. C. 658 : *R.* v. *Thompson* [1893] 2 Q. B. 12; 62 L. J. (Q. B.) 93 : *R.* v. *White*, 1 Phill. Evid. (7th ed.) 406 : and *R.* v. *Nute*, 1 Burn's J. 973 (30th ed.); 2 Russ. Cr. (7th ed.) 2180.

A confession is not necessarily inadmissible on the ground that the exact words used cannot be given, but only a police officer's recollection of them put into writing subsequently. *R.* v. *Godinho*, 76 J. P. 16; 28 T. L. R. 3, doubting *R.* v. *Sexton*, M.S. Chetw., 1. Burn's Justice, ed. Doyle and Williams, *tit. Confessions*, p. 1086.

Questions to prisoners by police constables.]—The admissibility of answers to questions put by the police before arrest must depend in each case upon the whole of the circumstances. *R.* v. *Miller*, 18 Cox, 54, Hawkins, J.; and *see R.* v. *Winkel*, 76 J. P. 191.

The following rules have been approved by His Majesty's Judges :—

1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person

or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence."

5. The caution to be administered to a prisoner, when he is formally charged, should therefore be in the following words: "*Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.*" Care should be taken to avoid any suggestion that his answers can only be used in evidence *against* him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

Where a constable said to the prisoner, who was suspected of the murder of her child, that "if she did not tell him where it was she might get herself into trouble, and that it would be the worse for her," a statement thereupon made by her to the constable was rejected. *R.* v. *Coley*, 10 Cox, 536, Mellor. J. But a statement made to a constable, after he had told the defendant the nature of the charge against him and that he need not say anything to criminate

himself, but that what he did say would be taken down, and used as evidence against him, was held to be admissible. *R.* v. *Baldry*, 2 Den. 430; 21 L. J. (M. C.) 130 : overruling *R.* v. *Drew*, 8 C. & P. 140, Coleridge, J. : *R.* v. *Morton*, 2 M. & Rob. 514 : *R.* v. *Furley*, 1 Cox, 76, Maule, J. : and *R.* v. *Harris*, *Id.* 106, Maule, J.

Where a constable in the course of a conversation between himself and the prisoner respecting the subject matter of the charge and immediately before apprehending the prisoner said to the prisoner, "I must know more about it," it was held that the use of this expression by the constable did not render a statement thereupon made by the prisoner inadmissible. *R.* v. *Reason*, 12 Cox, 228, Keating, J., after consultation with Quain, J. This case was approved in *R.* v. *James*, 2 Cr. App. R. 319.

Where a constable said to the prisoner, who was suspected of having stolen the prosecutrix's purse, "Now is the time for you to take it back to her" (the prosecutrix), it was held that the use of these words by the constable did not render inadmissible a statement subsequently made to him by the prisoner, as the words imported no promise or threat to the prisoner to induce him to confess. *R.* v. *Jones*, 12 Cox, 241 (C. C. R.).

The fact that a prisoner's statement is made by him in reply to a question put to him by a police constable *after* he has been taken into custody does not of itself render the statement inadmissible in evidence. *R.* v. *Best* [1909] 1 K. B. 692; 78 L. J. (K. B.) 658; 2 Cr. App. R. 30, overruling *R.* v. *Gavin*, 15 Cox, 656, and apparently also *R.* v. *Male and Cooper*, 17 Cox, 689. See also *R.* v. *Crowe and Myerscough*, 81 J. P. 288 : *R.* v. *Voisin* [1918] 1 K. B. 531; 82 J. P. 96; 13 Cr. App. R. 89 : *R.* v. *Cook*, 34 T. L. R. 515. The practice has, however, been strongly condemned. *R.* v. *Winkel*, 76 J. P. 191, Avory, J. *R.* v. *Grayson*, 16 Cr. App. R. 7. Where a constable said to the prisoner, before formally taking him into custody, "I am going to ask you some questions, and what you say may be taken down in writing, and might be used as evidence against you," the prisoner's admissions were held admissible. *R.* v. *Brackenbury*, 17 Cox, 628, Day, J. : *cf.* *R.* v. *Morgan*, 67 L. J. (Q. B.) 526; 59 J. P. 827. These decisions do not make a preliminary caution essential. *Rogers* v. *Hawken*, 67 L. J. (Q. B.) 528; 62 J. P. 279, Russell, L.C.J. : *Lewis* v. *Harris*, 110 L. T. 337; 78 J. P. 68; 30 T. L. R. 109; and *see* on this subject generally *Ibrahim* v. *Rex* [1914] A. C. 599; 83 L. J. (P. C.) 185; 24 Cox, 174; 30 T. L. R. 383. Where one of two prisoners in custody on a joint charge voluntarily made and signed a statement implicating the other, and such statement was read over to the prisoner implicated, and the latter, after being cautioned, made a confession which was taken down in writing and signed by him, it was held that the statement of the one prisoner and the confession of the other might be given in evidence upon the trial of the latter. *R.* v. *Hirst*, 18 Cox, 374, Dugdale, Q.C. (Commissioner), after consulting Cave, J. Where the prisoner was questioned by a police constable whilst in prison awaiting her trial without being cautioned, and the court was of opinion that such questions had been put to her for the purpose of entrapping her into making admissions, her answers were held inadmissible. *R.* v. *Histed*, 19 Cox, 16, Hawkins, J. : and *see* *R.* v. *Knight*, 69 J. P. 108; 20 Cox, 711, Channell, J. As to con-

fessions made in answer to questions put by post office officials when conducting inquiries, *see R.* v. *Booth and Jones*, 74 J. P. 475; 5 Cr. App. R. 177.

Accusations made in the presence of the accused.]—A statement made in the presence of an accused person, accusing him of a crime upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part. A mere denial by the accused does not necessarily render the statement inadmissible. There is no rule of law that evidence cannot be given of an accusation of a crime and of the behaviour of the accused on hearing such accusation where that behaviour amounts to a denial of guilt. But though there is no such rule of law, the evidential value of the behaviour of the accused *where he denies the charge* is very small either for or against him, and the effect on the minds of the jury of his being publicly or repeatedly charged to his face with the crime may seriously prejudice the fairness of his trial: therefore the judge may in most cases rightly exercise his influence in order to prevent such evidence being given where it would have little or no evidential value. *R.* v. *Christie* [1914] A. C. 545; 10 Cr. App. R. 141. (*a*) In this, the leading case on a vexed subject, the following passage from the judgment of the Court of Criminal Appeal in *R.* v. *Norton* was approved as affording valuable practical guidance, although it must not be taken as an accurate expression of rules of law: "When the statement is admitted the jury should be directed that if they come to the conclusion that the prisoner acknowledged the truth of the whole or any part of the facts stated they may take so much of the statement as was acknowledged to be true (but no more) into consideration as evidence in the case generally, not because the statement, standing alone, affords any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of its truth; but they should also be told that unless they find as a fact that there was such an acknowledgment they ought to disregard the statement altogether." *R.* v. *Norton* [1910] 2 K. B. 496; 79 L. J. (K. B.) 756; 26 T. L. R. 550; 5 Cr. App. R. 65. For previous cases, *see R.* v. *Smith*, 18 Cox, 470: *R.* v. *Head*. 69 J. P. 224: *R.* v. *Bexley*. 70 J. P. 263: *R.* v. *Bromhead*, 71 J. P. 103 (C. C. R.): *R.* v. *Thompson* [1910] 1 K. B. 640; 79 L. J. (K. B.) 321; 26 T. L. R. 252; and *see* also the subsequent cases of *R.* v. *Altshuler*, 11 Cr. App. R. 243: *R.* v. *Gardner* and *R.* v. *Hancox*, 85 L. J. (K. B.) 206; 114 L. T. 78; 80 J. P. 135; 25 Cox, 221; 32 T. L. R. 97; 11 Cr. App. R. 265.

Evidence obtained in consequence of inadmissible confessions.]—Although a confession for the above or any other reasons may not be receivable in evidence,

(*a*) The English cases were fully considered, and the decision of the House of Lords in *R.* v. *Christie* (*supra*) anticipated by the High Court of Australia in *R.* v. *Grills* [1910] 11 C. L. R. 400.

yet any discovery that takes place in consequence of such confession, or any act done by the defendant, if it is confirmed by the finding of the property, will be admitted; as, for instance, if a man by a promise of favour is induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods are found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved that in consequence of something the witness heard from the defendant he found the goods in question in the defendant's house. *R.* v. *Lockhart*, 2 East, P. C. 658; 1 Leach, 386: and *see R.* v. *Warickshall*, 1 Leach, 263: *R.* v. *Mosey*, *Id.* 265 n: *R.* v. *Butcher*, 2 East, P. C. 658: *R.* v. *Gould*, 9 C. & P. 364. And it would seem also, that declaration of the defendant accompanying such acts, may be received in evidence, even though the confession itself may be inadmissible. *R.* v. *Griffin*, R. & R. 151: *R.* v. *Jones*, R. & R. 152: *R.* v. *Leatham*, 30 L. J. (Q. B.) 205; 8 Cox, 498; and *see R.* v. *Jenkins*, R. & R. 492.

Proof of confessions.]—Confessions by the accused in open court before the court of trial are recorded and need no further proof, *vide ante*, p. 379.

A confession before a magistrate, if taken down in writing at the time, should be produced, and proved to be have been duly taken. It was at one time supposed that it must be proved by the magistrate who took and signed it, or by his clerk who wrote it: *see* 1 Hale, 585; 2 Hawk. c. 46, s. 43: *R.* v. *Bell*, 5 C. & P. 162; but it is clearly settled by later authorities that it may be given in evidence on the prisoner's handwriting being proved by any person who was present at the preliminary inquiry: *R.* v. *Chappel*, 1 M. & Rob. 395: *R.* v. *Hopes*, *Id.* 396 n.; 7 C. & P. 136: *R.* v. *Foster*, 7 C. & P. 148: *R.* v. *Rees*, *Id.* 568: *R.* v. *Reading*, *Id.* 649: *R.* v. *Pikesley*, 9 C. & P. 124. Under s. 18 of the *Indictable Offences Act*, 1848 (*ante*, p. 380), it is proved by production of the statement signed by the justices before whom it was made, from the custody of the officer to whom it has been committed with the depositions; but the statutory mode of proof does not exclude other modes recognized by the common law. *R.* v. *Bird*, 79 L. T. (N. S.) 359; 62 J. P. 761. Before 1848 it was held that if the prisoner admitted, when examined before the magistrate, that the deposition of a witness examined against him was true, that deposition might be read at the trial as part of the prisoner's statement, although the witness himself had been examined at the trial. *R.* v. *John*, 7 C. & P. 324. But the statement of one of several prisoners, brought before a magistrate for the same offence, cannot be read in evidence against the others; because they are only called upon to answer the depositions of the witnesses, taken on oath, not the statements of their fellow-prisoners. *R.* v. *Swinnerton*, C. & Mar. 593. Where a defendant was examined before the Privy Council, and a witness took notes of his examination, which were not signed by or read over to the defendant, it was held that the witness might refresh his memory from the notes, but that the minutes were not admissible as a judicial examination. *R.* v. *Layer*, 16 St. Tr. 93, 215. The effect of 11 & 12 Vict. c. 42, s. 18, so far as regards the evidence of a confession, seems to be, that a written examination taken as the statute directs, is evidence *per se*, and is the only admissible written evidence of the defendant's having made a declara-

tion of the things therein contained; whereas, at common law (unless the defendant signed the paper, or, on its being read, allowed it to be true), the confession must have been proved by some person who heard it, and the writing could only have been made use of by the person who wrote it, for the purpose of refreshing his memory. 2 Russ. Cr. (7th ed.) 2205, 2217. (*a*)

Admissions or confessions to persons other than magistrates, if in writing, are proved as any other written instrument. *R.* v. *Swatkins*, 4 C. & P. 548. If made by parol, they are proved by parol evidence of some person who heard them. What the prisoner has been overheard to say to another, or to himself, is equally admissible; though it is evidence to be acted on with much caution, as being liable to be unintentionally misrepresented by the witnesses. *See* *R.* v. *Simons*, 6 C. & P. 540.

Admissions in cases of treason.]—11 & 12 Vict. c. 42. s. 18 (*ante*. p. 380), applies to treason. Apart from that Act the confession of an overt act upon an examination before a magistrate or other person having authority for that purpose, if proved at the trial by two witnesses, was held sufficient to convict the defendant: *R.* v. *Francia*, 15 St. Tr. 859; 1 East, P. C. 133 n.; Fost. 240; but evidence of a confession to a person not having such authority, although given by two or more witnesses, can only be received in corroboration of the other evidence in the case; and the treason must still be proved by two witnesses. *R.* v. *Willis*, 15 St. Tr. 613; and *see* Fost. 241, 243. But a confession before a magistrate or other person may be given in evidence to prove a collateral fact, as, for instance, that the defendant is a natural-born subject: *R.* v. *Vaughan*, 13 St. Tr. 485: *R.* v. *Smith*, Fost. 242, or the like, and may be proved by one witness, as in ordinary cases.

Effect of confessions.]—As to the effect of direct confessions in open court *see ante*, p. 380. The court is usually reluctant to accept and record a confession of guilt on indictments for grave crimes, and will generally advise the defendant to retract it and plead not guilty. 2 Hale, 255. But where the defendant refuses to withdraw his confession, there is no alternative but to accept it, even in the case of murder, of which instances have occurred.

A free and voluntary confession of guilt by a defendant, whether under examination before magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proved, is sufficient to warrant a conviction, without any corroborative evidence. *R.* v. *White*, R. & R. 508: *R.* v. *Tippet*, *Id.* 509: *R.* v. *Eldridge*, *Id.* 440: *R.* v. *Falkner*, *Id.* 481: *R.* v. *Francia*, *supra*: *R.* v. *Lambe*, 2 Leach, 552: *R.* v. *Wheeling*, 1 Leach, 311 n.; and *see* 2 Russ. Cr. (7th ed.) 2156.

In all cases, the whole of the confession should be given in evidence: for it is a general rule, that the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him, not merely as evidence that he

(*a*) *See* *R.* v. *Riley* [1909] Queensland State Rep. 141, for a discussion of the English authorities.

had made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. 4 Taunt. 245; and *see Queen Caroline's case*, 2 B. & B. 284, 294; 1 St. Tr. (N. S.) 1348. It has been said, that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true: *R.* v. *Jones*, 2 C. & P. 629; but the better opinion seems to be that, as in the case of all other evidence, the whole should be left to the jury, to say whether the facts asserted by the prisoner in his favour be true. *Smith* v. *Blandy*, Ry. & M. 257: *R.* v. *Higgins*, 3 C. & P. 603: *R.* v. *Clewes*, 4 C. & P. 221.

A man's confession is only evidence against himself, and not against his accomplices; 1 Hale, 585 n.; 2 Hawk. c. 46, s. 34: *R.* v. *Tonge*, Kel. (J.) 17, 18; 6 St. Tr. 225: *R.* v. *Boroski*, 9 St. Tr. 1: *R.* v. *Swinnerton*, C. & Mar. 593.

Sect. 3.

PRESUMPTIONS.

In general.]—Presumptive or (as it is usually termed) circumstantial evidence is receivable in criminal as well as in civil cases; and, indeed, the necessity of admitting such evidence is more obvious in the former than the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. Although presumptive evidence must, from necessity, be admitted, yet it should be admitted cautiously. And Hale, in particular, lays down (2 Hist. P. C. 290) two rules as most prudent and necessary to be observed in this respect: *firstly*, Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods (*see R.* v. *Trainer* [1906] 3 Austr. C. L. R. 126; 2 Russ. Cr. (7th ed.) 2063); and *secondly*, Never to convict any person of murder or manslaughter, till at least the body be found—on account of two instances he mentions, where persons were executed for the murder of others who were then alive, although missing. *See* 1 Russ. Cr. (7th ed.) 822, 823. This rule is obviously inapplicable in cases of murder at sea. *See R.* v. *Armstrong*, 13 Cox, 184: *R.* v. *Kersey*, 21 Cox, 690; and *post*, *tit. Homicide*, p. 853.

Presumptions of fact.]—A presumption arises where from the proof of some fact the existence of another fact may naturally be inferred from the mere probability of its having occurred, without further proof. The fact thus inferred to have occurred is said to be presumed, *i.e.*, is taken for granted until the contrary is proved by the opposite party; *stabit præsumptio donec probetur in contrarium*. 4 Co. Rep. 71 b. And it is presumed the more readily, in propor-

tion to the difficulty of proving the fact by positive evidence, and to the facility of disproving it or of proving facts inconsistent with it, if it really never occurred. *See* Stephen, Evid. (5th ed.), pp. 2, 161; Wills, Circumstantial Evid. (6th ed.).

Presumptions of fact are usually divided into three classes: *violent* presumptions where the facts and circumstances proved *necessarily* attend the fact presumed; Gilb. Evid. 147; *probable* presumptions, where the facts and circumstances proved *usually* attend the fact presumed; 3 Bl. Com. 372; and *light* or *rash* presumptions, which have no weight or validity at all. *Id.*; Gilb. Evid. 147; Co. Litt. 6 b: *R.* v. *Stoddart*, 73 J. P. 348; 2 Cr. App. R. 217, 241. If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the defendant was immediately afterwards seen running out of it with a bloody sword in his hand; these facts would raise a violent presumption that the defendant was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder. Co. Litt. 6 b; Staundf. 179 a; Gilb. Evid. 157.

So, upon an indictment for stealing in a dwelling house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, there would arise a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not till sixteen months after, it would be merely a light or rash presumption, and entitled to no weight. *Anon.*, 2 C. & P. 459; *see R.* v. *Adams*, 3 C. & P. 600, Parke, B.: *R.* v. *Cooper*, 3 C. & K. 318, Maule, J. If the prisoner gives a reasonable account of the manner in which he became possessed of the goods, this will so far rebut the presumption as to throw it upon the prosecutor to negative that account. *R.* v. *Crowhurst*, 1 C. & K. 370, Alderson, B.: *R.* v. *Smith*, 2 C. & K. 207, Denman, C.J.: *R.* v. *Harmer*, 2 Cox, 487, Pollock, C.B.: *R.* v. *Schama and Abramovitch*, 84 L. J. (K. B.) 396; 79 J. P. 184; 24 Cox, 591; 31 T. L. R. 88; 11 Cr. App. R. 45. If he fails to give a reasonable explanation on the first opportunity, or gives inconsistent explanations, or does not give evidence on his own behalf in support of the explanation, he may confirm the presumption. *See R.* v. *Kelson*, 3 Cr. App. R. 231: *R.* v. *Theadorus*, *ib.* 269. And generally where the facts proved by the prosecution amount to evidence establishing a *primâ facie* case, the defendant is put to explain or rebut the presumption thus created, and if his explanations are not such as the jury can properly accept, they are entitled to convict on the presumptive case proved by the prosecution. *R.* v. *Stoddart*, 2 Cr. App. R. 217, 241, 242; 73 J. P. 348. Where a prisoner was convicted of stealing some articles of dress and the evidence against him consisted of proof that he was in possession of the property recently after it had been stolen, that he sold it openly, and on his arrest stated to the constable that C. and D. brought the things to his house, and that W., who was at his house, would say that that was true; C., D., and W. were persons known to the constable, and might have

been produced as witnesses, but were not called; and inquiry was made of W., but the result of the inquiry was not given in evidence; it was held that the conviction was good, and that it was not incumbent on the prosecution to call the witnesses to whom the prisoner had referred, to disprove his statement. *R.* v. *Wilson*, Dears. & B. 157; 26 L. J. (M. C.) 45. Although the last-mentioned case may at first sight seem at variance with the doctrine laid down in *R.* v. *Crowhurst*, *R.* v. *Smith*, and *R.* v. *Harmer*, *supra*, it is not so in reality; for although *R.* v. *Crowhurst* and *R.* v. *Smith* were cited in *R.* v. *Wilson*, the decision in *R.* v. *Wilson* did not turn on those cases, but on the question whether the whole evidence taken together was sufficient to justify a conviction. Best on Evidence (10th ed.) 196. So, where on the trial of an indictment for receiving stolen goods it appeared that the prisoner had told the constable who found the stolen property in his possession that he had purchased it of a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held that there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story, it was unnecessary to call the tradesman on the part of the prosecution. *R.* v. *Ritson*, 15 Cox, 478 (C. C. R.). The presumption of guilt arising from the possession of stolen property will, of course, vary according to the nature of the property stolen, and whether it is or is not likely to pass readily from hand to hand. *See R.* v. *Partridge*, 7 C. & P. 551, Patteson, J.

The presumption can, of course, only arise where the possession is proved. A bag was left by the owner near a place where the prisoner and two other persons were at the time. The prisoner passed the place on his way home, and shortly afterwards one of the other two persons followed in the same direction along with the prosecutor. They met the prisoner coming back to his home from the opposite direction, and, being questioned, he denied all knowledge of the bag, and said that he had been in a neighbouring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it, were then searched without success. About twenty-four hours afterwards the bag was found in a hayloft in one of the disused farm buildings, near the highway. There was no door to it, and passers-by had easy access to it. The prisoner was then taken into custody, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this." It was held that there was no evidence from which the jury might infer the prisoner had had possession of the bag, and therefore that the case could not be treated as one of recent possession. *R.* v. *Hughes*, 14 Cox, 223 (C. C. R.).

Although upon an indictment for larceny it is necessary to prove that goods of the prosecutor have been taken, they may be proved by circumstances, although the witnesses for the prosecution cannot swear to the loss of the article said to be stolen, nor that the property found upon the prisoner and alleged to have been stolen is the prosecutor's. A large quantity of pepper was kept in bulk in a warehouse where the prisoner had no business. He was met coming out of the warehouse, having on him a quantity of pepper of the same description as that in the warehouse. On being stopped, he threw down the pepper, and said, "I hope you will not be hard with me." From the large quantity in the warehouse, it could not be proved that any pepper had been taken from the bulk. Upon

these facts, it was held that there was abundant evidence to justify the conviction of the prisoner for stealing the pepper. *R.* v. *Burton*, Dears. 282; 23 L. J. (M. C.) 52. "If a man go into the London Docks sober, without means of getting drunk, and come out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed." Maule, J., in *R.* v. *Burton*, *supra*. *Cf. R.* v. *Dredge*, 1 Cox, 235, Erle, J.: *R.* v. *Mockford*, 11 Cox, 16 (C. C. R.): *R.* v. *Joiner*, 74 J. P. 200; 26 T. L. R. 265.

Upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson.—*See R.* v. *Rickman*, 2 East, P. C. 1034, 1035. A like presumption may arise in the case of murder, accompanied by robbery; Wills, Circumstantial Evidence (6th ed.) 216-218; in a case of burglary, *R.* v. *Gould*, 9 C. & P. 364, Parke, B.: *R.* v. *Exall*, 4 F. & F. 922, Pollock, C.B.; and in the case of the possession of a quantity of counterfeit money: *R.* v. *Fuller*, R. & R. 308: *R.* v. *Jarvis*, Dears. 552; 25 L. J. (M. C.) 30; Taylor, Evid. (11th ed.), s. 142.

Where, upon an indictment for perjury, in falsely taking the freeholder's oath in the name of J. W., at a parliamentary election, it was proved that the freeholder's oath was administered to a person who polled on the second day of the election by the name of J. W.; that there was no such person in fact as J. W.; that the defendant voted on the second day, though he was not a freeholder; that he did not vote in his own name or in any other than the name of J. W.; that there was but one false vote given on the second day's poll; and that the defendant some time afterwards boasted that he had "done the trick," and was not paid enough for the *job*, and was afraid he should be "pulled up for his bad vote"; the court held that this was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge in the indictment. *R.* v. *Price*, 6 East, 323.

Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes raises a *probable* presumption that he knew the present note to be forged; and if, in addition to this, it be proved that the defendant when he passed these notes gave a false name or address, it amounts to a *violent* presumption of a guilty knowledge. And the same upon indictments for uttering counterfeit money. *See ante*, p. 363.

The fact that a person is alive on a given day may be presumed from proof of his being alive on an antecedent day. If, for example, it was proved on the trial of a man for bigamy that the first wife was in good health on the day preceding the second marriage, the inference would be almost irresistible that she was living on the latter day, and the jury would, in all probability, find that she was so. If, on the other hand, it was proved that she was on the day before the second marriage in a dying condition, and nothing further was proved, they would probably decline to draw that inference. The question is, however, entirely for the jury, the law making no presumption either way.

R. v. *Lumley*, L. R. 1 C. C. R. 196; 38 L. J. (M. C.) 86. And *see R.* v. *Willshire*, 6 Q. B. D. 366; 50 L. J. (M. C.) 57, *post*, p. 401.

Presumptions of law.]—"Presumptions of law consist of these rules, which in certain cases forbid or dispense with further inquiry." Taylor, Evid. (11th ed.), s. 70. They fall into two classes—*disputable* presumptions, which can be rebutted by evidence sufficient to displace them; and *conclusive*, which are absolute, and cannot be rebutted by any evidence.

1. *Disputable presumptions.*]—The most important of the disputable presumptions of law in criminal cases is the presumption that the accused is innocent. This is the maxim, "*semper præsumitur pro negante*," or that the burden of proof lies on the person who affirms a fact. *R.* v. *Twyning*, 2 B. & Ald. 386 : *Sissons* v. *Dixon*, 5 B. & C. 758; Taylor, Evid. (11th ed.), ss. 109 *et seq.* But this presumption is easily rebutted by proof of acts tending to show guilt, and when these acts are wrongful and not accidental a presumption of malice or criminal intent arises. And where certain facts are proved against a defendant the law in certain cases presumes against him malice or intent, or some state of mind involving criminal responsibility, as having accompanied the act proved. This rule may also be expressed by saying that to justify conviction in a criminal case the evidence of guilt must not be a mere balance of probabilities; but must satisfy the jury beyond reasonable doubt that the accused is guilty. *See R.* v. *White*, 4 F. & F. 384 : *R.* v. *Beal*, 8 Cr. App. R. 95. In murder, the law presumes *malice* from the act of killing, until the contrary is proved by the defendant. Fost. 255; 1 East, P. C. 340. And malice is also presumed where any wrongful act is done intentionally, without just cause or excuse. "Malice," says Bayley, J., in delivering the judgment of the court in *Bromage* v. *Prosser*, 4 B. & C. 247, 255, "in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of *malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle, without knowing whose they are,—if I poison a fishery, without knowing the owner,—I do it of *malice*, because it is a *wrongful* act, and done intentionally. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional." (*a*)

On an indictment for libel a défamatory statement is presumed to be malicious unless the occasion is privileged. *R.* v. *Harvey*, 2 St. Tr. (N. S.) 1; 2 B. & C. 257 : *Bromage* v. *Prosser*, 4 B. & C. 247; 3 L. J. (K. B.) 203 : *R.* v. *Creevey*, 1 M. & Sel. 273. The meaning of malice in a criminal case varies to some extent with the common-law or statutory definition of each offence. *See McDowell* v. *Mayor, etc., of Dublin* [1903] 2 Ir. Rep. 541 (C. A.).

So also where a man is charged with doing an act of which the probable

(*a*) This definition was considered in *Allen* v. *Flood* [1898] A. C. 1; 67 L. J. Q. B. 119, and seems to have been there approved. That case, which draws a distinction between malice in criminal and civil cases, has been explained in *Quinn* v. *Leathem* [1901] A. C. 495; 70 L. J. P. C. 76.

consequence may be highly injurious the intention is an inference of law resulting from the doing of the act. *R.* v. *Dixon*, 3 M. & Sel. 11, at p. 15, *per* Lord Ellenborough, C.J.; or, put more broadly, a person who does an act necessarily intends or must be taken to have intended the natural and probable consequences of his act. *R.* v. *Farrington*, R. & R. 207 : *R.* v. *Martin*, 14 Cox, 633, at p. 637, *per* Coleridge, J. : *R.* v. *Harvey*, 2 B. & C. 257, at p. 264 : *R.* v. *Meade* [1909 1 K. B. 895, at p. 899. *See* also Taylor on Evidence (11th ed.), s. 80. Thus, the uttering of a forged receipt for money to a person who advanced the money to the prisoner for the purchase of stock, was held sufficient evidence of an attempt to defraud, notwithstanding the belief of the person to whom it was uttered that the prisoner had no such intention. *R.* v. *Sheppard*, R. & R. 169. And upon an indictment for forgery, an intention to defraud the person who would have to pay the instrument if it were genuine, may be inferred even though the instrument be so framed as not to impose upon him, and the intention to defraud be general, and not confined or in any way pointed to the person by whom, if genuine, the instrument would be paid. *R.* v. *Mazagora*, R. & R. 291 : *R.* v. *Hill*, 2 Mood. 30; 8 C. & P. 274 : *R.* v. *Cooke*, *Id.* 582. Where a man has in his possession a large quantity of counterfeit coin unaccounted for, it may be inferred that he procured it with intent to utter it, if there is no evidence that he was the maker. *R.* v. *Fuller*, R. & R. 308. Where a man was indicted under 43 G. 3, c. 58 (*rep.*), for setting fire to a mill, with intent to injure the occupiers, it was held that the intent might be inferred from the act. *R.* v. *Farrington*, R. & R. 207. So, in every case, intention can be but matter of presumption, arising either from the facts stated in the instrument, or from extrinsic facts stated in evidence. *See ante*, pp. 355 *et seq.*

In the case of possession of instruments adapted for *forgery* or *coining* and counterfeit coins and certain forged documents, the presumption of guilt is placed by statute on the person found in possession, and he must prove a lawful excuse. *See* the statutes in these titles, *post;* and as to presumptions in cases of *larceny*, *see ante*, p. 397.

The intention to be implied from an act is not to be rebutted or got rid of, because the person committing such act has some ulterior intention. *Steele* v. *Brannan*, 41 L. J. (M. C.) 85, 91, Grove, J.

There is no presumption of law that a person proved to have been alive on a certain day was alive on a subsequent day, although a jury may be well warranted by such proof, in finding as a matter of fact that he was so. *R.* v. *Lumley*, L. R. 1 C. C. R. 196; 38 L. J. (M. C.) 86 (*ante*, p. 399). And where the question was whether a person was alive on the 7th September, 1879, and the only evidence of her being alive at that date was that she was living in June, 1868, it was held that such evidence ought to have been submitted to the jury. *R.* v. *Willshire*, 6 Q. B. D. 366; 50 L. J. (M. C.) 57. Nor is there any presumption *of law* in favour of, or against, the continuance of life for any given period. *R.* v. *Lumley*, *supra: R.* v. *Tolson*, 23 Q. B. D. 168; 58 L. J. (M. C.) 97.

It is also a maxim of law, that "*omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium*"; upon which ground it will be presumed,

even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed, and has properly discharged his official duties. *R.* v. *Gordon*, 1 Leach, 515 : *R.* v. *Rees*, 6 C. & P. 606 : *R.* v. *Jones*, 2 Camp. 131 : *R.* v. *Verelst*, 3 Camp. 432 : *R.* v. *Murphy*, 8 C. & P. 297 : *R.* v. *Catesby*, 2 B. & C. 814 : *R.* v. *Newton*, 1 C. & K. 469 : *R.* v. *Townsend*, C. & Mar. 178 : *R.* v. *Cresswell*, 1 Q. B. D. 446; 43 L. J. (M. C.) 77; 13 Cox, 126 : *R.* v. *Manwaring*, 26 L. J. (N. S.) M. C. 10; Dears. & B. 132; 7 Cox, 192 : *R.* v. *Stewart*, 13 Cox, 296 : *R.* v. *Roberts*, 14 Cox, 101 (C. C. R.).

The rule that ignorance of the law shall not excuse a man or relieve him from the penal consequences of a crime (*ante*, p. 24), is usually spoken of as arising from a presumption that every person knows the law. Taylor, Evid. (11th ed.), s. 80. The following language, however, used by Maule, J., in *Martindale* v. *Falkner*, 2 C. B. 706, 720, is characterised by Blackburn, J., in *R.* v. *Mayor, etc., of Tewkesbury*, L. R. 3 Q. B. 629; 37 L. J. (Q. B.) 288, as clear and common sense : "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

As to the presumption of law that a child of seven but under fourteen cannot commit felony, *see ante*, p. 10; and as to the presumption arising from the possession of recently stolen property, *see post*, p. 726.

2. *Conclusive presumptions.*]—It is an incontrovertible presumption of law (1) that a child under seven is incapable of committing crime; (2) that a male under fourteen is incapable of sexual intercourse. *See ante*, p. 11. The *Criminal Law Amendment Act*, 1880 (43 & 44 Vict. c. 45), s. 2, enacts that the consent of a child of either sex who is under thirteen is no defence to a charge of indecent assault on such child, and the consent of a female under sixteen to unlawful carnal intercourse is no defence to proceedings under the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69), ss. 4, 5 : but these enactments only take away a defence and create no presumption as to capacity.

SECT. 4.

WRITTEN EVIDENCE.

1. *Public documents*, p. 402.
2. *Private documents*, p. 443.

1. PUBLIC DOCUMENTS.

Proof by Copies.

PUBLIC document was defined by Lord Blackburn (from the point of view of the law of evidence) as a document that is made by a public officer for the purpose of the public making use of it and being able to refer to it. *Sturla* v. *Freccia*, 5 App. Cas. 623, 643. This definition is wide enough to include entries

in the books of a manor which concern all parties interested in the manor and also entries in a corporation book concerning a corporate matter or something in which all the corporation is concerned. *Ib.*; and *see Mercer* v. *Denne* [1905] 2 Ch. 538; 74 L. J. (Ch.) 723.

As a general rule it is unnecessary to produce in evidence the original of any public document, for the reasons given *ante*, p. 367.

Copies of public documents admissible in evidence fall into four classes.

1. Exemplifications (*i.e.*, copies under seals of state).]—An exemplification under the Great Seal is itself a record, and needs no further proof. *Leyfield's case*, 10 Co. Rep. 93; Roscoe, Nisi Prius (18th ed.), 96; Taylor, Evid. (11th ed.), ss. 1536, 1537. Exemplifications under the seal of the court, to which the record belongs, whether it be a statutory or a common-law court, are in the same position. *Olive* v. *Guin*, 2 Sid. 145; Gilb. Evid. 17, 19. Exemplifications produced from the proper custody, and purporting to exemplify a commission from the crown, have been held admissible, though the seal has been lost. *Mayor of Beverley* v. *Craven*, 2 M. & Rob. 140.

2. Office copies (*i.e.*, copies made by an officer of the court to which the document belongs). Taylor, Evid. (11th ed.) s. 1538.]—These are admissible without proof of collation of the copy with the original. *See* Roscoe, Nisi Prius (18th ed.), 97. Office copies, certificates, and other documents appearing to be sealed with a seal of the central office of the High Court, shall be presumed to be office copies, certificates, or other documents issued from the central office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the central office, shall be required for the authentication of any such copy, certificate, or other document. R. S. C. [1883], O. 61, r. 7. By the *Supreme Court of Judicature Act*, 1873 (36 & 37 Vict. c. 66), s. 61, all writs and documents issued out of or filed in any district registry of the High Court of Justice, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such district registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

An office copy has been rejected for contractions and abbreviations. *R.* v. *Christian*, C. & Mar. 388.

3. Record office copies.]—In the case of records in the Public Record Office under the custody of the Master of the Rolls, copies certified by the Master of the Rolls, or deputy-keeper of the records, and purporting to be sealed or stamped with the seal of the Record Office, are to be received in evidence in all courts of justice without any further or other proof thereof, in every case where the original record would have been received there as evidence. 1 & 2 Vict. c. 94, ss. 11, 12, 13. All records of the High Court are kept in the court for twenty years, and then transferred to the Record Office.

4. Examined copies are copies made by any person from the record itself. The person to prove such a copy at the trial must examine the copy while the

officer reads the record; but the officer need not also read the copy while the witness examines the record. *Reid* v. *Margison*, 1 Camp. 469: *Gyles* v. *Hill*, *Id.* 471 n.: *Rolf* v. *Dart*, 2 Taunt. 52; Roscoe, Nisi Prius (18th ed.), p. 97; Taylor, Evid. (11th ed.), s. 1545.

Statutes and Laws.

Public Acts.]—Public general statutes, like the rules of the common law or general customs of the realm, need not be either pleaded or proved, because the courts are bound *ex officio* to take judicial notice of them. Production at the trial of a public general statute is not for the purpose of putting it in evidence, but merely in aid of the memory of the court and jury. Gilb. Evid. 10; Taylor, Evid. (11th ed.), s. 21; Roscoe, Nisi Prius (18th ed.), 103, 104. In order to assure the correctness of the text of a statute, reference may be made to printed copies purporting to be published by authority, or to the official editions of the statutes; but no statutory provision exists as to proof of the public general statutes of England, Great Britain, or the United Kingdom. In the case of early statutes an exemplification can be obtained of the Act as appearing on the chancery roll, or a certified or examined copy can be made from the parliament roll, or in case of need the original roll can be produced or referred to. Taylor, Evid. (11th ed.), s. 21: *The Prince's case*, 8 Co. Rep. 18 a, 20 b; Craies on Statute Law (2nd ed.), pp. 48 *et seq.* It seems that the preamble of a public general statute is admissible, but not conclusive evidence of the facts therein recited. *R.* v. *Sutton*, 4 M. & Sel. 532. The books of common prayer are judicially noticed as Acts of Parliament, being scheduled to the Acts of Uniformity. 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1, s. 4; 1 Eliz. c. 2; 14 Car. 2, c. 4. Acts of the Irish Parliament, printed and published by the King's printer, are to be received as conclusive evidence in any court of Great Britain. 41 G. 3, c. 90, s. 9. There is no statutory provision as to the proof of a Scots Act. Copies of Acts, ordinances, and statutes passed (whether before or after 21 Aug., 1907) by the legislature of any British possession, and of orders, regulations, and other instruments issued or made (whether before or after 21 Aug., 1907) under the authority of any such Act, ordinance, or statute, if purporting to be printed by the "Government Printer," shall be received as evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed. 7 Edw. 7, c. 16, s. 1 (1). (*a*) The Act may be extended by order in council to Cyprus and any British Protectorate; sub-s. (5). The terms "Government printer" and "British possession" are defined by sub-s. (3). Colonial statutes may also be proved in England by the certificate of the proper officer of the colony that the document to which it is attached is a true copy of the statute in question. 28 & 29 Vict. c. 63, s. 6; 7 Edw. 7, c. 16, s. 1 (4). All statutes of the United Kingdom passed since 1850, whether

(*a*) Since the passing of this Act there has been legislation in many colonies in order to bring certain prints of colonial Acts and ordinances within its terms. By s. 1 (2) it is a misdemeanor (punishable by imprisonment with or without hard labour for a term not exceeding twelve months) to print any copy or pretended copy of any Act, etc., which falsely purports to have been printed by the Government printer, or knowingly tendering in evidence a copy, etc., so falsely printed.

general, local and personal, or private, are public Acts, and to be judicially noticed as such, unless the contrary is expressly provided by the particular statute. 52 & 53 Vict. c. 63, s. 9. Such Acts therefore do not need proof, though in certain cases it may be expedient to plead them specially. Prior to 1850 it was not uncommon to insert in local and personal or private Acts a clause that they should be deemed and taken to be public Acts, and judicially noticed without being specially pleaded. This rendered a King's printer's copy admissible as in the case of a public general Act. *Brett* v. *Beales*, M. & M. 416, 421 : *Woodward* v. *Cotton*, 1 Cr. M. & R. 44 : *Beaumont* v. *Mountain*, 10 Bing. 404 : *Greswolde* v. *Kemp*, C. & Mar. 635. It has been held that such Acts must be specially pleaded to make facts stated therein admissible in evidence against strangers. *Brett* v. *Beales*, *supra*. This decision must be read subject to 52 & 53 Vict. c. 63, s. 9, *supra*, and to the dicta of Cairns, L.C., in *Aiton* v. *Stephen*, 1 App. Cas. 456, to the effect that 13 & 14 Vict. c. 21 (of which 52 & 53 Vict. c. 63, is on this point a re-enactment), gave the *local* Acts to which it applied *all* the effect of *public* Acts. *See* Craies on Statute Law (2nd ed.), 485.

Special or private Acts.]—The common-law mode of proving a private statute is by an examined copy of the parliament roll, Gilb. Evid. 12 : *R.* v. *Shaw*, 12 East, 479 : or by an exemplification made from the chancery roll (1 Statt. Realm, Introd. xxxv.), or by a certified copy from the clerk of the parliaments or the Public Record Office. *See R.* v. *Milton*, 1 C. & K. 58, 59 n. By the *Evidence Act*, 1845 (8 & 9 Vict. c. 113), s. 3, as amended by the *Documentary Evidence Act*, 1882 (45 & 46 Vict. c. 9), s. 2 (*post*, p. 410), all copies of private and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the King's printers or under the superintendence or authority of his Majesty's Stationery Office, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed. As to available texts and indices of private Acts, *see* Roscoe, Nisi Prius (18th ed.), 104, 105 : Craies on Statute Law (2nd ed.), p. 40 n.

Colonial and foreign laws.]—The law, whether written or unwritten, of a foreign country or of any part of the King's dominions outside England, must be proved in English courts by the oral testimony of witnesses of competent skill, and in the case of written law cannot be proved by the production of the written law itself, or of an authenticated copy. *Dalrymple* v. *Dalrymple*, 2 Hagg. (Consist. Rep.) 54 : *Sussex Peerage claim*, 6 St. Tr. (N. S.) 79; 11 Cl. & F. 85, 114-117; 8 Eng. Rep. 1034 : *Baron de Bode* v. *R.*, 6 St. Tr. (N. S.) 237; 8 Q. B. 208, 250-267 : *Castrique* v. *Imrie*, L. R. 4 H. L. 414; Taylor, Evid. (11th ed.), ss. 1423, 1424; Roscoe, Nisi Prius (18th ed.), 120. The witness to prove a foreign law must be a person *peritus virtute officii*, or *virtute professionis*. *Sussex Peerage claim*, *supra*. A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorized to decide on cases affected by the law of Rome, was therein held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Id.* But a witness whose knowledge of the law of a

foreign country is derived solely from his having studied it at a university in another country, is not a good witness to prove it. *Bristow* v. *Sequeville*, 5 Ex. 275; 19 L. J. (Ex.) 289: *In the goods of Bonelli*, 1 P. D. 69; 45 L. J. (P. D. & A.) 42; and *see* 2 Russ. Cr. (7th ed.) 2137; Taylor, Evid. (11th ed.), s. 1425. A witness competent to give evidence on a point of foreign law may refer to foreign law-books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence. *Sussex Peerage claim, supra.* The law of a foreign country may also be ascertained by the court here by obtaining an opinion on the subject from a superior court of the foreign country whose law is in question, if a convention has been entered into between the British Government and that of the foreign state. 24 & 25 Vict. c. 11. The law of one part of the King's dominions for the purpose of judicial proceedings in another part may be ascertained in a similar manner under 22 & 23 Vict. c. 63. Both these Acts have been extended by order in council to many places to which the *Foreign Jurisdiction Act*, 1890 (53 & 54 Vict. c. 37), applies. The principal orders in force at the end of 1903 are published in the 1904 edition of the Statutory Rules and Orders Revised, vol. v., *tit. Foreign Jurisdiction;* those since that date in the volume of Statutory Rules and Orders for the year in which they were made *See also* Encycl. of Laws of England (2nd ed.), Vol. VI., *tit. Foreign Jurisdiction.*

Proceedings in Parliament.

Entries in the journals of the House of Lords and House of Commons may be proved by examined copies from their minute-books: *Jones* v. *Randall*, 1 Cowp. 17: *R.* v. *Lord G. Gordon*, 2 Doug. 590, 594; 21 St. Tr. 485: *R.* v. *Lord Melville*, 29 St. Tr. 549, 683; or by copies purporting to be printed by the printers to the Crown or to either House of Parliament, or under the superintendence or authority of the Stationery Office, without any proof being given that such copies were so printed. 8 & 9 Vict. c. 113, s. 3; 45 & 46 Vict. c. 9, s. 2. The journals of the House of Lords have been held evidence to prove not only an address of the Lords to the King, but also the King's answer. *R.* v. *Holt*, 5 T. R. 436, 445: *R.* v. *Francklin*, 17 St. Tr. 625, 637. But the resolutions of either house, with a view to ulterior proceedings, are no evidence of the facts therein stated; as, for instance, when the House of Commons resolved that a plot against the government existed, the resolution was held to be no evidence of the existence of such a plot. *Titus Oates' case*, 10 St. Tr. 1073, 1165. As a general rule the proceedings in either house are not admissible as an aid to construing a statute. *Steele* v. *Midland Ry. Co.*, L. R. 1 Ch. App. 275, 282. But *see* cases collected in Craies on Statute Law (ed. 1907), 122, 123.

Statutory Rules.

Very many statutes authorize the making by the Privy Council or by government departments of "statutory rules," *i.e.*, of subordinate legislation under authority delegated by parliament. By the *Rules Publication Act*, 1893 (56 & 57 Vict. c. 66), it is enacted that all statutory rules made after December 31, 1893, shall forthwith be sent to the King's printer of Acts of

Parliament, and subject to regulations made by the Treasury with the concurrence of the Lord Chancellor and Speaker of the House of Commons be numbered, and save as provided by the regulations, be printed and sold by him, and in cases where such rules are required by any Act to be published or notified in the London, Edinburgh, or Dublin Gazette, a notice in the Gazette of the rules having been made, and of the place where copies can be purchased, is now sufficient compliance with such requirement. 56 & 57 Vict. c. 66, s. 3 (3). The regulations issued in 1894 (Stat. Rules and Orders Revised (ed. 1904), vol. 11, *tit. Statutory Rule*) restrict the operation of the Act of 1893 to rules which are of a legislative, and not merely of an executive, character, and to rules made, and not merely confirmed, by a government department : and rules of the latter class, which are of a merely local character, are for the most part not printed under the regulations. Proof of statutory rules may be given by production of the annual volume of Statutory Rules and Orders published by authority, containing them, or by a copy issued by the King's printer. *See R.* v. *Vos* [1895] 6 Queensland L. J. 215, an indictment under the *Pacific Islanders Protection Act*, 1872 (35 & 36 Vict. c. 19).

31 & 32 Vict. c. 37 (*Documentary Evidence Act*, 1868), s. 2 : " *Primâ facie* evidence of any proclamation, order, or regulation, issued before or after the passing of this Act by his Majesty, or by the Privy Council, also of any proclamation, order or regulation issued before or after the passing of this Act by or under the authority of any such department of the government or officer, as is mentioned in the first column of the schedule hereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned : that is to say :—

" 1. By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

" 2. By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer, (*a*) or, where the question arises in a court in any British colony or possession, (*b*) of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

" 3. By the production, in the case of any proclamation, order or regulation issued by his Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule, in connection with such department or office. Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order or regulation." (*c*)

(*a*) *Vide post*, p. 410. (*b*) *Vide post*, p. 410.
(*c*) For punishment of forgery, etc., *see post*, *tit. Forgery*, pp. 802 *et seq.*

Schedule.

Column 1. NAME OF DEPARTMENT OR OFFICER.	Column 2. NAME OF CERTIFYING OFFICERS.
"The Treasury" (*see* 52 & 53 Vict. c. 63, s. 12 (2)).	Any commissioner, secretary or assistant secretary of the Treasury.
"The Admiralty" (*see* 52 & 53 Vict. c. 63, s. 12 (4)).	Any commissioner for executing the office of Lord High Admiral, or either of the secretaries to the said commissioners.
Secretaries of State.	Any secretary or under-secretary of state.
"The Board of Trade" (*see* 52 & 53 Vict. c. 63, s. 12 (8)).	Any member of the "Board" or any secretary or assistant secretary of the "Board" (and *see* 5 Edw. 7, c. 15, s. 52 (*Trade Marks*), and 57 & 58 Vict. c. 60, s. 719 (*Merchant Shipping*).
"The Local Government Board" (*d*) (substituted for the Poor Law Board by 34 & 35 Vict. c. 70).	Any member of the Board: any secretary or assistant secretary of the said Board (*see* 34 & 35 Vict. c. 70, s. 5).
The Board of Agriculture and Fisheries (*added by* 58 Vict. c. 9, s. 1; 3 Edw. 7, c. 31, s. 1).	The president, or any member of the Board, or the secretary of the Board, or any person authorized by the president to act on behalf of the secretary of the Board.
The Board of Education (substituted by 62 & 63 Vict. c. 33 for the Department of Education, *which was added by* 33 & 34 Vict. c. 75, s. 83); and *see* 62 & 63 Vict. c. 33, s. 7 (2), (3) and (4).	The document must bear the official seal of the Board and be authenticated by the signature of a member of, or any secretary or assistant-secretary, or some person authorized by the president or some member of the Board to act on behalf of a secretary.

(*d*) 7 & 8 Vict. c. 101 (*The Poor Law Act*, 1844), s. 71.—A copy of any rule, order, or regulation made by the Poor Law Commissioners, printed by the King's printer, shall, after the lapse of fourteen days from the date thereof, be received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof that such order was duly made and is in force. The Poor Law Commissioners have been superseded by the Local Government Board, and (by 34 & 35 Vict. c. 70, s. 5) "a rule, order, or regulation made by the Local Government Board shall be valid if it is made under the seal of the Board and signed by the president or one of the *ex-officio* members of the Board, and countersigned by a secretary or assistant secretary: and the

Schedule continued—

Column 1. NAME OF DEPARTMENT OR OFFICER.	Column 2. NAME OF CERTIFYING OFFICERS.
The Postmaster-General.	Any secretary or assistant-secretary of the Post Office (8 Edw. 7, c. 48, s. 36).
The Insurance Commissioners and Joint Committee established under 1 & 2 Geo. 5, c. 55, ss. 57, 83 (*added by* 3 & 4 Geo. 5, c. 37, s. 29 (3)).	The chairman or any other member or the secretary or clerk, or any person authorized to act on behalf of the secretary or clerk, of any body of the Insurance Commissioners or Joint Committee (3 & 4 Geo. 5, c. 37, s. 29 (3)).
The Minister of Pensions (*added by* 6 & 7 Geo. 5, c. 65, s. 6 (5)).	The Minister or a Secretary in the Ministry or any person authorized by the Minister to act on his behalf (6 & 7 Geo. 5, c. 65, s. 6 (5)).
The Minister of Labour (*added by* 6 & 7 Geo. 5, c. 68, s. 11 (4)).	Do. do. (6 & 7 Geo. 5, c. 68, s. 11 (4)).
The President of the Air Board (*added by* 6 & 7 Geo. 5, c. 68, s. 11 (4)).	Do. do. (6 & 7 Geo. 5, c. 68, s. 11 (4)).
The Minister of Health (*added by* 9 & 10 Geo. 5, c. 21, s. 7 (5)).	Do. do. (9 & 10 Geo. 5, c. 21, s. 7 (5)).
The Minister of Transport (*added by* 9 & 10 Geo. 5, c. 50, s. 26 (5)).	Do. do. (9 & 10 Geo. 5, c. 50, s. 26 (5)).

Sect. 3. " Subject to any law that may be from time to time made by the legislature of any British colony or possession, this Act shall be in force in every such colony or possession."

Sect. 5. " The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; that is to say :—

" ' British colony and possession ' shall, for the purposes of this Act, include the Channel Islands, the Isle of Man, and such territories as may for the time

roduction of such *primâ facie* evidence of any of the said rules, orders or regulations as required by the *Documentary Evidence Act*, 1868 (*ante*, p. 407), with respect the rules, orders and regulations of the Poor Law Board, shall, until the contrary is own, be a sufficient proof that any such rule, order or regulation of the Local Governent Board was duly made."

being be vested in his Majesty by virtue of any Act of Parliament for the government of India, and all other his Majesty's dominions.

" ' Legislature ' shall signify any authority, other than the imperial parliament or his Majesty in council, competent to make laws for any colony or possession.

" ' Privy Council ' shall include his Majesty in council, and the lords and others of his Majesty's Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto.

" ' Government printer ' shall mean and include the printer to his Majesty, and any printer purporting to be the printer authorized to print the statutes, ordinances, Acts of State, or other public Acts of the legislature of any British colony or possession, or otherwise to be the government printer of such colony or possession.

" ' Gazette ' shall include the London Gazette, the Edinburgh Gazette, and the Dublin Gazette, or any of such gazettes."

Sect. 6. " The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common-law."

45 & 46 Vict. c. 9 (*Documentary Evidence Act*, 1882), s. 2: " Where any enactment, whether passed before or after June 19, 1882, provides that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the government printer, or the King's printer, or a printer authorized by his Majesty, or otherwise under his Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of his Majesty's Stationery Office."

Executive Acts.

Of British Government.]—The London Gazette, printed and published by the King's printer, is evidence of all Acts of State, or public matters therein notified. *Att.-Gen.* v. *Theakston*, 8 Price, 89: *R.* v. *Holt*, 5 T. R. 436. Thus, a Gazette, which stated that addresses had been presented to the King from several bodies of his subjects, expressive of their loyalty, was held to be evidence of that fact. *Id.* But in *R.* v. *Gardner*, 2 Camp. 513, it was held not to be evidence of military appointments notified therein. And it is not evidence of a private matter contained therein, unless it be shown that the party to be affected has read the article. *Harratt* v. *Wise*, 7 L. J. (K. B.) 309; 9 B. & C. 712. The mere production of the Gazette would seem to be sufficient, without proof that it was bought at the Gazette office, or from whence it came. *R.* v. *Forsyth*, R. & R. 277. And where a statute (12 & 13 Vict. c. 106, s. 240 (*rep.*)) enacted that " a copy of the London Gazette " should be evidence, it was held to be sufficient merely to produce a paper purporting to be the London Gazette, and to be printed by authority, although it did not purport to be printed by the Queen's printer. *R.* v. *Raudnitz*, 11 Cox, 360 (C. C. R.). But where a statute (11 Vict. c. 2, s. 21 (*rep.*))

enacted that "the production of the Dublin Gazette, *purporting to be printed by the Queen's printer*," should be evidence, it was held not sufficient to produce a paper purporting to be the Dublin Gazette and to be printed by authority by A. B., but not giving his style as Queen's printer. *R.* v. *Wallace*, 10 Cox, 500; 17 Ir. C. L. Rep. 207. Where the production of the Gazette is made evidence of any matter, it is not sufficient to produce a whole leaf cut from the Gazette containing the matter sought to be proved, but not bearing the imprint of any printer or purporting to be published by authority. *R.* v. *Lowe*, 52 L. J. (M. C.) 122; 15 Cox, 286.

Articles of war.]—The articles of war for the better government of officers and soldiers of the army and the rules of procedure relating to courts-martial, etc., are to be judicially noticed by all judges and in all courts whatsoever, and therefore require no proof. 44 & 45 Vict. c. 58, ss. 69, 70: *see* the Manual of Military Law, printed by authority.

Letters patent.]—Letters patent may be given in evidence without further proof; or they may be proved by exemplifications under the great seal (*see* 1 Saund. 119 n.), or the wafer great seal. 47 & 48 Vict. c. 30. And *see* Taylor, Evid. (11th ed.), s. 1603; Roscoe, Nisi Prius (18th ed.), p. 107.

Proclamations.]—Where a proclamation recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, it was held to be admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those places. *R.* v. *Sutton*, 4 M. & Sel. 532. It seems doubtful whether the courts will take judicial notice of royal proclamations without proof. *Dupays* v. *Shepherd*, 12 Mod. 216: *Van Omeron* v. *Dowick*, 2 Camp. 42. Such proclamations may be proved by the London Gazette (*ante*, p. 410), or by copies purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them [or purporting to be printed under the superintendence or authority of his Majesty's Stationery Office, 45 & 46 Vict. c. 9, s. 2 (*ante*, p. 410)], without proof being given that such copies were so printed. 8 & 9 Vict. c. 113. s. 3: and also under 31 and 32 Vict. c. 37 (*ante*, p. 407; and *see* Roscoe, Nisi Prius (18th ed.), 105, 106; Taylor, Evid. (11th ed.), s. 1527.

Treaties.]—As a treaty has no binding effect until confirmed by statute, *Walker* v. *Baird* [1892] A. C. 491, it is rarely needed in evidence. Extradition treaties, however, are brought into operation by order in council, and can be proved by a King's printer's copy of the order, under 31 & 32 Vict. c. 37, s. 2 (*ante*, p. 407), or by production of a copy of the official publication of statutory rules and orders (*ante*, p. 406).

Proclamations, etc., of colonial or foreign governments.]—All proclamations, treaties and other Acts of State of any foreign country or British colony . . .

may be proved in any court of justice or before any person having by law or consent authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved is a proclamation, treaty, or other Act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British colony to which the original copy belongs . . . but if any of the aforesaid authenticated copies shall purport to be sealed as hereinbefore directed, the same shall be admitted as evidence in every case in which the original could have been received as evidence without any proof of the seal where a seal is necessary. 14 & 15 Vict. c. 99, s. 7. Examined copies must be examined with the public archives abroad. A copy printed and published abroad, by the authorized printer of the foreign government or colony, will not, it seems, be sufficient. *Richardson* v. *Anderson*, 1 Camp. 65 n. As to colonial documents, *see* 31 & 32 Vict. c. 37, s. 3, (*ante*, p. 409).

Maps, Surveys, etc.

Ancient terriers, maps, etc.]—Ancient terriers, surveys, and maps of manors etc., when evidence, must be produced at the trial, and such circumstances connected with them stated in evidence as may induce the court and jury to give credit to them. *See* Taylor, Evid. (11th ed.), ss. 622, 1772; Roscoe, Nisi Prius (18th ed.), 102, 103. Modern maps, or plans, even ordnance maps, are not admissible (*see R.* v. *Milton*, 1 C. & K. 58, 61), *except as part of the evidence of the person who made them*, or unless they can be shown to bind in some way the person against whom they are tendered (Taylor, Evid. (11th ed.), s. 622: *Mercer* v. *Denne* [1905] 2 Ch. 538; 74 L. J. (Ch.) 71), or *semble* unless their accuracy has been verified by the personal examination of the *locus in quo* by the witness who produces them. Maps annexed to inclosure awards are not admissible against persons not subject to the jurisdiction of the commissioners who made the award. *R.* v. *Berger* [1894] 1 Q. B. 823; 63 L. J. (Q. B.) 529; 17 Cox, 761.

In *Caton* v. *Hamilton*, 53 J. P. 504, an ordnance map was received as evidence of boundary at the date when it was made, *sed quære*. *See* Taylor, Evid. (11th ed.), s. 1770.

Surveys, inquisitions, etc.]—Inquisitions, taken by virtue of the King's writ, or of a commission under the seal of the Exchequer (if they have been returned and filed), etc., are proved by the production of the writ or commission and inquisition, or by an examined copy. It is questionable whether they can be evidence at all, until returned and filed. *Cornish* v. *Searell*, 6 L. J. (K. B.) 255; 8 B. & C. 471; Taylor, Evid. (11th ed.), ss. 1582, 1769 a.

Public surveys, taken by officers acting for the Crown, many of which are to be found in the Public Record Office, are proved by the production of them by the proper officer, without further proof, or by examined copies, or copies taken under 1 & 2 Vict. c. 94, s. 13; Taylor, Evid. (11th ed.), s. 1769A.

Domesday-book, when evidence (*see* Taylor, Evid. (11th ed.), s. 1768), must be produced at the trial, if intended to prove the gist of the pleadings; Hob. 188;

but if intended to prove some collateral matter merely, an examined copy (or a Record Office copy) of that part of the book relating to it will be sufficient.

Documents in the Record Office.

All documents in the custody of the Master of the Rolls can be proved either by production of the originals by a clerk from the Record Office or by a Record Office copy made under 1 & 2 Vict. c. 94, s. 13, or by an examined copy. The documents to which the custody of the Master of the Rolls extends are determined by 1 & 2 Vict. c. 94, s. 2, and the orders in council made thereunder. *See* Statutory Rules and Orders Revised (ed. 1904), vol. 11, *tit. Record Office*, and list in Taylor, Evid. (11th ed.), s. 1485. They include the records of the courts merged in the High Court of Justice in 1875 (ss. 1, 3).

Public Registers.

Births, marriages, deaths, etc.]—Baptisms, marriages, and burials may be proved by the parish register in which they are entered, by giving in evidence either the register itself or an examined copy of it (Gilb. Evid. 72; 2 Bac. Abr. Evid. (F.) : *Doe* v. *Barnes*, 1 M. & Rob. 386), if the original is in the proper custody, that is, in the church itself, or in the custody of the rector, vicar, curate, or other officiating minister; 52 G. 3, c. 146 : *Doe* v. *Fowler*, 14 Q. B. 700 : *Walker* v. *Countess Beauchamp*, 6 C. & P. 552; or a copy certified by the incumbent or other person to whose custody the original register is intrusted, under 14 & 15 Vict. c. 99, s. 14 (*post*, p. 443). Before such books or examined copies are received the court must be satisfied that there was a public duty on the person keeping the register to satisfy himself of the truth of the entries made therein. *Doe* v. *Andrews*, 15 Q. B. 756; 759, Erle, J. Besides the register, some proof must be given of the identity of the parties married, etc. *Birt* v. *Barlow*, 1 Doug. 171. *See also R.* v. *Bellis*, 6 Cr. App. R. 283 : *R.* v. *Rogers*, 10 Cr. App. R. 276. It would seem that a certificate of baptism does not prove the age of the party or the date of birth; *Wihen* v. *Law*, 3 Stark. (N. P.) 63; but *see R.* v. *North Petherton*, 4 L. J. (K. B.) 213; 5 B. & C. 508. By 6 & 7 W. 4, c. 86, s. 38, certified copies of entries purporting to be sealed or stamped with the seal of the General Register Office established by that Act are to be "received as evidence of the birth, death or marriage to which they relate, without any further or other proof of such entry"; but "no certified copy purporting to be given in the said office" (at Somerset House) "shall be of any force or effect which is not sealed or stamped as aforesaid." A copy of an entry in the register book of births in a registrar's district within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, was held to be admissible evidence, under 14 & 15 Vict. c. 99, s. 14, of the entry in the register book upon the mere production of such copy. *R.* v. *Weaver*, L. R. 2 C. C. R. 85; 43 L. J. (M. C.) 13. Upon an indictment for carnally knowing a girl, being above the age of ten years and under the age of twelve years, such a certified copy of an entry showing that the child was of the age of eleven years and eight

months, was held sufficient proof of the age, there being independent evidence of the identity of the girl with the child whose name was entered in the book. *Id.*; and *see Re Goodrich* [1904] Prob. 138; 73 L. J. P. 33, disapproving *Re Wintle*, L. R. 9 Eq. 373, in which Romilly, M.R., held that the certificate was only evidence of the fact of birth before registration and not of the date of birth. But evidence of identity is essential. *R.* v. *Rogers*, 79 J. P. 16; 24 Cox, 465. In *R.* v. *Cox* [1898] 1 Q. B. 179; 67 L. J. (Q. B.) 293; 18 Cox, 672, 675, it was held that no statute made production of a birth certificate necessary for proof of the age of a child, and that the age could be proved by persons who had seen the child and by the mistress of an elementary school at which the child attended. As to proof that a person charged as a habitual criminal was over sixteen at the date of previous convictions alleged against him, *see R.* v. *Turner* [1910] 1 K. B. 346; 79 L. J. (K. B.) 176; 26 T. L. R. 112. "An entry or certified copy of an entry of a birth or death in a register under the *Births and Deaths Registration Acts*, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea. When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the '*Births and Deaths Registration Acts*, 1836 to 1874,' or in a certified copy of such a register, shall not be evidence of such birth unless such entry purports (*a*) if it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar as well as by the registrar; or (*b*) if more than twelve months have so intervened, to have been made with the authority of the registrar-general, and in accordance with the prescribed rules. Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act, of the death in a register under the *Births and Deaths Registration Acts*, 1836 to 1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the registrar-general, and in accordance with the prescribed rules," 37 & 38 Vict. c. 88, s. 38. By the *Non-Parochial Registers Act*, 1840 (3 & 4 Vict. c. 92), s. 6, all registers and records deposited in the General Register Office by virtue of that Act, except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May-fair, at the Mint in Southwark, etc., which were deposited in the registry of the Bishop of London, in the year 1821 (*see* s. 20), shall be deemed to be in legal custody, and be receivable in evidence in all courts of justice: and provision is made for the production of them by the registrar-general. Section 17 provides, that in all criminal cases the original register or record shall be produced; but *see* 14 & 15 Vict. c. 99, s. 14 (*post*, p. 443), 21 & 23 Vict. c. 25,

ss. 1, 3. As to proof of births, deaths, and marriages at sea, *see* 57 & 58 Vict. c. 60, ss. 240, 253, and s. 64, *infra*. As to proof of marriages abroad under British law, *see* 55 & 56 Vict. c. 23, s. 16. As to proof of births, deaths and marriages out of England, see *Lyell* v. *Kennedy*, 14 App. Cas. 437, 448; 59 L. J. (Q. B.) 258 : *Brinkley* v. *Att.-Gen.*, 15 P. D. 76; 59 L. J. (P. D. & A.) 51.

As to proving a Jewish marriage, *see Bigamy, post.*

The register of the navy, with the letters *Dd.* opposite to a name therein registered (it being proved to be the practice of the Navy Office to write these letters opposite to the names of such persons as died), was held admissible evidence of the death of a man opposite to whose name these letters were written. Bull (N. P.) 249 : *R.* v. *Rhodes*, 1 Leach. 24.

By the *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), s. 64, sub-s. 2, "the following documents shall be admissible in evidence in manner provided by this Act, namely :—(*a*) Any register book under this part of this Act (*Register of British Ships*), on its production from the custody of the registrar, or other person having the lawful custody thereof; (*b*) A certificate of registry under this Act purporting to be signed by the registrar or other proper officer; (*c*) An indorsement on a certificate of registry purporting to be signed by the registrar or other proper officer; (*d*) Every declaration made in pursuance of this part of this Act in respect of a British ship." Sub-section 3 : "A copy or transcript of the register of British ships kept by the Registrar-General of Shipping and Seamen, under the direction of the Board of Trade, shall be admissible in evidence in manner provided by this Act, and have the same effect to all intents as the original register, of which it is a copy or transcript." *See also* ss. 694, 695, as to proof of documents under the Act Further provision is made by ss. 719, 720, of the Act, as to documents issued by the Board of Trade, as supervisor of British shipping.

As to the admissibility of registers of professional men, *see post*, p. 416.

By 44 & 45 Vict. c. 60 (*Newspaper Libel and Registration Act*, 1881), s. 15, "every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown."

Certificates given under Public Authority.

The certificates of bishops with respect to marriage, general bastardy, excommunication orders, and other like matters, were received in evidence; Co. Litt. 4 : *R.* v. *Mawbey*, 6 T. R. 619, 637. So is the certificate of the Recorder of London, as to the custom of that city. Taylor, Evid. (11th ed.), s. 5. And so are the certificates of justices of peace as to a highway being in repair. *R.* v. *Mawbey, supra.*

But the certificate of a British consul abroad is not admissible as evidence in the courts of this country; *Waldron* v. *Coombe*, 3 Taunt. 162: *Ex parte Church*, 1 D. & R. 324; except under specific statutory provisions, *e.g.*, 52 & 53 Vict. c. 10, s. 6 (Oaths); 55 & 56 Vict. c. 23 (Foreign Marriage).

Professional qualifications—Barristers.]—The proof that a man is a barrister is by certificate of his call issued by the Inn to which he belongs. The Law List is not, strictly speaking, evidence as to barristers.

Solicitors.]—The certificates authorizing solicitors to practise, granted in pursuance of 23 & 24 Vict. c. 127, if in the form prescribed by 40 & 41 Vict. c. 25, s. 16, are, it seems, admissible in evidence without further proof. The Law List, published under the authority of the Commissioners of Inland Revenue, is *primâ facie* evidence of the right of solicitors and conveyancers named therein to practise during the current year; and on a prosecution for obtaining money by a false pretence of being a solicitor it was held sufficient to prove that the accused was not qualified by producing the Law List. 23 & 24 Vict. c. 127, s. 22: *R.* v. *Wenham*, 10 Cox, 222. An extract from the roll of solicitors kept by the Incorporated Law Society as registrar of solicitors, certified under the hand of the secretary of the society, is evidence of the facts appearing in such extract. 23 & 24 Vict. c. 127, s. 22; 51 & 52 Vict. c. 65, s. 5.

Medical practitioners.]—The mere production of a diploma of doctor of physic, under the seal of one of the universities, is not of itself evidence to show that the party therein named is entitled to that degree, *Moises* v. *Thornton*, 8 T. R. 303. *See Collins* v. *Carnegie*, 3 L. J. (N. S.) K. B. 190; 3 Nev. & M. 703; 1 A. & E. 695. A copy of the Medical Register, annually published by the registrar of the General Medical Council, is evidence of the due registration of the persons named therein: and absence of a name from the register is *primâ facie* evidence that the person is not a registered medical practitioner; but in the case of a person not on the register a certified copy under the hand of the registrar of the General Medical Council, or of any branch council, of the entry of the name of any person on the general or local medical register, is evidence that such person is registered under the *Medical Act*, 1858 (21 & 22 Vict. c. 90), s. 27: *see Pedgrift* v. *Chevallier*, 29 L. J. (N. S.) M. C. 225; 8 C. B. (N. S.) 246. A certificate of the qualification of an apothecary if purporting to be under the common seal of the Society of Apothecaries is sufficient evidence of the qualification of the person therein named to practise as an apothecary without proof of the seal: 14 & 15 Vict. c. 99, s. 8. A certificate under the hand of the registrar, and countersigned by the president or two members of the council of the Pharmaceutical Society, is evidence that the person therein specified is registered under 15 & 16 Vict. c. 56, or the *Pharmacy Act*, 1868, as the case may be: 31 & 32 Vict. c. 121, s. 13. A certificate purporting to be a certificate under the hand of the registrar under the *Dentists Act*, 1921, is *primâ facie* evidence of the facts stated in the certificate. 11 & 12 G. 5, c. 21, s. 15 (2). A copy of the register of veterinary surgeons, purporting to be printed or published in pursuance of the statute regulating the profession, is

primâ facie evidence of registration: and provisions similar to those of s. 27 of the *Medical Act*, 1858, *supra*, are made as to proof of the registration of persons not appearing in the register. 44 & 45 Vict. c. 62, s. 9.

A copy of the roll of midwives purporting to be printed by the authority of the Central Midwives Board or to be signed by the secretary of the board is evidence in all courts that the women therein specified are certified as midwives, and the absence of the name of any woman from the copy is *primâ facie* evidence that she is not certified; but where a woman's name is not on such copy a certificate of the secretary of the board of the entry of her name on the roll is evidence that the woman is certified (2 Edw. 7, c. 17, s. 7).

Companies and societies.]—A certificate of incorporation given by the registrar in respect of any association is conclusive evidence that the association is a company authorized to be registered and duly registered under the *Companies Act*, 1908 (8 Edw. 7, c. 69), s. 17 (1).

Certificates of the incorporation or copies of other documents in the registry are obtainable from the registrar, s. 243 (6), and a copy of or extract from any document kept and registered in the United Kingdom certified to be a true copy under the hand of the registrar or an assistant registrar whose handwriting need not be proved is in all legal proceedings admissible as of equal validity with the original document, s. 243 (7). A certified copy of the return made to the Commissioners of Inland Revenue under 7 G. 4, c. 46, s. 7, by the public officer of a joint stock bank is not the only admissible evidence of the making of the return. *R.* v. *Carter*, 1 Den. 65; 1 C. & K. 741.

The certificate of registry of a trade union issued by the Registrar of Friendly Societies, unless proved to have been withdrawn or cancelled, is conclusive evidence of compliance with the regulations of the *Trade Union Act*, 1871, with respect to registry: 34 & 35 Vict. c. 31, s. 13 (5). Like provisions are made as to friendly societies by 59 & 60 Vict. c. 25, ss. 11, 100; as to industrial and provident societies by 56 & 57 Vict. c. 39, ss. 8, 75; and as to building societies by 37 & 38 Vict. c. 42, s. 20.

Elections.]—In criminal proceedings in relation to corrupt practices at parliamentary elections, the certificate of the returning officer is sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat. 26 & 27 Vict. c. 29, s. 6. This enactment is extended by s. 53 of the *Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 Vict. c. 51), to prosecutions on indictment for any corrupt practice within the meaning of that Act at a parliamentary election, and by s. 30 of the *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 Vict. c. 70, which incorporates 46 & 47 Vict. c. 51, s. 53), to prosecutions on indictment for any corrupt practice at a municipal election, and by s. 35 of 47 & 48 Vict. c. 70, to similar prosecutions for corrupt practices at municipal elections in the city of London, and by s. 36 of the last-mentioned statute to similar prosecutions for corrupt practices at certain other elections in the said section specified. It has been further extended to the elections of county councils (51 & 52 Vict. c. 41, s. 75) and of urban and rural district councils, and of

boards of guardians and parish councils, 56 & 57 Vict. c. 73, s. 48: and of metropolitan borough councils, 62 & 63 Vict. c. 14, s. 2, sub-s. 5.

Acts, etc., of Public Bodies.

Corporation books, etc.]—Entries in corporation books, and in the books of public companies, relating to things public and general, and entries in other public books, may be proved by examined copies. *R.* v. *Mothersell*, 1 Str. 93: *R.* v. *Mayor, etc., of London, Id.* 307: *Mercers of Shrewsbury* v. *Hart*, 1 C. & P. 113 (and *ante*, p. 403). Entries in the books of the Custom House, of the Bank of England, or the like, may be proved in the same manner. *See Geery* v. *Hopkins*, 2 Ld. Raym. 851: *Warriner* v. *Giles*, 2 Str. 954: *Crew* v. *Saunders*, *Id.* 1005: *Edwards* v. *Vesey*, Cas. (K. B.) temp. Hardw. 128; and *see* 2 Doug. 593, n. 3: *Marsh* v. *Collnett*, 5 R. R. 763; 2 Esp. 665: *Hodgson* v. *Fullarton*, 4 Taunt. 787: *Mortimer* v. *M'Callan*, 9 L. J. (N. S.) Ex. 73; 6 M. & W. 58. But instruments of a private nature, such as a letter found in the corporation chest, *R.* v. *Gwyn*, 1 Str. 401, or the like, must be proved in the ordinary way as any other instrument. Where under any Act "a document or proceeding of any corporation or joint stock or other company is receivable in evidence," it shall be admitted if it purports to bear the seal, or stamp, or signature directed by the Act, without proof of the seal, stamp, or signature, or official character of the person purporting to have signed. 8 & 9 Vict. c. 113, s. 1 (*post*, p. 442); and *see* Roscoe, Nisi Prius (18th ed.), 124.

Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases where the corporation is defendant, as it would have the effect of making the corporation furnish evidence to criminate itself. *R.* v. *Heydon*, 1 W. Bl. 351: *R.* v. *Purnell*, *Id.* 37; 1 Wils. (K. B.) 239; *cf.* 1 Ld. Raym. 705: 2 *Id.* 927; 2 Str. 1210; and *see Spokes* v. *Grosvenor Hotel Co.* [1897] 2 Q. B. 124; 66 L. J. (Q. B.) 572.

As to proof of regulations made by the Dental Board of the United Kingdom, *see* 11 & 12 Geo. 5. c. 21, s. 15 (1).

Proceedings of local authorities.]—A minute of proceedings at a meeting of the council of a municipal borough, or of a committee of such council, signed at the same or the next ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof. Until the contrary is proved, every meeting of the council, or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified; and where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes, 45 & 46 Vict. c. 50, s. 22, sub-ss. 5, 6. As to the minutes of a metropolitan borough council, *see* 18 & 19 Vict c. 120, s. 60; 62 & 63 Vict. c. 14, s. 2, sub-s. 5.

The minutes and proceedings of county councils are proved in the same way as those of town councils. 51 & 52 Vict. c. 41, s. 22, sub.s. 5 The minutes

and proceedings of the London County Council are regulated by a local Act of 1893 (56 & 57 Vict. c. ccxxi., s. 10). They can be proved either by printed copies under 44 & 45 Vict. c. 48, s. 33, or under 45 & 46 Vict. c. 50, s. 22. The minutes and proceedings of urban and rural district councils, and boards of guardians and their committees, may be proved under 38 & 39 Vict. c. 55, s. 199, and sched. 1, r. 10; 56 & 57 Vict. c. 73, s. 59, and minutes of parish councils and parish meetings may be proved as directed by 56 & 57 Vict. c. 73, sched. 1, part 3.

Parish books.]—On the trial of an indictment for non-repair of a highway, entries in an ancient parish book, produced by the churchwarden from the parish chest, were held receivable in evidence to show who were the surveyors of the highways at that time. *R.* v. *Pembridge*, C. & Mar. 157.

By-laws.]—8 & 9 Vict. c. 113, s. 1 (*post*, p. 442), dispenses with proof of the seal or signature or official character of by-laws which purport to be sealed or signed in accordance with any other past or future Act. Under the *Municipal Corporations Act*, 1882, the production of a written copy of a by-law made by the council under that Act, or under any former or present or future general or local Act of Parliament, if authenticated by the corporate seal shall, until the contrary is proved, be sufficient evidence of the due making and existence of the by-law, and, if it is so stated in the copy, of the by-law having been approved and confirmed by the authority whose approval or confirmation is required to the making or before the enforcing of the by-law. 45 & 46 Vict. c. 50, s. 24. This provision is extended by 51 & 52 Vict. c. 41, s. 23, to by-laws made by a county council, and by 62 & 63 Vict. c. 14, s. 5, sub-s. 2, and sched. 2, part 2, to by-laws made by a metropolitan borough council.

A copy of by-laws made under the *Public Health Act*, 1875 (made by a district council not being the council of a borough), if signed and certified by the clerk of the council to be a true copy, and to have been duly confirmed, shall be evidence, until the contrary is proved, in all legal proceedings of the due making, confirmation and existence of such by-laws without further or other proof. 38 & 39 Vict. c. 55, s. 186. By-laws made under prior statutes but continued in force by s. 326 of the *Public Health Act*, 1875, must be proved in accordance with the Act under which they were made, or under 8 & 9 Vict. c. 113, s. 1. Prints of municipal and county council by-laws with a print of the seal or certificate have been held insufficient. *Drew* v. *Harlow*, 39 J. P. 420 : *Timothy* v. *Fenn*, 74 J. P. 123. The proof of other by-laws depends on the statutes under which they are made, and on 8 & 9 Vict. c. 113, s. 1 (*post*, p. 442). For a list of such statutes, *see* Taylor. Evid. (11th ed.); Encycl. Local Govt. Law, vol. ii., p. 193.

Judicial Documents.

House of Lords.]—A judgment of the House of Lords is proved by an examined copy from the Journal of the House. *Jones* v. *Randall*, 1 Cowp. 17; or by a copy purporting to be printed by authority. *See* 8 & 9 Vict. c. 113, s. 3 (*ante*, p. 406).

Supreme Court.]—A record of the Supreme Court, or affidavit filed therein may be proved by production of the original from the central office, by an officer of the court, under order of a judge or master; and *see* 36 & 37 Vict. c. 66, s. 61, (*ante*, p. 403). A *subpœna* does not lie to produce it. R. S. C. 1883, Order LXI., r. 28. The order is obtained by obtaining the signature of a master to an official bespeak paper specifying the documents required, and where it is wanted for production elsewhere than at the Royal Courts by depositing a sufficient sum to secure the expenses of the attendance of the producing officer. R. S. C., Order LXI., r. 29. Production of the original record or document or an exemplification appears to be necessary at common law when it is the gist of the indictment or defence, which is seldom the case, except on a plea of *autrefois convict* or *acquit* (*ante*, pp. 155, 160); or on an indictment for an offence after a previous conviction (*post*, p. 421); or for escaping from prison, or for being at large during sentence, *R.* v. *Shaw*, R. & R. 526. Exemplifications are now seldom used for the purposes of proceedings in England. In all other cases an examined copy (*ante*, p. 403) may be used. *Leyfield's case*, 10 Co. Rep. 92 b; 2 Rolle Abr. 678, L. 45; Hardr. 119. But the modern form of office copy (*ante*, p. 403), being under the seal of the Court, is equivalent to an exemplification, and is the simplest mode of proof where the original is not necessary, and a Record Office copy would seem to be admissible. *See* Roscoe, Nisi Prius (18th ed.), 97, 98. The ancient mode of obtaining an exemplification of a record of the Court of King's Bench for use in an inferior court was by removing the record into Chancery by *certiorari* issuing from the Petty Bag Office to the Chief Justice of the court of which the record was: on removal an exemplification under the great seal was sent by *mittimus* to the inferior court. Gilb. Evid. 14, 15. The functions of the Petty Bag Office, which included the preparation of exemplifications, were, by 37 & 38 Vict. c. 81, s. 5, transferred partly to officers of the Supreme Court, and partly to the Clerk of the Crown in Chancery. And the Petty Bag Office was abolished in 1889, and the residue of its business, except as to the roll of solicitors, was transferred to the Crown Office of the High Court. (*See* Statutory Rules and Orders Revised (ed. 1904), vol. 12, *tit. Supreme Court, E*, p. 931). With the creation of the High Court the procedure by *certiorari* is apparently defunct, and application for an exemplification under the great seal apparently should now be made to the Clerk of the Crown in Chancery at the Lord Chancellor's office.

Proceedings not being records.]—Rules of court as to procedure are proved as statutory rules. (*See ante*, p. 406.) Rules or orders of court not amounting to judgments are proved by examined or office copies. *Selby* v. *Harris*, 1 Ld. Raym. 745: *Duncan* v. *Scott*, 1 Camp. 100: *Gyles* v. *Hill*, 1 Camp. 471 n: *Streeter* v. *Bartlett*, 17 L. J. (N. S.) C. P. 140; 5 C. B. 562. A rule of court is evidence that the court have ordered as is therein stated; but it is not evidence of any matters in it which are the mere suggestions of the party who obtained it. *Woodroffe* v. *Williams*, 6 Taunt. 19.

By the *Evidence Act*, 1845 (8 & 9 Vict. c. 113), s. 2, " all courts, justices, masters in chancery, masters of courts, commissioners judicially acting, and

other judicial officers, are thenceforth to take judicial notice of the signature of any of the judges of *the Supreme Court*, attached or appended to any decree, order, certificate, or other judicial or official document."

Affidavits, being admissions upon oath, are evidence as such against the parties who made them. Gilb. Evid. 51, 56 : *Harmer* v. *Davis*, 7 Taunt. 577. When filed in the central office of the High Court, they may be proved by office copies (R. S. C. 1883, Order XXXVII., r. 4), or by examined copies, or by production of the original from the proper custody. Affidavits not filed can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn; Gilb. Evid. 56. Even if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their handwriting. Gilb. Evid. 56. Upon an indictment for perjury in an affidavit, the affidavit, if in existence, must in all cases be produced, whether filed or not, and must be proved. *R.* v. *James*, 1 Show. 397 : *Crook* v. *Dowling*, 3 Doug. 75 : *Rees* v. *Bowen*, M'Clel. & Y. 383. But upon proof that it has been lost or destroyed, secondary evidence may be given of its contents and of the defendant's signature to it. *R.* v. *Milnes*, 2 F. & F. 10. Where an affidavit purported to have been sworn before a commissioner of oaths, but his commission was not proved, Patteson, J., held the affidavit to be admissible, and that proof of the commissioner's acting was sufficient. *R.* v. *Howard*, 1 M. & Rob. 187. And on the trial of an indictment for perjury, assigned on an affidavit sworn in the Court of Queen's Bench, proof of the defendant's signature to the affidavit, and that under a jurat, "sworn in open court at Westminster Hall, the 10th day of June, 1846," the words, "by the court" were in the handwriting of one of the masters of the Court of Queen's Bench, was held sufficient evidence of the swearing of the affidavit in that court, without any further proof that the master was in court when the affidavit was sworn. *R.* v. *Turner*, 2 C. & K. 732 : *see also R.* v. *Spencer*, 1 C. & P. 260; Ry. & M. 97.

Where an affidavit is sworn abroad by a person having authority to administer an oath *not derived from the law of a foreign state*, judicial or official notice is to be taken of his seal or signature affixed, impressed, or subscribed to the affidavit. 52 & 53 Vict. c. 10, s. 3 (2).

Convictions.]—As to what constitutes a conviction, *see ante*, p. 230. The proper proof that a prisoner was in lawful custody under a sentence of imprisonment passed at the assizes is by proof of the record of his conviction; and neither the production of the calendar of sentences, signed by the clerk of the assize, and by him delivered to the gaoler, nor the evidence of a person who heard sentence passed, is sufficient for this purpose. *R.* v. *Bourdon*, 2 C. & K. 966, Maule, J.

At common law upon an indictment for a subsequent felony, a conviction for a previous felony can be proved by the production of the record itself, if it is a record of the same court, or by an exemplification if it is the record of another court.

By the *Evidence Act*, 1851 (14 & 15 Vict. c. 99), s. 13, "whenever in any proceeding whatever (*civil as well as criminal*, *Richardson* v. *Willis*, L. R. 8

Ex. 69; 42 L. J. Ex. 15), it may be necessary to prove the trial and conviction or acquittal of any person charged with an indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof." It seems that under this enactment the record must be made up, although the formal parts need not be included in the certificate; but the production by the officer of the court (being the same court in which the subsequent proceeding was had) of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the court upon it, together with the minutes of the trial, made by the officer in court, was held sufficient evidence of the former trial, without the production either of the record or of a certificate under this section. *R.* v. *Newman*, 2 Den. 390; 21 L. J. (M. C.) 75: *R.* v. *Horne Tooke*, 25 St. Tr. 447. *See R.* v. *Parry*, 7 C. & P. 836. But evidence of a conviction given by a police officer present at the trial is not alone proper proof of the conviction. *Mash* v. *Darley*, [1914] 3 K. B. 1226; 30 T. L. R. 585—C.A. Convictions before justices of peace may be proved by examined copies, which the clerk of the peace for the proper county will make out upon an application for that purpose. *R.* v. *Gilkes*, 6 L. J. (M. C.) 118; 8 B. & C. 439. A previous conviction, whether summary or on indictment, is now in practice usually proved under the *Prevention of Crimes Act*, 1871 (34 & 35 Vict. c. 112), s. 18; which provides that " a previous conviction may be proved *in any legal proceeding whatever* against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. (*See Martin* v. *White* [1910] 1 K. B. 665; 79 L. J. (K. B.) 553.) A record or extract of a conviction shall, *in the case of an indictable offence*, consist of a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction, and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and *in the case of a summary* conviction shall consist of a copy of such conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the

passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section. The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction."

By s. 28 (1) of the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5. c. 58), "the record or extract by which a conviction may be proved under s. 18 of the *Prevention of Crimes Act*, 1871, may in the case of a summary conviction consist of a copy of the minute or memorandum of the conviction entered in the register required to be kept under s. 22 of the *Summary Jurisdiction Act*, 1879, purporting to be signed by the clerk of the court by whom the register is kept." This provision extends to all proceedings the method of proving a summary conviction which formerly was authorized in the same court in which the conviction took place. *See Commissioner of Police* v. *Donovan* [1903] 1 K. B. 895; 72 L. J. (K. B.) 545.

Under the *Criminal Law Act*, 1827 (7 & 8 Geo. 4, c. 28), s. 11. upon an indictment for felony, after a previous conviction for felony, proof of the previous conviction may be given by a certificate containing the substance and effect only (omitting the formal part) of the indictment or conviction for the previous felony purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, which certificate is upon proof of identity sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same. A certificate under this section should show that judgment was given: *R.* v. *Ackroyd*, 1 C. & K. 158; Cresswell, J.: *R.* v. *Stonnell*, 1 Cox, 142, Patteson, J. As to the mode of proving a previous conviction against a person indicted for any offence punishable under the *Larceny Act*, 1861 (24 & 25 Vict. c. 96), *see* s. 116. As to the mode of proving a previous conviction for any offence relating to the coin, *see* 24 & 25 Vict. c. 99, s. 37. Upon the trial of an indictment for being at large before the expiration of a sentence of transportation, provision is made by 5 G. 4, c. 84, s. 24, for proof of the former conviction and sentence by a certificate of the officer of the court. *See also* 28 & 29 Vict. c. 18, s. 6 (*post*, p. 475), which regulates the proof of a conviction for the purpose of discrediting a witness.

In all cases not provided for by statute, where a copy of a record is given in evidence, it must be a copy of the whole record; because the omission of part might have the effect of altering the sense and import of the residue. Gilb. Evid. 23; 3 Co. Inst. 173. Records are not complete until delivered into court on parchment; therefore a minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *R.* v. *Bellamy*, Ry. & M. 171: *R.* v. *Thring*, 5 C. & P. 507; *see R.* v. *Ward*, 5 C. & P. 366: *R.* v. *Bourdon*, 2 C. & P. 366 (*ante*, p. 421). Thus, to prove a verdict you must give in evidence an examined copy or office copy of the whole record, including the judgment; Bull. (N. P.) 234: Gilb. Evid. 37, 68; for otherwise it would not appear but that judgment had been arrested, or a new trial granted; Bull. (N. P.) 234: *Pitton* v. *Walter*, 1 Str. 162; unless

in the case of an issue out of Chancery, where no judgment was entered up. Bull. (N. P.) 234.

There is now no Nisi Prius record, and no *postea* in a civil case in the High Court. As to the *postea* in criminal trials in the High Court, *see* Cr. Off. Rules, 1906, r. 165, and Short and Mellor, Cr. Pr. (2nd ed.) 126. Under the Rules of the Supreme Court, 1883, O. XXXVI., r. 300, copies of the pleadings are to be deposited on entering the action for trial. The certificate provided by O. XXXVI., r. 42, takes the place of the *postea*, and judgments and orders need not now be enrolled, whether the judgment is dated before or since the commencement of the *Judicature Act*, 1873, or November 1, 1875, O. LXI., r. 8. "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties to the same extent as the original would be admissible." R. S. C. 1883, O. XXXVII., r. 4. But this rule does not apply to proceedings on the Crown side of the King's Bench Division. On an indictment for perjury in an action it was held that an allegation that judgment was entered up was proved by production of the book from the judgment office in which the *incipitur* was entered. *R.* v. *Gordon*, C. & Mar. 410. Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, the existence and trial of the action are sufficiently proved by the production, by the officer of the court, of the copy writ filed under O. V., r. 7, and the copy pleadings filed under O. XLI., r. 1, of the Rules of the Supreme Court, 1875, and by the production by the solicitor of the defendants in the action, of the original order to dismiss the action. *R.* v. *Scott*, 2 Q. B. D. 415; 46 L. J. (M. C.) 259. The *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), s. 14, prescribes the mode of proving the trial of an indictment for felony or misdemeanor upon the trial of an indictment for perjury or subornation of perjury, alleged to have been committed at the former trial. If it is necessary to prove what a witness said upon a former trial it may be proved upon oath from the notes or recollections of any person who was present at the time; *Mayor of Doncaster* v. *Day*, 3 Taunt. 262; but in order to let in such evidence, it must be first proved that the former trial took place.

Enrolled deeds.]—To prove a deed which has been enrolled, the indorsement of the enrolment is sufficient evidence, without further proof of the deed; Gilb. Evid. 24, 96; *Smartle* v. *Williams*, 1 Salk. 280; and *see Kinnersley* v. *Orpe*, 1 Doug. 56; *Rowe* v. *Brenton*, 5 L. J. (K. B.) 137; 8 B. & C. 737, 755. But if the deed is lost, it can be proved only by an examined copy of the enrolment. *Baikie* v. *Chandless*, 3 Camp. 17, 20. The copy is obtained in the case of deeds enrolled in the High Court from the enrolment department of the central office; *see* R. S. C., 1883, O. LXI. But enrolled deeds must within two years of enrolment be sent to the Public Record Office; and when this has been done they can be proved by a Record Office copy under 1 & 2 Vict. c. 94 (*ante*, p. 413). All this, however, must be understood of deeds only which need enrolment; for if any other deed be enrolled (as, for instance, a bargain and sale for years, or the like), and be afterwards offered in evidence, it must

be proved in the ordinary way. Gilb. Evid. 99; *Page's case*, 5 Co. Rep. 53: *Smartle* v. *Williams*, 1 Salk. 280.

Proceedings in Courts of Equity.]—Prior to the *Judicature Acts*, the Court of Chancery was not regarded as a Court of Record. 3 Bl. Com. 24 n. Since its fusion with the High Court its records and documents are provable as documents of the High Court (*see ante*, p. 420). All the records of the old Court of Chancery are now lodged in the Public Record Office, and may be proved by Record Office copies under 1 & 2 Vict. c. 94, s. 13 (*ante*, p. 413). Decrees of the old Court of Chancery and judgments of the Chancery Division may still be proved by exemplification under the wafer great seal; but this proceeding is only adopted for the purpose of enforcing them under the *Crown Debts Act*, 1801 (41 G. 3, c. 90). Independently of this mode of proof, in the case of proceedings prior to November 1, 1875, the bill and answer may be proved by examined copies (*ante*, p. 403); Gilb. Evid. 56: *Hennell* v. *Lyon*, 1 B. & Ald. 182: *Hodgkinson* v. *Willis*, 3 Camp. 401; or by Record Office copies under 1 & 2 Vict. c. 94 (*ante*, p. 413). In order to prove the answer, it was necessary to give in evidence an examined copy of the bill as well as of the answer; Gilb. Evid. 55; but where it was proved by the proper officer that he had searched diligently in the office for the bill and could not find it, the court allowed the answer to be read without it. *Id.* *See Ewer* v. *Ambrose*, 3 L. J. (K. B.) 115; 4 B. & C. 25: *Rowe* v. *Brenton*, 5 L. J. (K. B.) 137; 8 B. & C. 737, 765. Where the bill and answer are recited (as formerly they were) in the decree, the production of the latter was sufficient proof of them. Com. Dig. Evid (C. 1): *Wharton Peerage case*, 12 Cl. & F. 295; 8 Eng. Rep. 1410; *see Blower* v. *Hollis*, 1 Cr. & M. 393. Upon an indictment for perjury alleged to have been committed in an answer, the answer itself must be produced, and it must be proved either that the party was sworn to it, or that the name subscribed to it is his handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. *R.* v. *Morris*, 2 Burr. 1189: *R.* v. *Benson*, 2 Camp. 508. *See R.* v. *Spencer*, 1 C. & P. 260; Ry. & M. 97. And the same is to depositions in equity. As to the admissibility of decrees and orders in equity *see Layburn* v. *Crisp*, 8 L. J. (N. S.) Ex. 118; 4 M. & W. 320; 7 C. & P. 397; *Pim* v. *Curell*, 6 M. & W. 234: *Mayor of Ludlow* v. *Charlton*, 6 C. & P. 242. It would seem that bills, answers, and depositions in equity might also be proved by copies certified by the Clerk of Records and Writs under 14 & 15 Vict. c. 99, s. 13 (*post*, p. 443). *Reeve* v. *Hodson*, 10 Hare, App. xix., Wood, V.-C.

A decree in equity, if it remained in paper, must be proved by an examined copy (*ante*, p. 403), together with an examined copy of the bill and answer; but if it has been enrolled, it must be proved by an exemplification under the wafer great seal (*ante*, p. 403), or by a Record Office copy (*see ante*, p. 413).

Proceedings in Ecclesiastical Courts.]—The libel, answer, depositions, and sentence in ecclesiastical courts, in matters within their jurisdiction, are provable in the same manner as the bill, anwer, depositions, and decree in

equity. *See supra*, Gilb. Evid. 66, 67; Com. Dig. Evid. (C. 3); Roscoe, Nisi Prius (18th ed.), 116.

The practice of the ecclesiastical courts may be proved in the courts of common law by parol evidence. *Beaurain* v. *Scott*, 3 Camp. 388.

Proceedings in the Divorce Court.]—On the transfer of matrimonial causes to the Divorce Court, it was provided that all decrees and orders, and copies of decrees or orders, of the said court, sealed with its seal, should be received in evidence. 20 & 21 Vict. c. 85, s. 13. And this enactment is not affected by subsequent legislation, though the court is now part of the High Court of Justice. Judgments of a matrimonial court operate as judgments *in rem.*, *i.e.* if pronounced by a competent court on an issue properly arising in the cause, they are conclusive evidence of the facts they establish, except it is said in suits of jactitation of marriage. *Duchess of Kingston's case*, 20 St. Tr. 355: *Clewes* v. *Bathurst*, 2 Str. 960; Cas. (K. B.) temp. Hardw. 11: *Mendez* v. *Villa Real*, *Ib.* 18. *See* Dicey, Conflict of Laws (2nd ed.), 425.

Proceedings in Probate Courts.]—By s. 22 of the *Court of Probate Act*, 1857 (20 & 21 Vict. c. 77), "all probates, letters of administration, orders, and other instruments and exemplifications and copies thereof respectively purporting to be sealed with any seal of the Court of Probate shall in all parts of the United Kingdom be received in evidence without further proof thereof." This provision is not affected by the amalgamation of the Court of Probate with the High Court of Justice.

Wills affecting real estate proved on or since Jan. 11, 1858, can be proved by the probate or by an office copy under the seal of the court. 20 & 21 Vict. c. 77, ss. 61, 62. But the probate issued from an ecclesiastical court before Jan. 11, 1858, is not admissible to establish a will affecting real estate. *See* Taylor, Evid. (11th ed.), 1759. Roscoe, Nisi Prius (18th ed.), 118.

Letters of administration granted since Jan. 11, 1858, are proved under 20 & 21 Vict. c. 77, s. 22 (*supra*); letters granted prior to that date can be proved by production of the letters of administration, or by a certificate from the ecclesiastical court, that administration was granted, or by calling a clerk from the Court of Probate to produce the book of acts, containing the direction for the letters to issue, and the surrogate's *fiat* for the same. Bull. (N. P.) 246: *Elden* v. *Keddell*, 8 East, 187; 9 R. R. 404: *Davis* v. *Williams*, 13 East. 232.

Proceedings in Admiralty.]—Proceedings in and records of the Admiralty Division of the High Court are proved as stated *ante*, p. 420. The judgment is conclusive evidence of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers. Thus, a sentence condemning goods as captured from the enemy is conclusive evidence that they were so captured. *Stirling* v. *Vaughan*, 11 East, 619: *Castrique* v. *Imrie*, L. R. 4 H. L. 414: 39 L. J. (C. P.) 50: *The Minna Craig*, [1897] 1 Q. B. 55, 460; 66 L. J. (Q. B.) 339 and *see* Dicey, Conflict of Laws (2nd ed.), 423.

Proceedings in courts of assize or quarter sessions.]—Courts of assize, oyer and terminer, and gaol delivery, including the Central Criminal Court, are now part of the High Court, and their records are those of that court. *R.* v. *Dudley*, 14 Q. B. D. 273, 560; 54 L. J. (M. C.) 32: *R.* v. *Parke* [1903] 2 K. B. 432; 72 L. J. (K. B.) 839. Courts of quarter sessions for the trial of indictments are said not to be inferior courts. *R.* v. *Smith*, 6 L. J. (M. C.) 99; 8 B. & C. 341, 342, Tenterden, C.J. The record, and not a mere minute or entry, must be produced, except in cases dealt with by statute (*ante*, pp. 421-423): *R.* v. *Smith*, *supra*; Roscoe, Nisi Prius (18th ed.), 107. Proof of previous convictions at quarter sessions or before a court of summary jurisdiction may be made under 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 422).

Where the record of a court of quarter sessions is pleaded in a court of oyer and terminer, or the converse, or where the record of one court of oyer and terminer is pleaded in another, the exemplification, in strictness, should in like manner be obtained upon *certiorari*. In the case of courts of oyer and terminer, and gaol delivery, which are now parts of the High Court (*see ante*, p. 104), *certiorari* would not now be appropriate. And as to all these courts the general practice is, to apply simply to the clerk of the peace or clerk of assize, who will make it out accordingly, without writ, or will attend with the record itself at the trial. Where the "sessions book" was produced to prove an order of the quarter sessions, but the clerk of the peace said that he would have made up the record if it had been bespoken, Parke, B., refused to receive the book in evidence. *R.* v. *Ward*, 6 C. & P. 366: *see R.* v. *Bellamy*, Ry. & M. 171. But where the entry of the order in the book had a regular caption, and was in the present tense, and in every other respect like a record, and it was proved that no other record was ever made up, this was held to be legal evidence of the order. *R.* v. *Yeoveley*, 8 L. J. (N. S.) M. C. 9; 8 A. & E. 806; and *see* Roscoe, Nisi Prius (18th ed.), 108.

Proceedings in inferior civil courts of record.]—By s. 28 of the *County Courts Acts*, 1888 (51 & 52 Vict. c. 43), provision is made for the entry of a note by the registrar of all proceedings of a county court in a court book, and it is enacted that "such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry, and of the regularity of such proceeding, without any further proof." And this is the only proper evidence of such proceedings. *R.* v. *Rowland*, 1 F. & F. 72. If a certificate is asked for, the purpose for which it is wanted must be stated on application and entered by the registrar on the certificate. County Court Rules, 1903, O. XXIII., r. 10. Where the entry, of which a copy was produced, stated that the court had been held before U., deputy-judge of the said court, it was held that this was sufficient evidence of the regularity of U.'s appointment. *R.* v. *Roberts*, 14 Cox, 101 (C. C. R.). Where office copies of proceedings in the court are required, they are prepared by the registrar on prepayment of the cost. County Court Rules, 1903, O. II., r. 7.

Judgments in a court baron, a common law county court, or other inferior court, may be proved either by producing the books in which they are entered, or by examined copies. *See* Gilb. Evid. 74; Com. Dig. Evid. (C. 1); Roscoe, Nisi Prius (18th ed.), 117, 119.

The court rolls of a manor may be proved by examined copies. Gilb. Evid. 75: *R.* v. *Hains*, Comb. 337; 12 Mod. 24; or, it seems, by a copy under the steward's hand; *Lee* v. *Boothby*, 1 Keb. 720; or the steward or his deputy may produce them at the trial. *See* Gilb. Evid. 75.

Proceedings in bankruptcy.]—Section 137 of the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59), contains the following provisions as to evidence:—"(1.) A copy of the *London Gazette* containing any notice inserted therein in pursuance of this Act shall be in evidence of the facts stated in the notice. (2.) The production of a copy of the *London Gazette* containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date." A cutting from the *London Gazette* appearing on the Bankruptcy file is not sufficient; but the entire *Gazette* containing the notice or order must be produced. *R.* v. *Lowe*, 52 L. J. (M. C.) 122; 15 Cox, 286 (C. C. R.). An order of discharge is conclusive evidence of the bankruptcy, and of the validity of the proceedings therein. 4 & 5 Geo. 5, c. 59, s. 28, sub-s. 3. By s. 138 of the same Act: "(1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof. (2) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had." By s. 139: "Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever." By s. 141: "In the case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to." By s. 142: "Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge, or registrar of any such court, in all legal proceedings." By s. 143: "A certificate of the Board of Trade that a person has been appointed trustee

under this Act, shall be conclusive evidence of his appointment." By s. 144 : " (1.) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the board, or to be signed by a secretary or assistant secretary of the board or any person authorized in that behalf by the president of the board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown. (2.) A certificate signed by the president of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified."

As to proof of statements by a bankrupt in his public examination, *see ante*, p. 382.

Proceedings before Justices and Coroners.

Convictions.]—Previous convictions before justices may be proved in all legal proceedings under 34 & 35 Vict. c. 112, s. 18, and 4 & 5 Geo. 5, c. 58, s. 28 (1) (*ante*, pp. 422, 423).

Depositions before magistrates.]—The *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), s. 17 (after directing justices to take in manner therein mentioned the statement on oath or affirmation of the witnesses against any person charged before them with an indictable offence), enacts, that " if upon the trial of the person so accused it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." These provisions are extended to depositions taken before justices on behalf of the accused by 30 & 31 Vict. c. 35, s. 3, which enacts in its concluding words that " upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the deposition of witnesses hereby directed to be taken."

Unsworn evidence by children.]—Where in any proceeding against any person for an offence, any child of tender years who is tendered as a witness does not in the opinion of the court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of the child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of s. 17 of the *Indictable Offences Act*, 1848, or of Part II. of the *Children Act*, 1908, shall be deemed

to be a deposition within the meaning of that section and that part respectively 8 Edw. 7, c. 67 (*Children Act*, 1908), s. 30 (*see post*, p. 453), as amended by 4 & 5 Geo. 5, c. 58 (*Criminal Justice Administration Act*, 1914), s. 28 (2). The deposition of an unsworn child taken in the way prescribed above may subsequently be read under s. 17 of the *Indictable Offences Act*, 1848 (*ante*, p. 429) if the child dies or becomes so ill as not to be able to travel.

Further provision is made for admitting such unsworn deposition in certain cases by s. 29 of the *Children Act*, 1908, which enacts that "where, on the trial of any person on indictment for an offence of cruelty, or any of the offences mentioned in the first schedule to this Act, the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to the life or health of the child or young person, any deposition of the child or young person taken under the *Indictable Offences Act*, 1848, or Part II. of this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition."

The indictable offences to which this enactment applies are—

(1) Cruelty (s. 12).

(2) Offences under ss. 27, 55, 56, of the *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100).

(3) Offences under the *Dangerous Performances Acts*, 1879 and 1897 (42 & 43 Vict. c. 34, and 60 & 61 Vict. c. 52).

(4) Offences against a person under 16, under ss. 5, 42, 43, 52, or 62 of the *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100), or under the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69).

(5) Any other offence involving bodily injury to a person under 16.

The unsworn evidence of a child of tender years must be corroborated by some other material evidence in support thereof implicating the accused. 8 Edw. 7, c. 67, s. 30 (a).

Illness justifying the reading of a deposition.]—The words, "so ill as not to be able to travel," in 11 & 12 Vict. c. 42, s. 17, do not mean that the witness's coming to give evidence on the trial shall actually endanger his life, but that he is not reasonably fit, from illness, to attend. *R.* v. *Riley*, 22 L. J. (N. S.) M. C. 48; 3 C. & K. 116 : *R.* v. *Cockburn*, Dears. & B. 203; 26 L. J. (M. C.) 136; 7 Cox, 265 : *cf. R.* v. *Day*, 6 Cox, 55 : *R.* v. *Wilson*, 8 Cox, 453, 454 n. A witness came to the assize town and into court, but a short time before the trial came on he left the court and returned to his home by the advice of a medical man, who deposed that in his judgment it would have been highly

dangerous for the witness to remain. While the trial was going on the witness was on his way home. Channell, Serj., after consulting with Parke, B., held that the witness was "so ill as not to be able to travel," and that his deposition before the committing magistrate might be read in evidence. *R.* v. *Wicker*, 18 Jur. 252. It is for the presiding judge at the trial to decide, in his discretion, whether the evidence that the witness is too ill to travel is sufficient: *R.* v. *Stephenson*, L. & C. 165; 31 L. J. (M. C.) 147; and such evidence need not *necessarily* come from a medical man. *Id.* Followed in *R.* v. *Noakes*, [1917] 1 K. B. 581; 86 L. J. (K. B.) 594; 81 J. P. 140; 25 Cox, C. C. 722; 12 Cr. App. R. 204; 33 T. L. R. 201. Where, however, the only evidence that the person whose deposition it was proposed to put in was so ill as not to be able to travel, was that of a police officer, who said that he had that morning seen him in bed and that he had fever and that he had been confined to his bed for a fortnight, Byles, J., on ascertaining that the constable knew of the confinement to bed for a fortnight by hearsay only, rejected the deposition on the ground that to make it admissible there should be the evidence of a medical man, *or* other evidence which the court might think of equal value to medical testimony. *R.* v. *Welton*, 9 Cox, 296, explained in *R.* v. *Noakes*, *supra;* and *see R.* v. *Ulmer*, 4 Cox, 442: *R.* v. *Butcher*, *post*, p. 432. Where it was proposed to put in the deposition of an absent witness on the ground that he was "so ill as not to be able to travel," and the evidence of such inability was that of a medical man, who said that he had last seen the witness on the Monday (the trial taking place on the Wednesday next following), and that he was then recovering from a severe attack of pain in the bowels, and was too feverish then to travel, but that it was possible that he might have sufficiently recovered by the Wednesday to have travelled, but that he (the medical man) would not have advised it, Blackburn, J., refused to admit the deposition on the ground that no one had seen the witness for forty-eight hours, and that he might have sufficiently recovered in that period. *R.* v. *Bull*, 12 Cox, 31. Unless there is actual illness, old age causing nervousness and inability to stand cross-examination is not enough foundation for the reading of the deposition of an absent witness: *R.* v. *Farrell*, L. R. 2 C. C. R. 116; 43 L. J. (M. C.) 94; even although the bringing such witness into court would be dangerous to his life. *R.* v. *Thompson*, 13 Cox, 181, Lush, J.

Pregnancy.]—In *R.* v. *Stephenson*, L. & C. 165; 31 L. J. (M. C.) 147, it was held that there might be incidents in regard to the state of pregnancy which might bring the case within s. 17. Bramwell, B., allowed the deposition of a married woman to be read on the evidence of her husband that she was pregnant and unable to attend; although he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that morning, and had not been confined to bed; but a fortnight before she had suffered in consequence of being driven to the assize town. *R.* v. *Croucher*, 3 F. & F. 285. And it is now settled that pregnancy may be a source of such illness as to render the witness unable to travel, *and be an illness* within the statute 11 & 12 Vict. c. 42, s. 17. *R.* v. *Wellings*, 3 Q. B. D. 426; 47 L. J. (M. C.) 100. In *R.* v.

Wellings no medical evidence was tendered as to the condition of the witness, whose deposition was held by the Court for Crown Cases Reserved to have been rightly admitted, and the only evidence as to her condition was given by her husband, who proved that he resided with his wife at a place fifteen miles distant from the place of trial, and that when he left his wife on that morning she was unable to move about without considerable difficulty, that she was then lying down, and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. He further stated that his wife thought her confinement would not take place until the middle of the following week, but might occur at any hour. So where a medical man gave evidence to the effect that he had examined the witness that morning; that she was very near her confinement, and it would have been dangerous to expose her to the excitement of attending a criminal trial; and that two days previously there were symptoms of approaching labour, and her confinement might take place at any moment; but at the same time he could not say that her case differed in any way from any ordinary case of confinement: Bowen, J., after consulting with Lush, J., admitted her deposition. *R.* v. *Goodfellow*, 14 Cox, 326. In *R.* v. *Butcher* [1900] 64 J. P. 808, Darling, J., refused to accept as sufficient the evidence of a police constable that a witness was about to be confined, and stated that there should either be medical evidence or an application for an adjournment.

The above decision with respect to pregnancy have been applied to illness following childbirth. In *R.* v. *Harney*, 4 Cox, 441, the deposition of a woman who had just been confined was admitted, although it was urged that in a very few weeks the woman would almost certainly be able to attend. In *R.* v. *Marsella*, 17 T. L. R. 164; 35 L. J. Newsp. 693; 110 L. T. J. 237, Bruce, J., admitted the deposition of a woman who had been confined ten days before the trial, on the oath of the doctor who attended her, that it would be dangerous for her to travel, and held that the decisions to the contrary effect in *R.* v. *Wilton*, 1 F. & F. 309: *R.* v. *Walker*, *Id.* 534, were overruled by *R.* v. *Goodfellow*, *supra*, and were no longer law.

Similarity of charges.]—The deposition is receivable only where the indictment is substantially for the *same offence* as that with which the defendant was charged before the justice. *R.* v. *Ledbetter*, 3 C. & K. 108. Where the deposition was taken on a charge of feloniously wounding, it was held receivable on the trial of the defendant for the murder of the person wounded, who had in the meantime died of the wound. *R.* v. *Beeston*, Dears. 405; 24 L. J. (M. C.) 5; 6 Cox, 425. And where the deposition was taken on a charge of robbery with violence to the person, it was received on the trial of the prisoner for the murder of the person robbed, he having in the meantime died from the violence. *R.* v. *Lee*, 4 F. & F. 63, Pollock, C.B. These decisions were approved and followed in *R.* v. *Edmunds*, 25 T. L. R. 658; 2 Cr. App. R. 257 (C. C. A.), where depositions taken on a charge of wounding with intent to murder were held admissible on a charge of murder, the person wounded having died since the depositions were taken. Where the deposition had been taken on a charge of obtaining money by false pretences, it was allowed to be read

on a trial of an indictment against the prisoner for uttering a forged promissory note, the charges of false pretence and uttering being substantially the same, both arising out of the same transaction and the same evidence proving both charges. *R.* v. *Williams*, 12 Cox, 101, Montague Smith, J. *See R.* v. *Radbourne*, 1 Leach, 457 : *R.* v. *Smith*, R. & R. 339; Holt (N. P.), 614 : *R.* v. *Dilmore*, 6 Cox, 52, Wightman, J. : *Leach* v. *Simpson*, 5 M. & W. 309. The point is not whether the inquiry before the magistrate was exactly the same as that before the judge, but whether that inquiry was such that a full opportunity of cross-examination has been given to the party accused. Alderson, B., in *R.* v. *Beeston*, *supra*.

Postponement of trial.]—Where a witness is so ill as not to be able to travel, the judge may, if he thinks fit, postpone the trial to the next assizes, instead of permitting the depositions to be read under 11 & 12 Vict. c. 42, s. 17. *R.* v. *Tait*, 2 F. & F. 553, Crompton, J. In all cases where there is any doubt as to whether the deposition is admissible in evidence, it would be prudent to apply to the judge for a postponement of the trial.

As to reading before the grand jury depositions taken under 11 & 12 Vict. c. 42, s. 17, *see ante*, p. 75.

Decisions before the Indictable Offences Act.]—Although the former (and repealed) statutes relating to the examination of witnesses against a prisoner before justices and coroners (1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10; 7 G. 4, c. 64, ss. 2-5) did not contain any express enactment like that contained in 11 & 12 Vict. c. 42, s. 17, it was recognized as a rule of law, that, where the examinations of witnesses in cases of felony under those statutes were taken in the presence of the accused, and he had the opportunity of cross-examining them, the deposition of any such witness might be read in evidence against the accused on his trial, if the person who made the deposition were dead; 1 Hale, 305; Bull. (N. P.) 242; or insane (though the insanity were of a temporary nature) : *R.* v. *Marshall*, C. & Mar. 147 : *R.* v. *Eriswell*, 3 T. R. 707, 720 (but *see R.* v. *Ferrystone*, 2 East, 54); or if it appeared satisfactorily to the court that he was kept out of the way by means of the procurement of the defendant : *R.* v. *Harrison*, 12 St. Tr. 833, 852 : *R.* v. *Lord Morley*, Kel. (J.) 53, 55; 6 St. Tr. 770, 771 (in which case, however, the deposition is no evidence against other co-defendants : *R.* v. *Scaife*, 2 Den. 281; 17 Q. B. 238; 20 L. J. (M. C.) 229); or if he were bedridden, or so ill as to be unable to travel. 1 Hale, 305; 2 Hawk. c. 46, ss. 15-17 : *R.* v. *Wilshaw*, C. & Mar. 145. But they could not be thus read, if it merely appeared that the witness was absent (even if he were resident abroad), and that the prosecutor had in vain used his best endeavours to find him. *R.* v. *Lord Morley*, Kel. (J.) 55 : *R.* v. *Scaife*, *supra*: *R.* v. *Austin*, Dears. 612; 25 L. J. (M. C.) 48. Nor could depositions formerly be read upon an indictment for high treason; 5 & 6 Edw. 6, c 12; Fost. 337; but in *R.* v. *Lynch* (K. B. D. Dec. 19, 1902; 72 L. J. (K. B.) 167) the deposition of a witness absent from illness was allowed to be read to the grand jury.

Mode of taking the depositions.]—Depositions before magistrates, to be thus given in evidence, must be taken in conformity with the statute: *R.* v. *Smith*, R. & R. 339; Holt (N. P.) 614; 2 Stark. (N. P.) 208, 211 n. (*a*), and in the presence of the prisoner, so that he may have an opportunity of cross-examining the witness; 11 & 12 Vict. c. 42, s. 17 (*ante*, p 429): and *see R.* v. *Paine*, 1 Salk. 281; 1 Ld. Raym. 729: *R.* v. *Woodcock*, 1 Leach, 500; 1 East, 354, 356: *Pyke* v. *Crouch*, 1 Ld. Raym. 730: *R.* v. *Dingler*, 2 Leach, 561; Bull. (N. P.) 243: *R.* v. *Forbes*, Holt (N. P.) 599 n.: *R.* v. *Harris*, 82 J. P. 196. The fact that the prisoner had a full opportunity of cross-examining the witness may be negatived by proof that he was insane when the deposition was taken, or was otherwise incapacitated by illness from cross-examining the deponent. *R.* v. *Peacock*, 12 Cox, 21, Brett and Mellor, JJ. The depositions must also be taken in the presence of the justice: *R.* v. *Watts*, L. & C. 339; 33 L. J. (M. C.) 63; and nothing should be returned as a deposition unless the prisoner had an opportunity of knowing what was said, and of cross-examining the party making it. *R.* v. *Arnold*, 8 C. & P. 621, Denman, C.J.; *R.* v. *Johnson*, 15 L. J. (N. S.) M. C. 7; 2 C. & K. 394. But where a deposition was not wholly taken in the presence of the prisoner, but the witness was afterwards resworn in his presence, and the deposition repeated, and signed, the judges held that it was, under the circumstances, admissible evidence; for the prisoner had then an opportunity of cross-examining the witness. *R.* v. *Smith*, R. & R. 339; *see R.* v. *Bates*, 2 F. & F. 317. In *R.* v. *Holloway*, 65 J. P. 712, Wills, J., admitted the deposition of a deceased witness, proved to have been read over to her and assented to by her, but not signed by her owing to injuries to her hands. As to depositions before coroners, *see post*, p. 438.

Where several depositions were taken on one sheet of paper, and at the foot of the whole was written "sworn before me," with the signature of the magistrate, the depositions previous to the last were held to be receivable in evidence. *R.* v. *Osborne*, 8 C. & P. 113, Coleridge, J. And it is now settled that although all the depositions are not taken on one sheet of paper, it is not necessary that each deposition should be signed by the magistrate taking it; and, therefore, where a number of depositions taken at the same hearing on several sheets of paper are fastened together and signed by the magistrate taking them once only at the end of all the depositions, in the form given in the Schedule (M.) to 11 & 12 Vict. c. 42, one of these depositions is admissible in evidence, after the death of the witness making it, although no part of it is on the sheet signed by the magistrate. *R.* v. *Parker*, L. R. 1 C. C. R. 225; 39 L. J. (M. C.) 60, which is in accordance with *R.* v. *Young*, 3 C. & K. 106, and *R.* v. *Lee*, 4 F. & F. 63, and overrules *R.* v. *Richards*, 4 F. & F. 860. In *R.* v. *Parker*, *supra*, the case stated by the learned judge stated that "the deposition in question was the second of four depositions made at the same hearing, all of which were pinned together." It does not state, however, whether any proof was given at the trial, whether the depositions were pinned together at the time of the signature by the magistrate, although Byles, J., in his judgment, as reported 39 L. J. (M. C.) at p. 62, says, "the different sheets appear to have been attached together at the time of the signature." In an earlier case, however, it was held to be clear, that if the depositions are on separate sheets,

and no distinct proof be given of their having been fastened together at the time when the last was signed, those bearing no signature will be rejected. *R.* v. *France*, 2 M. & Rob. 207, Alderson, B. But where the depositions were on separate sheets, and were signed only at the end by the magistrate, the deposition of one of the witnesses who was dead was admitted in evidence, although it seems that the sheets were not fastened together at the time of the signature by the magistrate, but had been afterwards attached together by the magistrate's clerk. *R.* v. *Lee*, 4 F. & F. 63, Pollock, C.B. In *R.* v. *France*, *supra*, it was held that depositions taken in cross-examination, at a subsequent time to those in chief, and not signed by the magistrate, were held to be so irregular as to prevent the whole depositions from being read against the prisoner; although both were sworn by the magistrate to have been accurately taken. But this seems to be no longer law. The depositions may also be given in evidence by the defendant, in cases where the witnesses appear, in order to show some material variance between their evidence at the trial and before the magistrate; and may be read by the prosecutor, as it would seem, and certainly by the judge, to impeach the credit of a witness who gives evidence contradicting statements contained in the deposition made by such witness in a former proceeding in the same case. *R.* v. *Oldroyd*, R. & R. 88. It is not necessary, to make the depositions evidence, that *each* should have a separate *caption* or heading; a general caption or heading at the head of the body of depositions sufficiently shows that they were all taken under the statute. *R.* v. *Johnson*, 2 C. & K. 354. Indeed, a deposition is admissible in evidence though it has no caption, if it be described as the examination of the witness, and the evidence contained in it be relevant to the charge. *R.* v. *Langbridge*, 1 Den. 448; 2 C. & K. 975; 18 L. J. (M. C.) 198. (*a*)

Taking out of court depositions of persons dangerously ill.]—*The* Criminal Law Amendment Act, 1867 (30 *& 31 Vict. c.* 35, *known as* "*Russell Gurney's Act*"), *after reciting that by s.* 17 *of* 11 *& 12 Vict. c.* 42, *it is permitted, under certain circumstances, to read in evidence on the trial of an accused person the deposition, taken in accordance with the said Act, of a witness who is dead, or so ill as to be unable to travel, and that it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and that it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same,*—enacts (s. 6) that, "whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and, in the opinion of some registered medical practitioner, not likely to recover from such

(*a*) The decision to the contrary by Hill, J., in *R.* v. *Newton*, 1 F. & F. 641 (followed by Mellor, J., in *R.* v. *Johnson Metcalfe*, York Spring Assizes, 1862, M.S.), was given without *R.* v. *Langbridge* being cited.

illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and, if the same shall relate to any indictable offence for which any accused person is already committed, or bailed to appear for trial, shall transmit the same with the said addition, to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same and file it of record; and if afterwards upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will be ever able to travel, or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same " : *see R.* v. *Peacock*, 12 Cox, 21, Brett, J. It is to be observed that the proviso at the close of this section overrides the whole section, and no statement, professedly taken under it, can be available as such at the trial unless notice has been given before taking it of the intention to take it. *R.* v. *Quigley*, 18 L. T. (N. S.) 211, Mellor and Lush, JJ. Section 7 points out the mode in which a prisoner in actual custody, who shall have served, or shall have received notice of an intention to take such statement, may have an opportunity of being present when it is taken; and such notice must be *in writing*, otherwise the statement cannot be read against the prisoner on the trial, although he may have been present when it was taken, and had a full opportunity of cross-examination. *R.* v. *Shurmer*, 17 Q. B. D. 323; 55 L. J. (M. C.) 153; 16 Cox, 94 : *R.* v. *Harris*, 82 J. P. 196. In *R.* v. *Prestridge* (C. C. C.) Nov. 1881, 72 L. T. Journ. 93, after the deposition of a dying person had been taken under 30 & 31 Vict. c. 35, s. 6, and she had been cross-examined, further questions were put to her by the justice, and her answers were added to the deposition. The caption was added afterwards and returned with the deposition. Hawkins, J., refused to allow the answers to the justice's questions to be given in evidence, and further expressed a very strong opinion that the caption was an integral part of the deposition, and must be added at the time to render the deposition admissible; he stated that he

should admit the deposition and reserve the point, but its admission was not pressed. In *R.* v. *Curtis*, 21 Times L. R. 87, Bigham, J., refused to admit a deposition taken under the same enactment because the caption did not state where it was taken. A deposition of a dying person purporting to have been taken under 11 & 12 Vict. c. 42, s. 17, but to which there was no caption and which had not been taken by the committing justice, was held inadmissible. *R.* v. *Rees*, Glamorgan Assizes, Times Newsp. (20 Dec. 1888), Charles, J. But where the deposition of a dying person was taken by a justice at a hospital in the presence of the accused and all the requirements of 11 & 12 Vict. c. 42, s. 17, were complied with, it was held that the deposition was admissible in evidence, although the requirements of 30 & 31 Vict. c. 35, s. 6, had not been complied with. *R.* v. *Katz*, 64 J. P. 807; 16 T. L. R. 67, Darling, J.; in which case counsel was authorized by Wills, J., to state that he had altered the opinion to the contrary expressed by him in *R.* v. *Simpson*, 62 J. P. 825; and *see R.* v. *Harris*, 82 J. P. 196.

As to the duty of a magistrate to take the evidence of a witness who is dangerously ill at the residence of the witness, *see R.* v. *Bros. Ex parte Hardy* [1911] 1 K. B. 159; 80 L. J. (K. B.) 147; 22 Cox, 352.

As to when statements made in the presence of the prisoner are evidence, *see ante*, p. 393.

Special provision is made by s. 28 of the *Children Act*, 1908 (8 Edw. 7, c. 67), for taking out of court the sworn depositions of persons under sixteen in respect of whom an offence against Part II. of that Act, or any of the offences mentioned in the first schedule to the Act (*ante*, p. 430), is alleged to have been committed if attendance at court would involve serious danger to the life or health of the deponent: *see* those sections, *post*.

Right of accused to inspection and copies of depositions.]—6 & 7 W. 4, c. 114, enacts (s. 4), that, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had." By s. 27 of the *Indictable Offences Act*, 1848 (which replaces 6 & 7 W. 4, c. 114, s. 3), "at any time after all the examinations aforesaid shall have been *completed*, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid, is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of 1½*d.* for each folio of ninety words." The enactment does not apply in case of committal on remand, but only after committal for trial: *see R.* v. *Lord Mayor of London*, 5 Q. B. 555; Dav. & M. 484; *Ex parte Fletcher*, 13 L. J. (M. C.) 67. Where a prisoner has obtained a certificate for legal aid under the *Poor Prisoners Defence Act*, 1903 (*ante*, p. 175), the cost of a copy of the depositions for his use is allowed as part of the costs of the prosecution; 8 Edw. 7, c. 15, s. 1 (3), (*ante*, p. 268). Where the depositions have been transmitted to the director of public prosecutions in

pursuance of 42 & 43 Vict. c. 22 (*Prosecution of Offences Act*, 1879), s. 5, he is by that section put under the same obligation, and upon the same payment, to deliver to an applicant copies thereof.

Under 11 & 12 Vict. c. 42, s. 17, depositions were taken only of witnesses for the Crown. But the accused is now entitled to copies of the examinations of witnesses examined before the justices on his behalf, under s. 3 of 30 & 31 Vict. c. 35, as it is enacted by s. 4 of that Act, that all the provisions of 11 & 12 Vict. c. 42, for giving the accused copies of the examinations shall be read and shall have operation as part of 30 & 31 Vict. c. 35.

By 7 G. 4, c. 64, s. 5 (as extended by 42 & 43 Vict. c. 22, s. 5), justices who fail to deliver to the court of trial *or to the director of public prosecutions* any examination, information, evidence, bailment, or recognizance, may, on examination and proof of the offence in a summary manner before the court of trial, be fined as the court shall think meet. This enactment seems to apply to magistrates neglecting their duty under 11 & 12 Vict. c. 42, s. 20, and the continuance of the liability to fine is clearly indicated by 42 & 43 Vict. c. 22, s. 5. As to coroners, *see infra*.

Prior to the passing of the *Indictable Offences Act*, 1848, the judges intimated that justices should return to the court of trial all depositions taken against the accused, whether the deponents had or had not been bound over by recognizance to attend the trial, and also that they should return a full statement of all that the witnesses said, not merely of so much thereof as they deem material, much time having been occupied in endeavouring to establish contradictions between the testimony of the witnesses and their depositions, in the omission of minute circumstances in their statements before the magistrate. *See R.* v. *Simons*, 6 C. & P. 540 : *R.* v. *Fuller*, 7 C. & P. 269 : *R* v. *Grady*, *Id.* 650 : *R.* v. *Coveney*, *Id.* 667 : *R.* v. *Thomas*, *Id.* 817. The opinions thus expressed are equally applicable to depositions taken under 11 & 12 Vict. c. 42. That statute obviously applies only to the case of a person bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to prepare for trial, and does not extend to the case of a person committed to prison for default of sureties to keep the peace, and who has been discharged by the sessions. *Ex parte Humphrys*, 19 L. J. (M. C.) 189. A prisoner was not entitled, under 6 & 7 W. 4, c. 114, s. 2 (*rep.*), to a copy of *his own* statement returned by the magistrates, but only to a copy of the depositions of the witnesses. *R.* v. *Aylett*, 8 C. & P. 669, Parke, B. But it is submitted that under 11 & 12 Vict. c. 42, the statement is a part of the depositions in the case. The reading, on the part of the prosecution, of the prisoner's statement, returned with the depositions, does not give the prisoner the right to consider the depositions as in evidence on the part of the prosecution, though it appear that they were all taken before such statement was made; but if the prisoner wishes to have the whole or any particular part of the depositions read, he must read it as his evidence. *R.* v. *Pearson*, 7 C. & P. 671.

Depositions before coroners.]—The provisions of 11 & 12 Vict. c. 42, s. 17, do not in terms apply to the depositions taken before coroners : and it is

submitted that the ruling to the contrary by Darling, J., in *R.* v. *Butcher*, 64 J. P. 808, was given *per incuriam*. But it is stated in Bull. (N. P.) 242 that depositions taken before a coroner may be read if the witness is dead or beyond the sea. In *R.* v. *Cowle*, 71 J. P. 52, Grantham, J., admitted the deposition of a witness before a coroner on proof of the death of the witness, and that the deposition was taken in the presence of the accused, who by her solicitor had full opportunity of cross-examining. And the same learned judge in a similar case admitted the deposition where the accused was not represented by a solicitor, but had full opportunity of cross-examining personally: *R.* v. *Black*, 74 J. P. 71. By the *Coroners Act*, 1887 (50 & 51 Vict. c. 71), s. 18, sub-s. 5, a person charged upon an inquisition with murder or manslaughter is entitled to have from the person having for the time being the custody of the inquisition or of the depositions of the witnesses at the inquest, copies thereof, on payment of a reasonable sum for the same, not exceeding the rate of 1½*d.* for every folio of ninety words. In the case of poor prisoners who have obtained a certificate for legal aid, this charge is included in the costs payable out of the local rate; 8 Edw. 7, c. 15, s. 1 (3). The depositions in such cases are returned to the clerk of the court of trial (50 & 51 Vict. c. 71, s. 5), or to the Director of Public Prosecutions if he takes up the case. The judges had power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party concerning whose death the inquiry took place before the coroner, although in a case where the coroner could not have been compelled to return them under 7 G. 4, c. 64, s. 4. That section is repealed by 50 & 51 Vict. c. 71, but the repeal does not seem to affect the powers of the judges. *Ex parte Greenacre*, 8 C. & P. 32: *R.* v. *Walford*, 8 C. & P. 767. There was formerly supposed to be a difference between depositions taken before a magistrate and before a coroner; for the latter were said to be evidence, even though the party accused was not present when they were taken. Bull. (N. P.) 242: *R.* v. *Eriswell*, 3 T. R. 707, 713, Buller, J. The reason given for this exception was, that the coroner is an elective officer, appointed on behalf of the public, to make inquiry of matters within his jurisdiction, who therefore is presumed to take the depositions fairly and impartially. Bull. (N. P.) 242. Although the propriety of this distinction had been questioned (*see* 2 Stark. Evid. 384), the practice nevertheless formerly was to admit such depositions without inquiry whether the party accused was or was not present: and in *R.* v. *Purefoy*, Peake, Evid. 64; 2 Phill. Evid. (7th ed.) 373, Hotham, B., received depositions taken before a coroner, although it appeared that the defendant was not present. But in *R.* v. *Rigg*, Leeds Summer Assizes, 1866, MS., 4 F. & F. 1085, Montague Smith, J., refused to admit in evidence the deposition of a witness taken before the coroner, where the prisoner was not present at the inquest when the witness was examined. The dicta and expressions of opinion in favour of a contrary practice, cited above, were brought on that occasion under his lordship's notice; but he said that he had no doubt upon the subject, and had no hesitation in rejecting the deposition. This ruling is in accord with the opinions expressed by the ablest text-writers on the subject. Taylor, Evid.

(11th ed.), s. 493; Roscoe, Cr. Evid. (13th ed.), 67; Stark. Evid. (4th ed.), 38: Jervis on Coroners (6th ed.), 51, 52; and *see* 2 Russ. Cr. (7th ed.) 2245. Depositions taken before the coroner, in order to be admissible, must appear to have been taken before the coroner *quâ* coroner, and must be signed by him. 50 & 51 Vict. c. 71, s. 4, sub-s. 2: *R.* v. *England*, 2 Leach, 767, 771. The depositions must appear also to have been upon oath; 2 Hale, 284; Bull. (N. P.) 242.

50 & 51 Vict. c. 71, s. 4, sub-s. 2, enacts, that the deposition shall be signed by the witness as well as by the coroner, which the old statutes did not. This gets rid of the ruling in *R.* v. *Flemming*, 2 Leach, 854; 1 East, P. C. 440. A deposition taken before a coroner may be proved by the coroner, or by any person who can prove the coroner's and the witness's signature, and that the witness was sworn, and that the prisoner was present and had an opportunity of cross-examining the witness. 50 & 51 Vict. c. 71, s. 4, sub-s. 2; Taylor Evid. (11th ed.), s. 493: *R.* v. *Wilshaw*, C. & Mar. 145: *Sills* v. *Brown*, 9 C. & P. 601: *R.* v. *Marriott*, 75 J. P. 284.

Depositions taken abroad.]—A deposition taken out of England is not admissible in England in substitution for the oral statement of the deponent, except under statutory provision, although it may be put in against the deponent if made by him and containing confessions or admissions.

Depositions may be taken abroad in certain criminal cases, under the following statutes, 13 G. 3, c. 63; 24 G. 3, sess. 2, c. 25; 26 G. 3, c. 57, as to offences in India (*see* Ilbert, Government of India (2nd ed.), pp. 255 *et seq.*); and under 42 G. 3, c. 85, as to offences by public officers outside Great Britain. Such depositions are admissible in England. The *Evidence on Commission Act*, 1831 (1 W. 4, c. 22), does not relate to criminal proceedings (*R.* v. *Upton St. Leonards*, 10 Q. B. 827; 16 L. J. (N. S.) M. C. 84), and commissions are, it is believed, never issued in criminal cases under the *Evidence by Commission Act*, 1859 (22 Vict. c. 20). If the witness has been examined abroad, under 13 G. 3, c. 63, and has there proved original documents, those documents themselves must be transmitted and given in evidence in this country; copies are not admissible. *R.* v. *Douglas*, 1 C. & K. 670.

Provision is made in Extradition Treaties for the execution of commissions to take evidence for the purposes of proceedings in the King's dominions against a fugitive criminal; but there is no statutory provision rendering the evidence so taken admissible in proceedings in England.

By the *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), s. 691, sub-s. 1, "Whenever in the course of any legal proceedings instituted in any part of his Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, or, if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in his Majesty's dominions,

or any British consular officer elsewhere, shall be admissible in evidence, provided that :—(*a*) If the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom. (*b*) If the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession. (*c*) If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused. (Sub-s. 2.) Every deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer before whom it is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof. (Sub-s. 3.) It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified. (Sub-s. 4.) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible." This section applies also to proceedings within the *Merchant Shipping Act*, 1906 (6 Edw. 7, c. 48). Where witnesses whose evidence had been taken abroad by a British vice-consul under 17 & 18 Vict. c. 104, s. 270 (of which this section is a re-enactment), were the officers of a British sailing vessel, which was stated by a clerk in the office of the registrar-general for seamen, from his examination of official records, never to have been in this country, this was held to be sufficient evidence that the witnesses could not be found in the United Kingdom, and as the depositions purported to be taken in the presence of the prisoner and of the British vice-consul, and also to be signed by the latter, they were admitted in evidence. *R.* v. *Conning*, 11 Cox, 134 : *see also R.* v. *Anderson*, 11 Cox, 154 : *R.* v. *Stewart*, 13 Cox, 296.

Proceedings in Colonial and Foreign Courts, etc.]—By s. 7 of the *Evidence Act*, 1851 (14 & 15 Vict. c. 99), "all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British Colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned, that is to say . . . if the document sought to be proved be a judgment decree order or other judicial proceeding of any foreign or colonial court or an affidavit pleading or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the

judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal: but if any of the aforesaid authenticated copies shall purport to be signed or sealed as hereinbefore respectively directed the same shall respectively be admitted as evidence in every case in which the original document could have been admitted in evidence, without any proof of the seal where a seal is necessary or of the signature or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." *See R.* v. *Newman*, 22 L. J. (N. S.) Q. B. 156; Dears. 85. This enactment does not apply to the proceedings of the courts of Scotland or Ireland, nor it would seem to those of the Isle of Man or Channel Islands, and judgments of these courts must in criminal cases ordinarily be proved as those of foreign courts were at common law, *i.e.*, by exemplifications under the seal of the court, if the court has a seal, and evidence must also be given that the seal affixed to the exemplification is in fact the seal of the court. *Henry* v. *Adey*, 3 East, 221: *Alves* v. *Bunbury*, 4 Camp. 28: *Cavan* v. *Stewart*, 1 Stark. (N. P.) 525: *Appleton* v. *Lord Braybrook*, 2 Stark. (N. P.) 6; 6 M. & Sel. 34: *Flindt* v. *Atkins*, 3 Camp. 215 n.: *Alivon* v. *Furnival*, 1 Cr. M. & R. 277.

Records of Irish Courts.]—Records of the courts in Ireland might, it is said, be proved in England by examined copies, etc., in the same manner as English records; but *see Harris* v. *Saunders*, 3 L. J. (K. B.) 239; 4 B. & C. 411. It was necessary, however, that the court should be satisfied that the copy was examined with a *record*; and, therefore, where the witness produced to prove the copy stated that he examined it with a parchment roll shown to him in a room over the Four Courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the court, Lord Ellenborough refused to receive it in evidence. *Adamthwaite* v. *Synge*, 4 Camp. 372: *see Slane Peerage case*, 5 Cl. & F. 23; 7 E. R. 311; and Taylor, Evid. (11th ed.), s. 1544.

Statutory modes of proving public documents.]—The production in evidence of most of the documents above mentioned has been facilitated by the following statutes. 8 & 9 Vict. c. 113 (*Evidence Act*, 1845), s. 1: "Whenever by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any

further proof thereof, in every case in which the original record could have been received in evidence." *See* Taylor, Evid. (11th ed.), ss. 7, 1602-7.

14 & 15 Vict. c. 99 (*Evidence Act*, 1851), s. 14: "Whenever any book or other document (*see Reeve* v. *Hodson*, 10 Hare, App. xix.) is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

[*See In re Hall's Estate*, 22 L. J. (Ch.) 177: *Re Porter's Trusts*, 25 L. J. (Ch.) 688: *R.* v. *Weaver*, L. R. 2 C. C. R. 85; 43 L. J. (M. C.) 13 (*ante*, p. 413); and Taylor, Evid. (11th ed.), ss. 1599, 1600.]

2. Private Documents.

Inscriptions and entries.]—In pedigree cases an entry in a family Bible, an examined copy of an inscription on a tombstone, a pedigree hung up in a family mansion, and the like, are admissible in evidence. *Goodright* v. *Moss*, 2 Cowp. 591: *Berkeley Peerage Claim*, 4 Camp. 401; Roscoe, Nisi Prius (18th ed.), 44; Taylor's Evid. (11th ed.), ss. 650-653.

Deeds and other instruments in writing.]—When a deed is to be given in evidence, the deed itself must be produced at the trial. *Leyfield's case*, 10 Co. Rep. 92 b, 93, except in the following cases, (1) where the deed is in the hands of the opposite party:—*Read* v. *Brookman*, 3 T. R. 151: *Wymark's case*, 5 Co. Rep. 73 a; (2) where it has been lost by time or accident, or by any other casualty, as by fire, etc., *Read* v. *Brookman*, 3 T. R. 153 n. (*see Kensington* v. *Inglis*, 8 East, 273: *Brewster* v. *Sewell*, 3 B. & Ald. 296: *Freeman* v. *Arkell*, 2 B. & C. 494, *as to proof of the loss, etc.*). In such cases its contents may be proved by a copy or other secondary evidence. *Leyfield's case*, 10 Co. Rep. 92 b: *Medlicott* v. *Joyner*, 1 Mod. 4. In *R.* v. *Hunter*, 3 C. & P. 591; 4 C. & P. 128, where it appeared that the deed alleged to be forged was in the custody of the defendant, who, after notice, refused to produce it, secondary evidence of the deed was received. In *R.* v. *Hall*, 12 Cox, 159, Cleasby, B., after consulting Byles, J., refused to admit secondary evidence of the document alleged to be forged in that case, on the ground merely that no foundation had been laid for the admission of such evidence by proof of the loss or destruction of the document. But in both cases the court declined to recognize a rule once supposed to assert that a person could not be convicted of forgery without the actual production of the forged document.

If there was no subscribing witness proof of the handwriting of the parties

is sufficient, the law in such a case presuming a delivery. The *Evidence Act*, 1865 (28 & 29 Vict. c. 18), s. 7, which applies to all courts of criminal judicature (*see* s. 1), enacts that it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto. This enactment got rid of the old rule requiring the calling of an attesting witness to any document purporting to be attested. Gilb. Evid. 99 : *Barnes* v. *Trompowsky*, 7 T. R. 266 : *Marsh* v. *Collnett*, 2 Esp. 665 : *Manners* v. *Postan*, 4 Esp. 239; 3 B. & P. 343 : and *see England* v. *Roper*, 1 Stark. (N. P.) 304. A list of instruments to the validity of which attestation is requisite, and which therefore must still, subject to the exceptions to be presently mentioned, be proved by the attesting witness, will be found in Taylor, Evid. (11th ed.), ss. 1110 *et seq.* It does not appear necessary that the attesting witness when called should swear that the deed was actually executed in his presence. If he were afterwards desired to attest it by the party who executed it (*Grellier* v. *Neale*, 1 Peake (3rd ed.), 198 : *Powell* v. *Blackett*, 1 Esp. 97), or in the presence of the party (*Park* v. *Mears*, 3 Esp. 171; 2 B. & P. 217), and attested it accordingly, this will be sufficient, provided that the attestation and execution be done so nearly at the same time, as fairly to be deemed parts of the same transaction. MS., E. 1814. On the other hand, a party who sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. *M'Craw* v. *Gentry*, 3 Camp. 232.

The rule as to proof of execution by an attesting witness besides the limitations above stated is also subject to the following exceptions.

1. Where the execution forms one of the admissions in the cause; but this exception is applicable to civil cases only.

2. Where the deed (and the same as to a will, although it is less than thirty years since the testator's death, *Doe* d. *Oldham* v. *Woolley*, 6 L. J. (K. B.) 286; 8 B. & C. 22) is thirty years old or upwards, the court will presume that it has been duly executed, and will not require it to be proved, Bull. (N. P.) 255 : *Chelsea Waterworks Co.* v. *Cowper*, 1 Esp. 275, 278, provided possession has followed the deed, or some satisfactory account is given of it, and provided there is no erasure or interlineation in it, and that it does not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting. 2 Bac. Abr. Ev. (F.); Bull. (N. P.) 255 : and *see Swinnerton* v. *Marquis of Stafford* [1810] 3 Taunt. 91. It may be necessary here to remark, that when you give an ancient obligation for the payment of money in evidence, you should be prepared to prove the payment of interest within the last twenty years, or other circumstances sufficient to rebut the presumption which the law will otherwise raise of such obligation having been satisfied. *See Forbes* v. *Wale*, 1 W. Bl. 532.

3. Where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness; but it may be proved by enrolment indorsed on it, or if the deed is lost, by an examined copy of the enrolment, as already mentioned, *ante*, p. 424.

4. Where one deed is recited in another, proof of the second deed is deemed

proof of the one recited, as against the parties to the second deed and those claiming under them. 2 Bac. Abr. Ev. (F.).

5. Secondary evidence of the execution may be given by proving the handwriting of the witness and the party, upon proof of any of the following circumstances: that the subscribing witness is dead, *Nelson* v. *Whittall*, 1 B. & Ald. 19, or has become insane, 12 Vin. Abr. 224: *Currie* v. *Child*, 3 Camp. 283, or is abroad out of reach of the process of the court, *Holmes* v. *Pontin*, Peake (3rd ed.), 135: *Cooper* v. *Marsden*, 1 Esp. 1: *Wallis* v. *Delancey*, 7 T. R. 266 n.; 12 Vin. Abr. 224: and *see Hodnett* v. *Forman*, 1 Stark. (N. P.) 90, whether domiciled abroad or not; *Prince* v. *Blackburn*, 2 East, 250, or has set out for the purpose of leaving the kingdom, *Ward* v. *Wells*, 1 Taunt. 461; or that from circumstances it may fairly be presumed that he has left the kingdom, *Wardell* v. *Fermor*, 2 Camp. 282: *Wyatt* v. *Bateman*, 7 C. & P. 586; or that he is serving in the navy, *Parker* v. *Hoskins*, 2 Taunt. 223, or the like; or that after a *bonâ fide* serious and diligent inquiry he cannot be found, *Cochlan* v. *Williamson*, 1 Doug. 93: *Cunliffe* v. *Sefton*, 2 East, 183: *Barnes* v. *Trompowsky*, 7 T. R. 266: *Crosby* v. *Percy*, 1 Camp. 303; 1 Taunt. 364: *Wardell* v. *Fermor*, 2 Camp. 282: *Willman* v. *Worrall*, 8 C. & P. 380: *Earl of Falmouth* v. *Roberts*, 11 L. J. (N. S.) Ex. 180; 9 M. & W. 469: or that he is or has become incompetent as a witness from any cause, *Jones* v. *Mason*, 2 Str. 833. The rule on this subject is not affected by the power to examine witnesses abroad on interrogatories, under s. 4 of the *Evidence on Commission Act*, 1831 (1 W. 4, c. 22), *Glubb* v. *Edwards*, 2 M. & Rob. 300. But the declarations of the witness himself as to the place of his residence, or hearsay statements of others on the subject, are not admitted to prove that he is abroad. *Doe* d. *Beard* v. *Powell*, 7 C. & P. 617.

In cases in which attestation is necessary to the validity of a document if the subscribing witness has become blind, the instrument cannot be read without calling him. *Cronk* v. *Frith*, 9 C. & P. 197; 2 M. & Rob. 262. But *see Wood* v. *Drury*, 1 Ld. Raym. 734: *Pedler* v. *Paige*, 1 M. & Rob. 258, *contrà*. In *Page* v. *Mann*, M. & M. 79, Lord Tenterden held, that proof of the handwriting of the subscribing witness, who was dead, was sufficient, without any further proof of the identity of the parties than the identity of the name and description. *See also Kay* v. *Brookman*, *Id.* 286: *Mitchell* v. *Johnson*, *Id.* 176. But *see Whitelocke* v. *Musgrave*, 1 Cr. & M. 511: *Jones* v. *Jones*, 11 L. J. (N. S.) Ex. 265; 9 M. & W. 75. If there are two witnesses to a deed, and any of the circumstances last above mentioned apply only to one of them, the deed must of course be proved by the other. By 26 G. 3, c. 57, s. 38, bonds or other deeds or writings executed in the East Indies, and attested by any person or persons resident there, may be given in evidence in Great Britain, upon proof by one or more credible witnesses of the handwriting of the parties and of the witnesses. Where the subscribing witness is unable, or refuses to disclose the truth at the trial, the deed may be proved by other witnesses. *Goodtitle* v. *Clayton*, 4 Burr. 2224: *Talbot* v. *Hodson*, 7 Taunt. 251.

Upon an indictment for forging a deed or other written instrument, all that it is incumbent upon the prosecutor to prove is, that the name subscribed to the deed is not the handwriting of the party whose signature it purports to be.

which may be proved by the party whose name is forged, or by others. 2 Russ. Cr. (7th ed.) 1660.

Wills.]—Wills of lands over thirty years old require no proof; Taylor, Evid. (11th ed.), ss. 87, 1845; and the ordinary mode of proving wills, whether of lands or of personal estate, is by production of the probate, if granted since January 11, 1858 (*see ante*, p. 426). (*a*).

Writings not under seal.]—All other writings, not under seal, are proved in the same manner as deeds; that is, by the subscribing witness, if there is one (*see ante*, p. 443): *Wetherston* v. *Edgington*, 2 Camp. 94: and *see Stone* v. *Metcalf*, 1 Stark. (N. P.) 53: *Higgs* v. *Dixon*, 2 Stark. (N. P.) 180; and if the instrument is one to the validity of which attestation is requisite, 28 & 29 Vict. c. 18, s. 7 (*ante*, p. 443); if not, then either by the subscribing witness or by proof of the party's handwriting. It is said also that a writing of this kind, if ancient, may be received in evidence without proof, in the same manner as an ancient deed. Tr. per Pais, 370; but *see* Fortesc. 43. If the original has been lost or destroyed, copies or other secondary evidence of the contents will be received; but evidence must be given at the same time of the genuineness of the original instrument. *See Goodier* v. *Lake* [1737] 1 Atk. 446: *R.* v. *Pembridge*, C. & Mar. 157.

Handwriting.]—The handwriting of a witness or party may be proved either by some person who has a knowledge of it from having seen him write, *see Burr* v. *Harper*, Holt (N. P.) 420; even once only, *Willman* v. *Worrall*, 8 C. & P. 380: *Warren* v. *Anderson*, 8 Scott, 384; or his surname only, *Lewis* v. *Sapio*, M. & M. 39; (dissenting from *Powell* v. *Ford*, 2 Stark. (N. P.) 164), or from having been in the habit of corresponding with him, *Gould* v. *Jones*, 1 W. Bl. 384: *Harrington* v. *Fry*, Ry. & M. 90; or of acting upon his correspondence with others, *R.* v. *Slaney*, 5 C. & P. 213: *see Doe* v. *Suckermore*, 5 A. & E. 703; 2 Nev. & P. 16; or the handwriting of a party may be proved by his own admission. *Waldridge* v. *Kennison*, 1 Esp. 143. But the witness must at least be prepared to swear that he believes the writing to be that of the witness or party. *Eagleton* v. *Kingston*, 8 Ves. 438, 475, Eldon, L.C.; *see hereon* 58 J. P. 813.

By s. 8 of *Denman's Act* (28 & 29 Vict. c. 18, which by s. 1 applies to all courts of criminal judicature), "comparison of a disputed writing with *any* writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." (*b*) It seems that under

(*a*) As to the common-law mode of proving wills of lands *see* Taylor, Evid. (11th ed.), s. 1759.

(*b*) Until this enactment, handwriting could not be proved by comparing it with other writings, although confessedly written by the person whose handwriting was in question. *Garrels* v. *Alexander*, 4 Esp. 37: *R.* v. *Cator*, 4 Esp. 117: *Macferson* v. *Thoytes*, Peake (3rd ed.), 29: *Stranger* v. *Searle*, 1 Esp. 14: *see Griffits* v. *Ivery*, 11 A. & E. 322: *Hughes*

this section the disputed writing and the writing whose genuineness is proved ought not as a rule to be submitted to the jury in order that they may draw their own unaided conclusion from a comparison, but that they should be assisted by the evidence of an expert: *R.* v. *Harvey*, 11 Cox, 546, Blackburn, J.; or of a person who in the ordinary course of business has come to know the handwriting in question. *Fitzwalter Peerage Claim*, 10 Cl. & F. 193; and *see* *R.* v. *Rickard*, 88 L. J. K. B. 720; 82 J. P. 256; 26 Cox, 318; 13 Cr. App. R. 140; Taylor, Evid. (11th ed.), ss. 1863 *et seq.*; 2 Russ. Cr. (7th ed.) 2150. In *R.* v. *Smith*, 74 J. P. 54; 3 Cr. App. R. 87, and in *R.* v. *Rickard*, *supra*, the Court of Criminal Appeal formed its own opinion as to handwriting alleged to be that of the appellant after confirming it with a letter written by her after conviction, and without resort to any expert evidence.

A man is an expert in handwriting who has an adequate knowledge and skill as to handwriting whether acquired in the way of his business or not. *R.* v. *Silverlock* [1894] 2 Q. B. 766; 63 L. J. (M. C.) 233. In *R.* v. *Wilbain*, 9 Cox, 448 (Ir.), and *R.* v. *Harvey*, *supra*, a police officer was held not to be qualified as an expert. Particularly is this so when his only knowledge on the subject has been acquired in the course of the particular case. *R.* v. *Crouch*, 4 Cox, 163.

It has long been established practice to admit the evidence of persons skilled in detecting forgeries to prove that a writing is in a feigned hand, though they never saw the party write. *R.* v. *Cator*, 4 Esp. 177: *Goodtitle* v. *Braham*, 4 T. R. 497; 2 Russ. Cr. (7th ed.) 2261. There are decisions to the contrary: *see Carey* v. *Pitt*, Peake (Add. Cas.), 130: *Batchelor* v. *Honeywood*, 2 Esp. 714: *Gurney* v. *Langlands*, 5 B. & Ald. 330: *R* v. *Backler*, 5 C. & P. 118. In *Doe* v. *Suckermore*, 5 A. & E. 703, the court was equally divided: *see* 2 Russ. Cr. (7th ed.) 2149.

Stamps.]—The *Stamp Act*, 1891 (54 & 55 Vict. c. 39), s. 14, sub-s. 4, enacts, that "save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, *except in criminal proceedings*, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed." This enactment replaces

v. *Rogers*, 10 L. J. (N. S.) Ex. 238; 8 M. & W. 123: *Younger* v. *Honner*, 2 M. & Rob. 536; 1 C. & K. 51. But on a question as to the genuineness of handwriting, the jury might compare the document with authentic writings of the party to whom it was ascribed, if such writings were in evidence for other purposes of the cause. *Solita* v. *Yarrow*, 1 M. & Rob. 133: *R.* v. *Morgan*, Id. 134 n.: *Griffith* v. *Williams*, 1 Cr. & J. 47: *Waddington* v. *Cousins*, 7 C. & P. 595: *Doe* v. *Newton*, 5 A. & E. 514; 1 Nev. & P. 1. In an action for a libel, which charged the plaintiff with having published a libel on the defendant, where the defendant justified on the ground that the plaintiff had published such libel, letters written by the plaintiff, not otherwise evidence in the cause, in which the defendant's name was spelt in a peculiar manner, were held to be admissible to show that the libel in question, which contained the defendant's name spelt with the same peculiarity, was also written by the plaintiff. *Brookes* v. *Tichborne*, 5 Ex. 929; 20 L. J. (N. S.) Ex. 69.

17 & 18 Vict. c. 83, s. 27 (*rep.*), which got rid of the difficulties of proof in criminal cases caused by prior Stamp Acts.

Bankers' books.]—The *Bankers' Books Evidence Act*, 1879 (42 & 43 Vict. c. 11), was passed in order to obviate the inconvenience occasioned to bankers and their customers, by the removal of ledgers and other account books from banks for the purpose of production in legal proceedings, and in order to facilitate proof of transactions recorded in such ledgers and account books. The materials parts of the Act are as follows :—S. 3 : " Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded." S. 4 : " A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits." S. 5 : " A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry, and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits." (The expression " some person " in this section is not limited to an officer of the bank : *R.* v. *Albutt and Screen*, 75 J. P. 112; 6 Cr. App. R. 55). S. 6 : " A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts, therein recorded, unless by order of a judge made for special cause." S. 7 : " On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs." (*See R.* v. *Bono*, 29 T. L. R. 635.) S. 8 : " The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act, shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding." S. 9 : " In this Act the expressions ' bank ' and ' banker ' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also

any savings bank certified under the Acts relating to savings banks, and also any post office savings bank.

"The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hand of her Majesty's Postmaster-General, or one of the secretaries of the Post Office."

"Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank." S. 10: "In this Act the expression 'legal proceeding' means any civil or *criminal* proceeding or inquiry in which evidence is or may be given, and includes an arbitration; the expression 'the court' means the court, judge, arbitrator, persons, or person, before whom a legal proceeding is held or taken; the expression 'a judge' means with respect to England a judge of the High Court of Justice, and with respect to Scotland a lord ordinary of the outer house of the Court of Session, and with respect to Ireland a judge of the High Court of Justice in Ireland." S. 11: "Sunday, Christmas Day, Good Friday, and any bank holiday, shall be excluded from the computation of time under this Act."

"The expressions 'bank' and 'bankers' in the *Bankers' Books Evidence Act*, 1879 (*supra*), shall include any company carrying on the business of bankers to which the provisions of the *Companies Acts*, 1862 to 1880 (*see* 8 Edw. 7, c. 69, s. 1), are applicable, and having duly furnished to the registrar of joint stock companies a list and summary with the addition specified by this Act, and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint stock companies." 45 & 46 Vict. s. 72 (*Revenue, etc., Act*, 1882), s. 11, sub-s. 2.

Most of the decisions on these Acts are collected in the Annual Practice and the Yearly Practice in the notes to O. XXXVII., r. 7. Justices before whom a preliminary inquiry is proceeding are a court within s. 10, and can make an order under the Act. *R.* v. *Kinghorn* [1908] 2 K. B. 949; 78 L. J. (K. B.) 33, dissenting from the contrary *dictum* of Coleridge, C.J., in *R.* v. *Bradlaugh*, 15 Cox, 222 n. In criminal proceedings applications in the High Court are made on the crown side, and the order is drawn up in the Crown Office. They may be made *ex parte*.

SECT. 5.

PAROL EVIDENCE.

1. *In what Cases receivable.*

PAROL evidence is admissible, (1) When it is the best evidence of the facts to be proved, *e.g.*, where it is the evidence of a person who saw or heard them; (2) As secondary evidence of the contents of writings, in which case it is inferior to the evidence of the documents themselves. As a general rule, the contents of a written document which is capable of being produced, must be proved by the document itself, and not by parol evidence: *Queen Caroline's case*, 2 B. & B. 284, 289; 1 St. Tr. (N. S.) 1348; subject to the exception, that what a party to the record says is *primary* evidence against him as an admission, though it relates to the contents of a written instrument, and though the contents are directly in issue in the cause. *Slatterie* v. *Pooley*, 6 M. & W. 664; 10 L. J. (Ex.) 8; Taylor, Evid. (11th ed.), ss. 410 *et seq.* Where a parol contract is made subsequently to, and in substitution for, a former written contract, parol evidence may be given of the latter contract. *White* v. *Parkin*, 12 East, 578. As to the cases in which parol evidence may be received as secondary evidence of a written instrument, where the written instrument is proved to have been burnt, destroyed, or lost, or in the possession of the opposite party, *see ante*, p. 367.

There are no *degrees* of secondary evidence: and therefore a party who has laid the foundation for such evidence, may prove the contents of a deed by parol, though it appears that there is an attested copy in existence. *Doe* v. *Ross*, 7 M. & W. 102: *Brown* v. *Woodman*, 6 C. & P. 206: *Hall* v. *Ball*, 3 Scott (N. R.) 577. But it has been held, that where there exists a copy of the original document, the document cannot be proved by a copy of that copy. *Liebman* v. *Pooley*, 1 Stark. (N. P.) 167: *Everingham* v. *Roundell*, 2 M. & Rob. 138. It must not, however, be understood that parol evidence can never be received where written evidence of the same fact is attainable. For although parol evidence cannot be substituted for any instrument which the law requires to be in writing; Taylor, Evid. (11th ed.), s. 396; nor for the written evidence of any contract which the parties have put in writing; *Id.* s. 401: nor for any writing, the existence or contents of which are disputed, and which is material to the issue between the parties, and is not merely the

memorandum of some other fact, *Id.* s. 409, yet where the writing does not fall within either of these three classes, no reason exists for excluding parol evidence of its existence and contents. *Id.* s. 415. Thus, although a written receipt may have been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. *Rambert* v. *Cohen*, 4 Esp. 213. So the fact of marriage may be proved by the evidence of a person who was present at it, although the marriage may have been registered. *R.* v. *Manwaring*, Dears. & B. 132; 26 L. J. (M. C.) 10. And where three witnesses stated that a vessel was a British ship of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel or of the ownership, it was held, that this was sufficient proof that the vessel was British. *R.* v. *Seberg*, L. R. 1 C. C. R. 264; 39 L. J. (M. C.) 133. And on an indictment for unlawful assembly, parol evidence of proclamations and inscriptions has been admitted without producing copies. *R.* v. *Hunt*, 1 St. Tr. (N. S.) 171: *R.* v. *Fursey*, 3 St. Tr. (N. S.) 543, 561: *O'Connell* v. *R.* 5 St. Tr. (N. S.) 1, 278.

As a general rule, parol evidence is not admissible as to anything not immediately within the knowledge of the witness; he must speak of facts which happened in his presence, or within his hearing. This rule excludes hearsay evidence, save in the cases mentioned, *ante*, pp. 370 *et seq.* It also, as a general rule, excludes the expression of opinion or belief. But to this rule there is a necessary exception on questions of the identity of things or persons, or the genuineness of handwriting, where the witness is qualified to express a credible opinion or belief on the subject. *R.* v. *Silverlock* [1894] 2 Q. B. 766; 63 L. J. (M. C.) 233; Taylor, Evid. (11th ed.), ss. 1414 *et seq.*, *ante*, p. 446. And in matters of science or trade, an expert, or person intimately acquainted with it, may be called upon to give his opinion as to the probable result or consequence from certain facts already proved. For instance, if it were required to determine whether a man died of any particular disease, symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the party died, as founded upon the symptoms so proved, although he have never seen the deceased. So, upon an indictment for murder, the deceased's wounds, etc., being described, a surgeon may be called upon to give in evidence his opinion whether the deceased died in consequence of his wounds, or from natural causes, or whether the wounds were self-inflicted. *R.* v. *Mason*, 76 J. P. 184; 28 T. L. R. 120. Upon a question of insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are, in his judgment, symptoms of insanity; but he cannot be asked, if, from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity; which is the very point to be decided by the jury. *R.* v. *Wright*, R. & R. 456; Taylor, Evid. (11th ed.), s. 1421; 2 Russ. Cr. (7th ed.) 2260; and *see ante*, p. 17. On an indictment for uttering a forged will, which it was suggested had been written over pencil-marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror and traced the pencil-marks, was admissible on the part of the prosecution. *R.* v. *Williams*, 8 C. & P. 434.

2. *Competency of Witnesses.*

Mode of ascertaining.]—It is the business of the judge to decide as to the competency of a witness. *R.* v. *Whitehead*, L. R. 1 C. C. R. 33; 35 L. J. (M. C.) 186; Taylor, Evid. (11th ed.), ss. 2, 23 A: which may be done by examining him on the *voire dire*, or by evidence *aliunde*. *R.* v. *Wakefield*, 2 Lew. 279; M. & M. 197 n., Murray's Report; 2 Russ. Cr. (7th ed.) 2262. It was at one time held that the objection for incompetency must be made before the witness was sworn in chief; but it has been generally allowed to be made at any time during the trial. *Stone* v. *Blackburn*, 1 Esp. 37: *Turner* v. *Pearte*, 1 T. R. 717. It is, however, always advisable to make the objection before the witness has been examined in chief, and if he can be examined as to it, to examine him on the *voire dire;* and more recent cases appear to decide that the objection should, in strictness, be taken at that time; *see Hartshorne* v. *Watson*, 5 Bing. (N. C.) 477: *Wollaston* v. *Hakewill*, 3 Scott (N. R.), 593; unless the incompetency appears only in the course of his examination in chief. *Yardley* v. *Arnold*, 10 M. & W. 141: *Jacobs* v. *Layhorn*, 12 L. J. (N. S.) Ex. 427; 11 M. & W. 685. The opposite party cannot, after the witness has been sworn and examined, adduce other evidence to show his incompetency. *Dewdney* v. *Palmer*, 4 M. & W. 664. If the judge has admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanour, the judge changes his opinion as to his competency, he may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case exclusively upon the evidence of the other witnesses. *R.* v. *Whitehead*, L. R. 1 C. C. R. 33; 35 L. J. (M. C.) 186.

What witnesses competent.]—Persons who by the common law were deemed incompetent as witnesses, and not allowed to give evidence upon a criminal prosecution, may be classed as follows: (1) those who do not appear to have sufficient discretion; (2) those who do not appear to have a right sense of the sanctity and moral obligation of an oath; (3) those whose crimes render them infamous; (4) those who are interested in the event of the suit. The 3rd and 4th disqualifications were removed by *Lord Denman's Act*, 6 & 7 Vict. c. 85 (*post*, p. 454). The competency of husband and wife and of counsel and solicitors is considered, *post*, pp. 467 *et seq.*, *tit. Privilege.*

1. Want of discretion.]—An idiot is not allowed to give evidence; Co. Litt. 6 b; Taylor, Evid. (11th ed.), s. 1375; a lunatic during a lucid interval may. *Id.:* Com. Dig. Testm. (A.). When a lunatic is tendered as a witness, it is for the judge to ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligation of an oath; if satisfied that he is, the judge should allow him to be sworn and examined, leaving the jury to decide the worth of his testimony. *R.* v. *Hill*, 2 Den. 254; 20 L. J. (M. C.) 222. A person who is deaf and dumb is not incompetent if he can be made to understand the nature of an oath, and if intelligence can be conveyed to and received from him by means of signs: *R.* v. *Ruston*, 1 Leach, 408: *R.* v. *O'Brien*, 1 Cox, 185 (Ir.), and may be examined through the medium

of a sworn interpreter, who understands his signs (*Id.*). A dumb man, not deaf, is sworn in the way usual before the Oaths Act, 1909 (9 Edw. 7, c. 39), and then the interpreter is sworn to interpret his signs. If a dumb witness can write he will be allowed to write down his evidence. *See* Taylor, Evid. (11th ed.), s. 1376.

An infant of any age may be sworn as a witness in any criminal case, provided that such infant appears sufficiently to understand the nature and moral obligation of an oath; for its competency depends not upon its age, but upon its understanding. *R.* v. *Powell*, 1 Leach, 110: *R.* v. *Brasier*, *Id.* 199 (1 East, P. C. 443): *R.* v. *Williams*, 7 C. & P. 320. *See* 2 Hale, 278, 284; Com. Dig. Testm. (A. 1): *R.* v. *Travers*, 2 Str. 700; Taylor, Evid. (11th ed.) s. 1377. The court has refused to postpone the trial of an indictment, in order that a child of six, who was a necessary witness for the prosecution, and who could not be examined from want of knowledge of the nature and obligation of an oath, might in the meantime be instructed therein. *R.* v. *Nicholas*, 2 C. & K. 246; 2 Cox, 136, Pollock, C.B. But where an indictment for rape on a girl of ten was ignored because the girl did not understand the nature of an oath, an order was made to detain the accused in custody until the girl could be instructed. *R.* v. *Baylis*, 4 Cox, 23, Erle, J.: and the same course was followed in *R.* v. *Cox*, 62 J. P. 89. It is submitted (Taylor, Evid. (11th ed.), s. 1377), that the matter is for the discretion of the judge in each case.

By *The Children Act*, 1908 (8 Edw. 7. c. 67), s. 30, as amended by the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), s. 28 (2), "Where in any proceeding against any person for an offence any child of tender years who is tendered as a witness, does not, in the opinion of the court, understand the nature of an oath, the evidence of that child may be received though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth . . . provided that a person shall not be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused." *See post*, p. 455.

2. Want of religion.]—At common law, it is not necessary that a witness should be a Christian, or even believe in the Old Testament (as laid down in some of the older authorities; *see* Co. Litt. 6 b; Gilb. Evid. 142, 143). In order to render him competent to take an oath as a witness, it is sufficient if he believes in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. *Omichund* v. *Barker*, Willes, 538; 1 Atk. 21; 1 Wils. 84; Bull. (N. P.) 292: *R.* v. *Taylor*, Peake (3rd ed.), 14. Consequently it is permissible to accept the sworn evidence of Christians of all sects and denominations (*R.* v. *Mildrone*, 1 Leach, 412: *Mee* v. *Reid*, Peake (3rd ed.), 33: *R.* v. *McCarther*, Peake (3rd ed.), 211: *R.* v. *Serva*, 2 C. & K. 53); Jews (Gilb. Evid. 143: *Gomez Serra* v. *Nunez*, 2 Str. 821); Turks, Moors, and other Mussulmans (*R.* v *Morgan*, 1 Leach, 54:

see 2 Str. 1104); Hindoos or Gentoos (*Omichund* v. *Barker*, *supra*); Chinese (*R.* v. *Entrehman*, C. & Mar. 248); and the like. *See* 2 Russ. Cr. (7th ed.) 2295: Stringer on Oaths (3rd ed.), 135 *et seq.*

Until the passing of the *Evidence Further Amendment Act*, 1869 (32 & 33 Vict. c. 68, s. 4), a man wholly without religion was not a competent witness. *Maden* v. *Catanach*, 7 H. & N. 360; 31 L. J. (Ex.) 118. Section 4 was repealed by the *Oaths Act*, 1888 (51 & 52 Vict. c. 46), and s. 1 of that Act (*post*, p. 479) was substituted. By s. 3 of the Act of 1888 (*post*, p. 477), where an oath has been duly administered and taken, the fact that the person taking it had no religious belief does not affect the validity or obligation of the oath. Section 1 (*post*, p. 479) does not provide for the case of a person called as a witness who does not object to be sworn, but who, although an adult and of sufficient intellect, has no belief in a future state of rewards and punishments, and no belief in a God, and it would seem that such a person might still be successfully objected to as a witness by the opposite party, although if he was actually sworn without objection, the oath would be valid under s. 3 (*post*, p. 477). The repealed s. 4 of 32 & 33 Vict. c. 68, provided not merely for the case of the person called as a witness objecting to take the oath, but also for the case of his being objected to as incompetent to take an oath.

It was held under the law as it stood before these statutes that the circumstance that a principal witness, although an adult and of sufficient intellect, had no idea of a future state of rewards and punishments, was not a sufficient ground for discharging the jury, though it appeared as soon as the jury was charged, and before any evidence was given. *R.* v. *Wade*, 1 Mood. 86. But if an application for that purpose is made before the jury are sworn, the judges have power to postpone the trial, if they have reason to believe that an adult, who is a necessary witness for the prosecution, can, within a reasonable time, be rendered competent to testify. *R.* v. *White*, 1 Leach, 430 n. (*a*).

3. Infamy.]—Formerly persons who had been *convicted* of certain crimes which were regarded as *infamous* were incompetent as witnesses, unless they had been pardoned or had endured their punishment. This rule excluded the evidence of convicted accomplices. 2 Hawk. c. 46, s. 101. It has been abolished by the *Evidence Act*, 1843 (6 & 7 Vict. c. 85), which enacts (s. 1) that "no person offered as a witness shall be excluded by reason of incapacity from *crime* or *interest* from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that

such person offered as a witness may have been previously convicted of any crime or offence." Notwithstanding this enactment, it has been held that a person actually under sentence of death is civilly dead, and is therefore incapable of being a witness. *R.* v. *Webb*, 11 Cox, 133, Lush. J. But this decision was prior to the passing of the *Forfeiture Act*, 1870 (33 & 34 Vict. c. 23), and seems to be inconsistent with the provisions of that Act. *See* Taylor, Evid. (11th ed.), s. 1347. The witness is liable to be questioned as to the fact of such conviction and to have it proved against him. (28 & 29 Vict. c. 18, ss. 1, 6, *post*, p. 475).

4. Interest.]—Until the *Evidence Act*, 1843 (6 & 7 Vict. c. 85, s. 1, *supra*), removed the incapacity, it was a general rule of evidence not to admit the testimony of a witness who was necessarily to be a gainer or loser by the event of a cause, whether such advantage were direct and immediate, or consequential only.

Accomplices.]—Notwithstanding this general rule, an accomplice was always a competent witness before the grand jury and the petty jury, 2 Hawk. c. 46, ss. 94—100 : *R.* v. *Dodd*, 1 Leach, 155; 2 East, P. C. 1003, and whether included in the indictment or not, *R.* v. *Tinckler*, 1 East, P. C. 354, 356, although his expectation of pardon depended upon the defendant's conviction. 1 Hale, 303; 2 Hawk. c. 46, s. 94. This expectation of pardon does not amount to a right, either as to the particular offence in question, or other offences committed. *R.* v. *Rudd*, 1 Leach, 115; 1 Cowp. 331 : *R.* v. *Lee*, R. & R. 361 : *R.* v. *Brunton*, R. & R. 454 : *R.* v. *Garside*, 4 L. J. (N. S.) M. C. 1; 2 A. & E. 266. As to the circumstances under which an accomplice should be admitted as an approver, *see R.* v. *Dunne*, 5 Cox, 507 (Ir.) : *R.* v. *Gallagher*, 15 Cox, 291. A police spy is not an accomplice. *R.* v. *Mullins*, 3 Cox, 526; 7 St. Tr. (N. S.) 1110 : *R.* v. *Bickley*, 73 J. P. 239 (C. C. A.). If the accomplice is dead his depositions, if properly taken, may be read against the defendant. *R.* v. *Westbeer*, 1 Leach, 12. An accessory is a competent witness against his principal, and the principal against the accessory. *R.* v. *Patram*, 2 East, P. C. 782 : *R.* v. *Haslam*, 1 Leach, 418.

Corroboration.]—The fact of the witness being an accomplice, accessory, or principal detracts very materially from his credit. Taylor, Evid. (11th ed.), s. 967.

The uncorroborated evidence of an accomplice is admissible in law : *R.* v. *Atwood*, 1 Leach, 464; but it has long been the practice at common law for the judge to warn the jury of the danger of convicting a prisoner on such uncorroborated evidence of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict on such evidence, though at the same time pointing out that it is within their legal province to convict upon it if they choose. *R.* v. *Stubbs*, Dears. 555 : *In re Meunier* [1894] 2 Q. B. 415. This rule of practice has become virtually a rule of law : *R.* v. *Farler*, 8 C. & P. 107 : *R.* v. *Tate* [1908] 2 K. B. 680; and in the absence of such a warning by the judge the conviction will on appeal be quashed by the Court of Criminal

Appeal. *R.* v. *Tate*, *supra*. Where there is a proper caution, in considering whether the conviction should be allowed to stand, the Court of Criminal Appeal will, on appeal, review all the facts of the case, bearing in mind that the jury had the opportunity of hearing and seeing the witnesses, and will quash the conviction if it thinks the verdict unreasonable or one that cannot be supported by the evidence. *R.* v. *Baskerville* [1916] 2 K. B. 658; 86 L. J. (K. B.) 28; 25 Cox, C. C. 524; 12 Cr. App. R. 81; *R.* v. *Bryant*, 13 Cr. App. R. 49. Where there is insufficient warning and no corroborative evidence the Court of Criminal Appeal will on appeal quash the conviction. *R.* v. *Norris*, 12 Cr. App. R. 156.

The kind of corroboration required is not confirmation by independent evidence of everything the accomplice relates, as his evidence would be unnecessary if that were so. *R.* v. *Mullins*, 3 Cox, 526, 531. What is required is some independent testimony which affects the accused by tending to connect him with the crime; that is, evidence, direct or circumstantial, which implicates the accused, which confirms in some material particular not only the evidence given by the accomplice that the crime has been committed, but also the evidence that the accused committed it. *R.* v. *Baskerville*, *supra*.

Where a specific charge is made and details given silence may, in a proper case, amount to corroboration. *R.* v. *Feigenbaum* [1919] 1 K. B. 431; 83 J. P. 123; 14 Cr. App. R. 1.

The evidence of one accomplice cannot be corroborated by the evidence of another. *R.* v. *Noakes*, 5 C. & P. 326; approved in *R.* v. *Baskerville*, *supra*.

The wife of an accomplice is not necessarily an accomplice, and her evidence may therefore be good corroboration. *R.* v. *Willis* [1916] 1 K. B. 933; 85 L. J. (K. B.) 1129; 114 L. T. 1047; 32 T. L. R. 452; 12 Cr. App. R. 44. But *semble*, where the wife of an accomplice is called to confirm the accomplice's evidence the jury should be warned as to her evidence. *R.* v. *Neal*, 7 C. & P. 168: *R.* v. *Payne*, 8 Cr. App. R. 171: *R.* v. *Willis*, *supra*.

Where two persons are indicted together corroboration implicating one only is not corroboration as to the other. *R.* v. *Jenkins*, 1 Cox, 177; approved in *R.* v. *Baskerville*, *supra*.

In cases of incest mere submission on the part of the woman may not be sufficient in the absence of permission to constitute her an accomplice. *R.* v. *Dimes*, 76 J. P. 47. In cases of sodomy or similar offences a boy between seven and fourteen may be held to be an accomplice where there is evidence to show that he had a guilty knowledge. *R.* v. *Cratchley*, 9 Cr. App. R. 232.

Where a woman was accused of administering a noxious drug with a view to cause miscarriage, evidence of the father of the woman to whom it was administered, that he had accused the prisoner of administering it, and that she did not deny it, was held corroboration. *R.* v. *Cramp*, 14 Cox, 390, Denman, J. Such cases should now be considered in the light of *R.* v *Christie*, cited, *ante*, p. 393.

On the hearing of a complaint under the *Bastardy Laws Amendment Act*, 1872, s. 4, evidence of the conduct of the alleged father at his trial on indictment for carnal knowledge of the complainant in having given evidence before the committing magistrates that the complainant was a fast girl, but having

made no such suggestion at the trial, has been held to be corroboration of the complainant that he was the father of her child. *Mash* v. *Darley* [1914] 3 K. B. 1226. But evidence of opportunity for or of the possibility of sexual intercourse between the parties is not corroborative evidence within the section. *Burbury* v. *Jackson*, 25 Cox, 515; nor is attention to the woman before and after the birth of the child necessarily corroboration. *Thomas* v. *Jones* [1921] 1 K. B. 22.

Where it is proposed to call an accomplice for the Crown, it is the practice: (A) not to include him in the indictment; or (B) to take his plea of guilty on arraignment: *Winsor* v. *R.*, L. R. 1 Q. B. 289, 390; or during the trial, if he withdraws his plea of not guilty: *R.* v. *Tomey*, 2 Cr. App. R. 329: or before calling him either (C) to offer no evidence and permit his acquittal: *R.* v. *Owen*, 9 C. & P. 83: *or* (D) to enter a *nolle prosequi*: *R.* v. *Feargus O'Connor*, 4 St. Tr. (N. S.) 935. As we have already seen, 6 & 7 Vict. c. 85, s. 1 (*ante*, p. 454), renders persons competent as witnesses, notwithstanding that they may have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, whether civil or criminal, in which they may be offered as witnesses; subject, however, to certain exceptions, which will be presently stated.

Parties to the suit.]—In *civil* actions, until the *Evidence Act*, 1851 (14 & 15 Vict. c. 99), neither party to a suit was allowed to give evidence for or obliged to give evidence against himself. The rule as to the competence of parties to give evidence was never properly applicable to criminal proceedings.

Prosecutor.]—The indictment being at the suit of the Crown, the private prosecutor was always considered a competent witness.

Defendant.]—The defendant at common law was not a competent or compellable witness at any stage of the proceedings, on the ground of the maxim *Nemo tenetur seipsum prodere*, which protected both the defendant and all witnesses in the case from liability to answer incriminating questions (*see post*, p. 469), and if the defendant were examined on oath any conviction would be bad. *R.* v. *Sullivan*, Ir. Rep., 8 C. L. 404. Nor was he bound to answer questions put to him at the preliminary inquiry or even when articles of the peace were sworn against him. *Lort* v. *Hutton*, 45 L. J. (M. C.) 95. On this last point the law has been altered as to summary proceedings by 42 & 43 Vict. c. 49, s. 25.

The position of the defendant has been gradually changed by a series of statutory provisions culminating in and superseded by the *Evidence Act*, 1877, and the *Criminal Evidence Act*, 1898.

40 & 41 Vict. c. 14 (*Evidence Act*, 1877), s. 1.]—"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the

wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence." [*These proceedings, even before the passing of this Act, had been regarded as in substance of a civil nature. R.* v. *Stephens*, L. R. 1 Q. B. 702; 35 L. J. (Q. B.) 251.]

47 & 48 Vict. c. 14 (*Married Women's Property Act*, 1884), s. 1.]—In any such criminal proceeding against a husband or a wife as is authorised by the *Married Women's Property Act*, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence. [*See ss.* 12 *and* 16 *of the Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *and s.* 36 *of the Larceny Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 50, *post*, p. 500.]

61 & 62 Vict. c. 36 (*Criminal Evidence Act*, 1898), s. 1. *Defendant and husband or wife of defendant competent witnesses for the defence.*]—"Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows :—

(a.) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application :

(b.) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution :

(c.) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged :

(d.) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage :

(e.) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged :

(f.) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

(g.) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence :

(h.) Nothing in this Act shall affect the provisions of section eighteen of the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), or any right of the person charged to make a statement without being sworn."

Competent witness.]—This provision appears to supersede all prior enactments, which rendered the defendant a competent witness, except the *Evidence Act*, 1877 (41 & 42 Vict. c. 14, *supra*). *See Charnock* v. *Merchant* [1900] 1 Q. B. 474; 69 L. J. (Q. B.) 221; 19 Cox, 443; and s. 6 of the Act, *post*, p. 466.

Charged jointly.]—In the case of an indictment against two or more defendants, one defendant may give evidence for the Crown against a co-defendant in the following cases :—

1. Where a *nolle prosequi* has been entered. *R.* v. *Sherman*, Case (K. B.) *temp.* Hardw. 303.

2. Where a verdict of acquittal has been given. *R.* v. *Rowland*, Ry. & M. 401.

3. Where the defendant in question has pleaded guilty on arraignment or during trial (*ante*, p. 168). *R.* v. *Tomey*, 2 Cr. App. R. 329 : *R.* v. *George*, C. & Mar. 111 : *R.* v. *Hinks*, 1 Den. 84; 2 C. & K. 462 : *R.* v. *Drury*, 3 C. & K. 190, Rolfe, B. : *R.* v. *King*, 1 Cox, 232, Platt, B. : *R.* v. *Williams*, 1 Cox. 289 : *R.* v. *Arundel*, 4 Cox, 260 : *R.* v. *Gallagher*, 13 Cox, 61 (C. C. R.); 1 Chit. Cr. L. 428.

4. Where, though jointly indicted, he is not being tried with the defendant against whom he gives evidence. *Winsor* v. *R.*, L. R. 1 Q. B. 390; 35 L. J. (M.) 161.

In all these cases a defendant is also a competent witness for a co-defendant. It has been said that a defendant who has pleaded guilty should be sentenced before being called in favour of a co-defendant. *R.* v. *Jackson*, 6 Cox, 525, Erle, J. If he is called for the Crown, his evidence needs corroboration. *R.* v. *Sparks*, 1 F. & F. 388; *and see ante*, p. 455.

Wife or husband.]—As to its effect on enactments making the defendant's husband or wife a competent witness, *see* ss. 4, 6, *post*, pp. 465, 466.

For the defence.]—The prisoner ought to be distinctly told by the Court of trial that he has a right to give evidence on his own behalf. *R.* v. *Warren*, 73 J. P. 359, C. C. A.; but failure to so inform him does not of itself necessarily invalidate the trial. *R.* v. *Saunders*, 68 L. J. (Q. B.) 296; 63 J. P. 24. The words " for the defence " allow a defendant to give evidence for a co-defendant who is indicted and tried " jointly " with him. *R.* v. *Macdonell* or *Macdonald*, 2 Cr. App. R. 322; 73 J. P. 490. For case of joint trial of husband and wife

who each gave evidence incriminating the other, *see R.* v. *Martin* [1905] 9 Canada Cr. Cas. 371 (Ont.). If the jury disagree on a trial in which the defendant has been sworn as a witness, and the indictment is tried again, it would seem that his evidence on the former trial may be put in against him. *R.* v. *Sharpe* [1903] 5 West. Austr. Rep. 125.

Every stage of the proceedings.]—These words do not include proceedings before the grand jury, but apply to proceedings at the preliminary inquiry and before the petty jury. *R.* v. *Rhodes* [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83; 19 Cox, 182: *R.* v. *Saunders*, 63 J. P. 24. They include evidence given after a plea of guilty but before sentence in mitigation of punishment. *R.* v. *Wheeler*, 86 L. J. (K. B.) 40; 81 J. P. 75; 12 Cr. App. R. 159; 33 T. L. R. 21. Evidence given by the defendant at the preliminary inquiry is admissible against him at the trial, even if he is not there called as a witness. *R.* v. *Bird*, 19 Cox, 180; 62 J. P. 760 (C. C. R.). *In R.* v. *Humphries*, 67 J. P. 396, Wills, J., intimated that if the defendant did not exercise at the preliminary inquiry his right to give evidence, and was content to reserve his defence, the value of his evidence at the trial was thereby lessened. This view has been adopted by many judges. *See R.* v. *Winkworth*, 1 Cr. App. R. 129, 130; and *see* charge of Lord Alverstone to grand jury, *ante*, p. 175.

Where a defendant does not give evidence in his own behalf at the trial he will not be allowed to give evidence on appeal against his conviction save in exceptional cases, and if then called he will be called as the first witness in support of the appeal. *R.* v. *Malvisi*, 73 J. P. 392; 2 Cr. App. R. 251.

Solely or jointly.]—In 1871 it was decided that where two persons were indicted and tried together, one could not be called as a witness for the other. *R.* v. *Payne*, L. R. 1 C. C. R. 349; 41 L. J. (M. C.) 65. The common law rule laid down in this case is not directly affected by the Act of 1898. *See R.* v. *Sheriff*, Lewes Assizes, November, 1900; 35 L. J. Newsp. 664, Bruce, J. But as each defendant is entitled to be called "for the defence," and not merely "on his own behalf," he seems to be free to give evidence which may exculpate or inculpate a co-defendant. *R.* v. *Hadwen* [1902] 1 K. B. 882; 71 L. J. (K. B.) 581; 20 Cox, 206; 66 J. P. 456: *R.* v. *Macdonell* or *Macdonald* [1909] 2 Cr. App. R. 322; 73 J. P. 490. If called for a co-defendant he may be cross-examined to show his own guilt. *R.* v. *Rowland* [1910] 1 K. B. 458; 79 L. J. (K. B.) 327. And if he goes into the witness-box to give evidence for the defence and is sworn, even though the only evidence he gives is a confession of his own guilt, he may be cross-examined by counsel for the prosecution, and the questions may be directed to incriminating a co-prisoner. He is then in the same position as an ordinary witness. *R.* v. *Paul* and *R.* v. *McFarlane* [1920] 2 K. B. 183; 14 Cr. App. R. 155.

Where it appears to the Court that the prosecutor has included one of the defendants in the indictment simply to shut him out from giving evidence for a co-defendant, and that there is no evidence affecting the defendant so unjustly joined, the Court may direct his immediate acquittal. *Davis* v. *Living*, Holt (N. P.) 275; and *see* Gilb. Ev. 132, 134; Buller (N. P.) 285: *R.* v. *Frazer*

(1797), McNally, Ev. 56 (Ir.): *R.* v. *O'Donnell*, 7 Cox, 337 (C. C. R. Ir.): *R.* v. *Owen*, 9 C. & P. 83. An alternative course in such a case is to direct that the defendants be separately tried: in which case the defendant not under trial is a competent witness for the defendant who is under trial. *R.* v. *Payne* (*supra*). Such an order was made in *R.* v. *Bradlaugh*, 15 Cox, 217: and *see* *R.* v. *Archer*, 3 Cox, 228, Maule, J.]

Proviso:—

(*a*) *Defendant not compellable witness.*]—"A person so charged shall not be called as a witness in pursuance of this Act except upon *his own application*."

His own application.]—This appears to mean on the application of the defendant himself or by his counsel with his consent.

(*b*) *Comment on failure to give evidence.*]—"The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence, shall not be made the subject of any comment by the prosecution."

By the prosecution.]—Though counsel may not comment on failure by the defendant to give evidence, the judge may comment if in his discretion he thinks it proper to do so. *R.* v. *Rhodes* [1899] 1 Q. B. 77, 83; 68 L. J. (Q. B.) 83; and *cf.* *Kops* v. *R.* [1894] A. C. 650; 64 L. J. (P. C.) 34. As to the effect of comment by counsel for the prosecution that the accused's wife had not been called by him, *see* *R.* v. *Dickman*, 74 J. P. 449. *See also* *Ross* v. *Boyd*, 5 Fraser, Just. Sc. 64. The fact that the defendant did not give evidence before the justices may be matter for unfavourable comment. *R.* v. *Humphries*, *ante*, p. 460. And the jury are entitled to draw inferences unfavourable to the defendant where he is not called to establish an innocent explanation of facts proved by the prosecution, which without such explanation tell for his guilt. *R.* v. *Corrie* [1904] 68 J. P. 294 (C. C. R.): *R.* v. *Bernard*, 1 Cr. App. R. 218.

(*c*) *Evidence of wife or husband of accused.*]—"The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged." *See post*, pp. 465, 466.

(*d*) *Communication between spouses privileged.*]—"Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage." *See post*, p. 467.

(*e*) *Incriminating questions.*]—"A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged." *See post*, p. 469.

(*f*) *Questions as to other offences or character.*]—"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character."

Shall not be asked . . . question tending to show.]—Any question or series of questions which would reasonably lead a jury to believe that it was being imputed to the accused that he had committed another offence comes within the words "tending to show" in this section. The expression includes more questions than the simple one whether the accused has committed a particular offence. The point cannot always be decided by looking merely at a single question, but each question must be judged in the light of others asked before and after. *R.* v. *Ellis* [1910] 2 K. B. 746; 79 L. J. (K. B.) 841; 22 Cox, 330; and *see R.* v. *Beecham* [1921] 3 K. B. 464; 85 J. P. 276; 37 T. L. R. 932; 16 Cr. App. R. 26. The statute forbids such questions to be put. *Id.*: *Barker* v. *Arnold* [1911] 2 K. B. 120; 80 L. J. (K. B.) 820; 22 Cox, 533; 75 J. P. 364.

Questions put in such a way as to make the accused either admit he was in prison at the time referred to by counsel or commit perjury are in direct opposition to the Act. *R.* v. *Haslam*, 85 L. J. (K. B.) 1511; 114 L. T. 617; 12 Cr. App. R. 10. *See also R.* v. *Ratcliffe*, 89 L. J. (K. B.) 135; 84 J. P. 15; 14 Cr. App. R. 95 (examination by judge). So also questions put for the purpose of establishing that the accused was swindling other people by other means than those charged in the indictment are questions put to show that he is a person of bad character, and are therefore improper. *R.* v. *Wilson*, 11 Cr. App. R. 251.

Any offence.]—Where such questions are admissible under the exceptions *infra* they may relate to convictions or offences subsequent to the offence for which the accused then stands charged, as well as to prior convictions or offences. *R.* v. *Wood* [1920] 2 K. B. 179; 84 J. P. 92; 14 Cr. App. R. 149.

Exception 1.]—"Unless (i) the proof that he has committed or been convicted of such offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or"

Admissible evidence.]—As to cases in which evidence of other offences is admissible to show guilt of the offence charged, *see ante*, pp. 355 *et seq.*, and *sub tit.* "*Receiving*," *post*, p. 722; and as to giving evidence of other convictions where evidence of good character has been given, *see ante*, p. 365.

Exception 2.]—"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or"

Imputations on the character of the prosecutor, etc.]—Where the defence set up is that one or more of the witnesses for the prosecution committed the offence charged against the accused and questions are asked of them with a view to showing this, the nature and conduct of the defence involve imputations

on the character of witnesses for the prosecution. The words of the statute must receive their ordinary and natural interpretation, and are not to be qualified by adding words such as "unnecessarily" or "unjustifiably" or "for purposes other than that of developing the defence," or similar words. *R.* v. *Hudson* [1912] 2 K. B. 465; 81 L. J. (K. B.) 861; 23 Cox, 61. So in a charge of larceny, where witnesses for the prosecution were asked questions by counsel for the accused with a view to showing they had committed the theft, it was held that cross-examination of the accused as to a previous conviction was justified. *Id.* So also on an indictment for murder, a suggestion on behalf of the defence that a witness for the crown had committed the offence was held to be an imputation within this part of the section. *R.* v. *Marshall*, 63 J. P. 36, Darling, J.

In cases not falling within this class, where the matters suggested as involving imputations on the character of the prosecutor or the witnesses for the prosecution are isolated and do not form any substantial part of the defence, the test is whether these matters involve the proposition on the part of the defence that the jury ought not to believe the prosecutor or one of his witnesses, on the ground that his conduct (not his evidence in the case, but his conduct outside the evidence given by him) makes him an unreliable witness. If that is so, the jury then ought also to know the character of the accused who either gives such evidence or makes such charge. *R.* v. *Preston* [1909] 1 K. B. 568; 78 L. J. (K. B.) 335. *See also R.* v. *Bridgwater* [1905] 1 K. B. 131; 74 L. J. (K. B.) 35 : 20 Cox, 737 : *R.* v. *Westfall*, 76 J. P. 335; 107 L. T. 463; 23 Cox. 185. In one case Day, J., ruled that cross-examination of the prosecutrix in a charge of rape, with a view to prove consent, involves an imputation on her character. *R.* v. *Fisher*, 34 L. J. (Newsp.) 100; Jelf on Criminal Evidence, 70. *In R.* v. *Sheean*. 72 J. P. 232; 24 T. L. R. 459; 21 Cox, 561, Jelf, J., ruled to the contrary; the question as to which of these two rulings is correct, was reserved for future consideration in *R.* v. *Preston*, *supra*. So questions put to a witness for the prosecution in cross-examination, as to whether she did not keep a disorderly house, with a view to discredit her evidence, come within the terms of the section. *R.* v. *Morrison*, 6 Cr. App. R. 159; and so may questions put with a view to showing that a witness whom the prosecution admit is an accomplice has been guilty of other criminal acts. *R.* v. *Watson*, 23 Cox, 543; 29 T. L. R. 450, followed in *R.* v. *Cohen*, 10 Cr. App. R. 91. So also may evidence that the prosecution is entirely without foundation, and has been started by way of revenge for some other matter outside the case. *R.* v. *Roberts* otherwise *Spalding*, 15 Cr. App. R. 65; 37 T. L. R. 69. A defence which involves a *bonâ fide* dispute as to accounts is clearly not an attack upon a witness for the prosecution. *R.* v. *Morgan*, 5 Cr. App. R. 157; and merely to deny in strong terms a statement made by the prosecutor is not necessarily an imputation on his character or that of his witnesses. *R.* v. *Rouse* [1904] 1 K. B. 184; 73 L. J. (K. B.) 60; 20 Cox, 592; 68 J. P. 14. Comments by the defendant on the course adopted by a police officer in conducting his identification proceedings were held not to involve imputations within the meaning of this section. *R.* v. *Preston*, *supra*; but evidence that a police officer has bribed the accused in

order to induce him to make a confession has been held to come within the section, though given in answer to questions in cross-examination. *R.* v. *Wright*, 5 Cr. App. R. 131. So also evidence given by answers in cross-examination that a witness for the crown is such a "horrible liar" that his brother will not speak to him may be sufficient. *R.* v. *Rappolt*, 6 Cr. App. R. 156; but an accusation of habitual drunkenness made against the prosecutor and of undue violence on arrest made against a police officer have been held not to amount to such an attack as to let in cross-examination as to the accused's own character. *R.* v. *Westfall*, 107 L. T. 463; 76 J. P. 335. *Primâ facie* answers given by a defendant to questions put in cross-examination are not a part of the "nature or conduct of the defence," but are part of the case for the prosecution. *R.* v. *Jones*, 74 J. P. 30; 3 Cr. App. R. 67. If such questions are in the nature of a trap an involuntary imputation on the character of a witness for the crown made in the answer will not justify putting in evidence of the bad character of the accused. *R.* v. *Jones*, *supra*; *R.* v. *Seigley*, 6 Cr. App. R. 106. The imputations must be against a witness for the prosecution and not against persons not called as witnesses. *R.* v. *Westfall*, 76 J. P. 335. In *R.* v. ——, Swansea Summer Assizes, 1898, 33 L. J. (Newsp.) 563, Day, J., under this sub-section allowed cross-examination as to previous acquittals, presumably as falling within the word "charged." In *R.* v. *Benson*, 3 Cr. App. R. 70, the appellant, who conducted his own case at the trial, had cross-examined a witness for the prosecution in a manner which brought him within the peril of s. 1 (*f*), ii., *supra*. He received no warning at the time, but upon going into the witness-box himself he was warned by counsel for the prosecution that if he gave evidence of his own good character (as he was proceeding to do), the prosecution "would have a word to say about it." Thereupon he desisted from giving such favourable evidence, but, notwithstanding this, counsel for the prosecution asked, and obtained, leave to cross-examine him as to character, by reason of his conduct at an earlier stage of the case in cross-examining a witness for the prosecution. The Court of Criminal Appeal held that such cross-examination of the defendant to credit was justified, and dismissed the appeal.

In an indictment for murder the defence was that the act was done in self-defence, the man who was killed having made improper overtures to the defendant and on their being rejected having violently assaulted him. Questions were addressed to the defendant in cross-examination which had no reference to the charge of murder but which tended to show that he had been guilty of obtaining money by false pretences, upon the ground that the defence involved an imputation on the character of the prosecutor. It was held that the deceased man was not "the prosecutor" within the meaning of this sub-section. *R.* v. *Biggin* [1920] 1 K. B. 213; 89 L. J. (K. B.) 90; 83 J. P. 293; 14 Cr. App. R. 87.

Exception 3.]—"(iii) he has given evidence against any other person charged with the same offence."

Evidence against any other person charged, etc.]—Where one of the defendants jointly indicted gives evidence on his own behalf, and in so doing incriminates the other defendant, counsel for the latter is entitled to cross-

examine. *R.* v. *Hadwen* [1902] 1 K. B. 882: 71 L. J. (K. B.) 581: 20 Cox, 206; 66 J. P. 456. *See also R.* v. *Seigley*, 6 Cr. App. R. 106.

(*g*) *Evidence from witness box.*]—" Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses gave their evidence."

[*The defendant is ordered to give evidence from the dock where there is reason to believe that he is likely to be violent.*]

(*h*) *Unsworn statements before justices and court of trial.*]—" Nothing in this Act shall affect the provisions of section 18 of the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), or any right of the person charged to make a statement without being sworn."

[*As to the provisions of* 11 & 12 *Vict. c.* 42, *s.* 18, *see ante* p. 380; *as to the right to make unsworn statements at the trial*, see ante, p. 203.]

Sect. 2.—*Time for calling defendant.*]—" Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution."

After the close of the evidence.]—This means before counsel for the prosecution sums up his case, and without prejudicing his right to do so. *R.* v. *Rhodes* [1899] 1 Q. B. 77, 83; 68 L. J. (Q. B.) 83. The section does not affect the right of the defendant to call witnesses to character, but seems to require that the defendant be first called. Where the defendant also calls witnesses to fact, the order in which he and these witnesses should be called appears to be in the discretion of his counsel. But *see R.* v. *Morrison*, 6 Cr. App. R. 159, at p. 165, *per* Lord Alverstone, L.C.J. Counsel has the right to open his case to the jury when he is calling evidence. *See R.* v. *Hill*, 7 Cr. App. R. 1, at p. 3.

Sect. 3.—*Right of reply.*]—" In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."

Evidence . . . for the defence.]—*See R.* v. *Gardner* [1899] 1 Q. B. 150; 68 L. J. (Q. B.) 42; and *ante*, pp. 205 *et seq.* In *R.* v. *Paget*, 64 J. P. 281, Fulton, Recorder, held that where one defendant gave evidence hostile to a co-defendant, cross-examination on behalf of the latter did not give the prosecution a right to reply.

Sect. 4.—*Calling of wife or husband in certain cases.*]—" (1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule of this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

" (2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

[*As to the effect of this section*, see post, p. 467.]

Sect. 5.—*Application of the Act to Scotland.*]

Sect. 6. *Provision as to previous Acts.*]—" (1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the *Evidence Act*, 1877 (40 & 41 Vict. c. 14, *ante*, p. 457).

" (2) But this Act shall not apply to proceedings in courts martial unless so applied—

" (*a*) As to courts martial under the *Naval Discipline Act* (29 & 30 Vict. c. 109), by general orders made in pursuance of section 65 of that Act; and

" (*b*) As to courts martial under the *Army Act* (44 & 45 Vict. c. 58), by rules made in pursuance of section 70 of that Act."

[*The Act has been applied to courts martial in the navy and army.*]

Sect. 7.—*Extent, commencement, and short title.*]—" (1) This Act shall not extend to Ireland.

" (2) This Act shall come into operation on the expiration of two months from the passing thereof (Aug. 12, 1898).

" (3) This Act may be cited as the *Criminal Evidence Act*, 1898."

SCHEDULE.

ENACTMENTS REFERRED TO.

Session and chapter.	Short title.	Enactments referred to.
5 Geo. 4, c. 83 .	*The Vagrancy Act*, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family (s. 3).
8 & 9 Vict. c. 83 .	*The Poor Law (Scotland) Act*, 1845.	*Sect.* 80.
24 & 25 Vict. c. 100.	*The Offences against the Person Act*, 1861.	*Sects.* 48 *to* 55.
45 & 46 Vict. c. 75 .	*The Married Women's Property Act*, 1882.	*Sect.* 12 *and sect.* 16. [Sect. 12 *of this Act was held not to apply to proceedings under* s. 16. R. *v.* Brittleton, 12 Q. B. 266; 53 L. J. (M. C.) 83; *but the statute was amended by* 47 & 48 Vict. c. 14.]
48 & 49 Vict. c. 69 .	*The Criminal Law Amendment Act*, 1885.	The whole Act.
8 Edw. 7, c. 45 (*a*) .	*The Punishment of Incest Act*, 1908.	The whole Act. *See* s. 4 (4) of the Act.
8 Edw. 7, c. 67 (*a*) .	*The Children Act*, 1908.	Part II. of that Act and the first schedule to that Act. *See* s. 27 of the Act.
3 & 4 Geo. 5, c. 28 (*a*) .	*The Mental Deficiency Act*, 1913.	*Sect.* 56 of that Act.

(*a*) These enactments have been added by subsequent legislation.

3. *Privilege.*

Doctor and patient.]—There is no privilege entitling a medical practitioner to refuse to give in evidence statements made to him by a patient, however confidential the communication may be. *Wilson* v. *Rastall*, 4 T. R. 753: *Duchess of Kingston's case*, 20 St. Tr. 355, 572; 2 Smith, L.C. (11th ed.) 731.

Husband and wife.]—Communications between husband and wife during the marriage are privileged from disclosure in evidence. This right is preserved as to criminal cases by the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36), s. 1 (d) (*ante*, p. 461).

That statute has to a considerable extent altered the law as to evidence by the husband or wife of an accused person. The present law appears to be as follows:—

1. The husband or wife of the prosecutor has always been a competent witness either for the Crown or for the defence. Taylor, Evid. (11th ed.), s. 1364.

2. The husband or wife of a defendant to an indictment within the *Evidence Act*, 1877 (40 & 41 Vict. c. 14), is a competent and compellable witness for the Crown or the defence (*see ante*, p. 457).

3. The husband or wife of a defendant is a competent witness *for the defence* in all criminal cases whether the defendant is charged solely or jointly. The *Criminal Evidence Act*, 1898, s. 1, ante, p. 458. Except in the cases referred to in s. 6 (1), and in s. 4 and the schedule to that Act (*ante*, pp. 465, 466), as extended in 1908 (*ante*, p. 466), the husband or wife can be called only on the application of such defendant (s. 1 (c), *ante*, p. 458).

4. At common law, as a general rule, the husband or wife of a defendant is not a competent witness for the Crown *against* such defendant: 2 Hawk. c. 46, s. 70: *R.* v. *Cliviger*, 2 T. R. 263: *Davis* v. *Dinwoody*, 4 T. R. 678. This rule is subject to the following exceptions:—

(*a*) In cases of high treason. But this is very doubtful. *R.* v. *Griggs*, Sir T. Raym. 1; 2 Hawk. c. 46, s. 82; 1 Hale, 48, 301; 1 Co. Litt. 6 b.

(*b*) When the husband is indicted for personal injury to the wife, or *vice versâ*: 2 Hawk. c. 46, ss. 77, 80, 81; 1 Hale, 301: *R.* v. *Azire*, 1 Str. 633: *R.* v. *Jagger*, 1 East, P. C. 455; 2 Russ. Cr. (7th ed.) 2281: *R.* v. *Pearce*, 9 C. & P. 667: *R.* v. *Serjeant*, Ry. & M. 352: *R.* v. *Jellyman*, 8 C. & P. 604. In *Lord Audley's case*, 3 St. Tr. 401, a wife was held a competent witness to prove that her husband was present and aided and abetted another in committing a rape on her. And on an indictment of a husband for the murder of his wife, the dying declarations of the wife have been admitted. *R.* v. *Woodcock*, 1 Leach, 500: 1 East, P. C. 354, 356: *R.* v. *Johns*, 1 East, P. C. 357; 1 Leach, 504, n.

(*c*) On an indictment for forcible abduction and marriage the wife is a competent witness against the husband even though the marriage is valid, or if voidable has not been annulled. 2 Hawk. c. 46, s. 78: *R.* v. *Wakefield*, 2 Lew. 279; Murray's Report, 257; M. & M. 197 n.: *R.* v. *Perry*, 2 Russ. Cr. (7th ed.) 2278. This rule is based by some on the view that the marriage, being under coercion, is null. 1 Hale, 301; Buller (N. P.), 286; and *see Scott* v. *Sebright*, 12 P. D. 21: *Cooper* v.

Crane [1891] Prob. 369; by others on the view that the force used is a personal wrong to the wife. Taylor, Evid. (11th ed.), s. 1370.

(*d*) On an indictment for bigamy the second wife is a competent witness on the first marriage being proved. 1 Hale, 693: *R.* v. *Peat*, 2 Lew. 288; 1 Russ. Cr. (7th ed.). But this is only an apparent exception, and depends on the fact that the second marriage is void: for the common law rule only applies where there is a valid marriage. *R.* v. *Young*, 2 Cox, 291, Erle, J.; Taylor, Evid. (11th ed.), s. 1365; *and see R.* v. *Fuzil Deen*, 6 Queensland L. J. 302.

All these common law exceptions are preserved by s. 4 (2) of the Act of 1898, *ante*, p. 465.

Statutory Exceptions.]—By s. 4 (1) of the Act of 1898 (*ante*, p. 465), the husband or wife of a defendant is entitled to give evidence either for the Crown or for the defence, without the consent of such defendant, in the case of proceedings under any of the enactments originally inserted in, or subsequently added to, the schedule (*see ante*, p. 466).

As to the questions to be asked of such a witness upon being called into the witness-box for the purpose of ascertaining whether he or she consents to give evidence, *see R.* v. *Acaster* (No. 2), 76 J. P. 263; 106 L. T. 384; 22 Cox, 743.

The wife or husband of a person charged with an offence under the *Vagrancy Act*, 1898 (61 & 62 Vict. c. 39), may be called as a witness either for the prosecution or defence and without the consent of the person charged. 2 & 3 Geo. 5, c. 20 (*Criminal Law Amendment Act*, 1912), s. 7 (6). This enactment gets rid of the decision in *Director of Public Prosecutions* v. *Blady* [1912] 2 K. B. 89; 81 L. J. (K. B.) 613; 22 Cox, 715.

By the *Children* (*Employment Abroad*) *Act*, 1913 (3 & 4 Geo. 5, c. 7), s. 3 (4), the wife or husband of a person charged with an offence under that Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

By the *Criminal Justice Administration Act*, 1914 (4 & 5 Geo. 5, c. 58), s. 28 (3), the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence and without the consent of the person charged.

Under these statutes the husband or wife, though a competent, is not a compellable witness. *R.* v. *Leach* [1912] A. C. 305; 76 J. P. 203; 22 Cox, 721; 81 L. J. (K. B.) 616.

5. Where two or more persons are indicted and tried *jointly*, the wives or husbands of such persons were at common law not competent witnesses either for or against their own spouses or their co-defendants. *R.* v. *Thompson*, L. R. 1 C. C. R. 377; 41 L. J. (M. C.) 112. That case is not directly overruled by the *Criminal Evidence Act*, 1898. The husband or wife cannot be called for the Crown against any of the co-defendants except in cases within the schedule to the Act of 1898 (*ante*, p. 466), and the common law exceptions above stated. And one spouse cannot be called for the defence save as in the statute provided, except on the application of the accused spouse. But if called it is submitted that the witness is free to give evidence for or against any of the

defendants subject to cross-examination by the Crown or the defendant inculpated. *R.* v. *Hadwen* (*ante*, p. 464).

The rules on this subject are substantially the same as in the case of evidence by co-defendants for or against each other. Thus a wife may give evidence for or against the co-defendants if her husband has been convicted (*R.* v. *Williams*, 8 C. & P. 284) or has pleaded guilty (*R.* v. *Thompson*, 3 F. & F. 824) or is not being tried with the persons indicted jointly with him. Taylor, Evid. (11th ed.), s. 1357; *and see ante*, p. 459.

Incriminating questions.]—A witness other than the defendant is privileged to refuse to answer any question which might tend to criminate him, *i.e.*, to expose him to any punishment, penalty, or forfeiture. After some former difference of opinion among the judges it is now settled that for the purpose of impeaching the credit of a witness he may always be asked on cross-examination questions with regard to alleged crimes or other improper conduct on his part. (Taylor, Evid. (11th ed.), s. 1453; 2 Russ. Cr. (7th ed.) 2348, and the cases there cited.) But the witness cannot be compelled to answer such questions where the answers would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture of any nature. *R.* v. *Slaney*, 5 C. & P. 213: *R.* v. *Garbett*, 1 Den. 236; 2 C. & K. 474: *Mexborough* (*Earl*) v. *Whitwood* [1897] 2 Q. B. 111; 66 L. J. (Q. B.) 637: *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; 48 L. J. (Q. B.) 34; Taylor, Evid. (11th ed.), s. 1453, and cases there cited; 2 Russ. Cr. (7th ed.) 2348. And the *Evidence Act*, 1851 (14 & 15 Vict. c. 99), expressly provides (s. 3) that nothing in that Act contained shall render any person compellable to answer any question *tending to criminate* himself or herself. The objection is for the witness to take, and he is presumed to know the law sufficiently to enable him to take it. *R.* v. *Coote*, L. R. 4 P. C. 599; 42 L. J. (P. C.) 45. Counsel for the opposite side cannot argue the question: *R.* v. *Adey*, 1 M. & Rob. 94: *Thomas* v. *Newton*, M. & M. 48, n.; and if the witness answers without objection, his answer is admissible on a charge as to the offence admitted. *R.* v. *Sloggett*, Dears. 656; 25 L. J. (M. C.) 93. But the witness may claim the protection of the Court at any stage of the inquiry; although he may already have answered without objection some questions tending to criminate him. *R.* v. *Garbett*, 2 C. & K. 474. The witness is not himself the sole judge whether his evidence will bring him into danger; the Court must be satisfied, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, whether there really is reasonable ground to apprehend danger to him from his being compelled to answer. *Ex parte Reynolds*, 20 Ch. D. 294 (C. A.); 51 L. J. (Ch.) 756: *Osborn* v. *London Docks Co.*, 10 Ex. 698; 24 L. J. (Ex.) 140: *Sidebottom* v. *Adkins*, 27 L. J. (Ch.) 152: *R.* v. *Boyes*, 1 B. & S. 311; 30 L. J. (Q. B.) 301: *Ex parte Fernandez*, 10 C. B. (N. S.) 3, 39, 40; 30 L. J. (C. P.) 231: *Spokes* v. *Grosvenor Hotel Co.* [1897] 2 Q. B. 124; 66 L. J. (Q. B.) 598. But if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the judge is bound to insist on the witness answering, unless he is satisfied that the

answer will tend to place him in peril. *Ex parte Reynolds, supra.* The privilege of refusing to answer questions on the ground that the answers may tend to criminate him is that of the witness alone, and neither party to the suit can take any advantage therefrom. *Boyle* v. *Wiseman*, 10 Ex. 647; 24 L. J. (Ex.) 160: *R.* v. *Kinglake*, 11 Cox. 499; 18 W. R. 805. Therefore, where a witness, called on the part of the Crown to prove bribery against the defendant, refused to give evidence on the ground that his evidence would tend to criminate himself, but on the objection being overruled by the judge, gave his evidence, the Court of Queen's Bench held, that the defendant could not object that such evidence had been improperly received. *R.* v. *Kinglake*, *supra*.

Where a witness, being interrogated as to his conduct on a particular occasion, refuses to answer on the ground that his evidence may render him liable to prosecution, the production to him of a pardon under the great seal for all offences committed by him on the occasion referred to takes away his privilege, and makes him compellable to answer. Thus, on the trial of an information filed by the attorney-general, by direction of the House of Commons, against A. for bribery at a parliamentary election, B., a witness for the Crown, on being asked whether he had not received money for his vote, refused to answer the question. Counsel for the Crown then produced and tendered to him a pardon under the great seal for all offences which he might have committed at or in relation to such election. The Court held that after tender of the pardon the witness was bound to answer all questions relating to what he did at the election; and overruled a further objection on his part that he was still liable to impeachment by parliament, from which the pardon would have been no protection (*see* 12 & 13 W. 3, c. 2, s. 3), holding that this possibility was too remote and improbable a contingency to affect the case, or to give the witness any privilege. *R.* v. *Boyes*, 1 B. & S. 311; 30 L. J. (Q. B.) 301; 2 F. & F. 157. *See R.* v. *Reading*, 7 St. Tr. 259, 296: *R.* v. *Kinglake*, *supra*.

The rule against incriminating questions does not apply to a defendant who is called as a witness on his own behalf under the *Criminal Evidence Act*, 1898, so far as relates to the offence then charged against him; *see* s. 1 (*e*), *ante*, p. 458. But a defendant when so called may not be asked and shall not be required to answer as to having committed or having been charged with or convicted of any offence not charged in the indictment, except in the cases provided by s. 1 (*f*) of the Act (*ante*, p. 458).

Judges and jurors.]—Hawkins (bk. 2, c. 46, s. 83) says that it is no exception against a person as a witness that he is one of the judges or jurors who are to try the case. But the functions of judge and juror would now be regarded as wholly incompatible with that of a witness (*see* Taylor, Evid. (11th ed.), s. 938; 2 Russ. Evid. (7th ed.) 2348). A grand juror is debarred by his oath, and privileged, from giving evidence on matters which occurred in proceedings before the grand jury (*see ante*, p. 73), and Taylor, Evid. (11th ed.), s. 942; 2 Russ. Cr. (7th ed.) 2346). The same rule appears to apply to petty jurors, Taylor, Evid. (11th ed.), s. 945.

Lawyer and client.]—" For the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that of course this limitation has been put, and justly put, that no court can be called upon to protect communications which are in themselves part of a criminal or unlawful proceeding." *Bullivant* v. *Att.-Gen. for Victoria* [1901] A. C. 196, 200; 70 L. J. (K. B.) 645, Halsbury, L.C. This privilege, therefore, does not extend to communications made to a solicitor by his client before the crime for the purpose of being guided or helped in the commission of it. *R.* v. *Cox and Railton*, 14 Q. B. D. 153; 54 L. J. (M. C.) 41: *R.* v. *Jones*, 1 Den. 166: *R.* v. *Farley, Id.* 197; 2 C. & K. 313; 2 Cox, 82: *R.* v. *Hayward*, 2 C. & K. 234; 2 Cox, 23: *R.* v. *Smith*, 114 L. T. 239; 80 J. P. 31; 31 T. L. R. 617; 11 C. R. App. R. 229; and *cf. Williams* v. *Quebrada Rail., etc., Co.* [1895]2 Ch. 751; 65 L. J. (Ch.) 68. In *R.* v. *Haydn* [1825] 2 Fox & Sm. 379 (Ir.), on an indictment for libel, a witness for the Crown testified that the defendant consulted him about certain MS., and asked whether it was safe to publish it. Bushe, C.J., ruled that the communication was privileged, and that the person asking advice must be considered as seeking how to avoid and not how to commit a crime. In *Bullivant* v. *Att-Gen. for Victoria*, *supra*, it was held that there must be some proof, or at least definite allegation, of fraud or illegality to take away the privilege. The privilege is strictly confined to counsel, and to solicitors and their clerks and agents, including interpreters between them and their clients. *Parkins* v. *Hawkshaw*, 2 Stark. (N. P.) 239: *Taylor* v. *Forster*, 2 C. & P. 195: *Foote* v. *Hayne*, Ry. & M. 165: *du Barre* v. *Livette*, Peake (3rd ed.) 108. It does not extend to stewards or other agents of the party; *Vaillant* v. *Dodemead*, 2 Atk. 524: *Wilson* v. *Rastall*, 4 T. R. 753. The privilege depends on the existence of the relation of lawyer and client at the time when the lawyer acquired the information, not on its existence at the time when the lawyer is called on to give evidence. *Minet* v. *Morgan*, L. R. 8 Ch. App. 361; 42 L. J. (N. S.) 627: *R.* v. *Brewer*, 6 C. & P. 363: *R.* v. *Farley*, 1 Den. 197; 2 C. & K. 313; 2 Cox, 82: *R.* v. *Hankins*, 2 C. & K. 823; 3 Cox, 434. And information acquired by a solicitor to a bank has been held not to be rendered privileged by his subsequent retainer by directors of the bank for their defence. *R.* v. *Brown*, 7 Cox, 442; S. C., *sub nom.*, *R.* v. *Esdaile*, 1 F. & F. 213. And where on a trial for forgery, a witness who had been served with a *subpœna duces tecum* objected that the documents came into his possession as the solicitor of the prisoner in a previous prosecution instituted by him, it was held that the documents must be produced. *R.* v. *Brown*, 9 Cox, 281, Willes, J. *Cf. R.* v. *Tylney*, 1 Den. 319; 18 L. J. (M. C.) 36: *R.* v. *Avery*, 8 C. & P. 596. And where an attorney refuses, and is justified in refusing, to produce documents, secondary evidence may be given of the contents. *Coates* v. *Birch*, 2 Q. B. 252. If, being solicitor for the defendant, he holds papers in another capacity, he must produce them; as, for instance, a solicitor and steward of a lord of a borough is bound to produce public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough. *R.* v. *Woodley*, 1 M. & Rob. 390. The

privilege has been held not to apply to the contents of a notice served upon him by the solicitor on the other side, requiring him to produce at the trial a certain paper belonging to his client in his hands, *Spenceley* v. *Schulenburgh*, 7 East, 357, or the like. *See Kennedy* v. *Lyell*, 23 Ch. D. 387, 405; 9 A. C. 81; 53 L. J. (Ch.) 449 : *Foakes* v. *Webb*, 28 Ch. D. 287, 289; 54 L. J. (Ch.) 262. And where a solicitor was present at the time his client swore to an answer in Chancery, it was held that he could be compelled to give evidence of that fact, on an indictment against his client for perjury. Bull. (N. P.) 284 : *sed contrà*, *R.* v. *Watkinson*, 2 Str. 1122. So he may be called to prove his client's handwriting, though the knowledge was obtained from witnessing his execution of a bail-bond in the action; *Hurd* v. *Moring*, 1 C. & P. 372; and he may be called to prove his client's identity. *Studdy* v. *Sanders*, 2 D. & R. 347; *contrà Parkins* v. *Hawkshaw*, *supra*. And if he is a subscribing witness to a deed of his client, he may be examined as to his execution of it. *Doe* v. *Andrews*, 2 Cowp. 845 : *Robson* v. *Kemp*, 4 Esp. 233; 5 Esp. 52 : *Doe* v. *Roe*, 6 Dowl. 518. A letter written by a solicitor for a client is not inadmissible on the ground of privilege as evidence against the client in a prosecution against the latter, but to make it evidence against the client, it must be shown that the letter was written in pursuance of the client's instructions, and it is not sufficient to prove merely that it was written by the solicitor *in consequence* of an interview with his client. *R.* v. *Downer*, 14 Cox, 486 (C. C. R.).

Master and servant.]—A servant may be a witness for or against the master or mistress; Gilb. Evid. 135; a master or mistress for or against the servant.

Parent and child.]—A father or mother may be a witness for or against their child. *R.* v. *Oakhampton* (*Mayor of*), 1 Wils. (K. B.) 332; *and see R.* v. *Bramley* [1795] 6 T. R. 330 : *Stapleton* v. *Stapleton* [1736] Cas. (K. B.) *temp.* Hardwicke, 277; *Anon.*, 1 Salk. 289 : *Goodright* v. *Moss* [1777] 2 Cowp. 591; and a child, for or against his father or mother; Gilb. Evid. 135.

Priest and penitent.]—The question whether ministers of religion, and in particular Roman Catholic priests, have any privilege from giving evidence of confessions has not been authoritatively decided. Steph. Dig. Evidence (5th ed.) 204. The canons of the English Church contemplate that confessions should be under the seal of secrecy. The tendency of judicial *dicta* is that while in strict law the privilege does not exist, the minister should not be required to give evidence as to a confession made to him. *Butler* v. *Moore*, McNally, Evid. 253 (Ir.) : *R.* v. *Sparkes*, Peake (3rd ed.) 109, *cit.* : *Broad* v. *Pitt*, 3 C. & P. 518, Best, C.J.; 2 Russ. Cr. (7th ed.) 233. *R.* v. *Gilham*, 1 Mood. 186, 203 : *R.* v. *Griffin*, 6 Cox, 219 : *R.* v. *Hay*, 2 F. & F. 4.

State privilege or public policy.]—Where the disclosure of a particular fact, not bearing directly upon the matter in question, may be of detriment to the public service, the Court will not compel a witness to disclose it. Documents or information received officially are privileged if the officer declares it to be injurious in the public interest to produce or disclose them. *Home* v. *Bentinck*,

2 B. & B. 130, 162 : *Att.-Gen.* v. *Briant*, 15 L. J. (N. S.) Ex. 265 ; 15 M. & W. 169 : *R.* v. *Fergus O'Connor*, 4 St. Tr. (N. S.) 935, 1050 : *Beatson* v. *Skene*, 29 L. J. (N. S.) Ex. 430 ; 5 H. & N. 838 ; 29 L. J. (Ex.) 430 : *Hennessy* v. *Wright*, 57 L. J. (Q. B.) 594 : *Williams* v. *Star Newspaper Co.*, 24 T. L. R. 297 ; Taylor, Evid. (11th ed.), ss. 608 *et seq.* ; Roscoe, Nisi Prius, Evidence (18th ed.), p. 174. In *R.* v. *Watson*, 2 Stark. (N. P.) 116, 136 ; 32 St. Tr. 1, 98, a witness for the Crown was held entitled to refuse to say through whom he made a disclosure to the Government. In *R.* v. *Smith O'Brien*, 7 St. Tr. (N. S.) 1, an informer was held entitled to refuse to disclose the source of his information when its disclosure would expose his informant to the risk of assassination ; and in *R.* v. *Hardy*, 24 St. Tr. 199, 753, a witness who was employed to obtain information of the proceedings at a meeting of one of the corresponding societies was not allowed to disclose the name of his employer. It is the usual practice not to press a police witness for the names of persons on whose information he has acted in the detection of crime, unless the evidence is directly material or necessary in the interests of the prisoner. *R.* v. *Richardson*, 3 F. & F. 693 ; and *cf. Marks* v. *Beyfus*, 25 Q. B. D. 494 ; 59 L. J. (Q. B.) 579, where the Director of Public Prosecutions was held to be entitled to refuse to disclose the names of persons on whose information he instituted a prosecution.

4. *Credit of Witnesses.*

The credibility of a witness depends upon (1) his knowledge of the facts he testifies ; (2) his disinterestedness ; (3) his integrity ; (4) his veracity ; and (5) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath (*post*, p. 478). Proportioned to these is the degree of credit his testimony deserves from the Court and jury.

Knowledge.]—Although a witness is perfectly disinterested, although he is a man of integrity and veracity, and has a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium : from defects in his power of observation : from his attention being occupied more by the circumstances accompanying it than by the fact itself at the time of its occurrence ; or from a thousand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake (*see* Munsterberg, Psychology and Crime). Where there is a doubt, therefore, whether the evidence given by a witness is not founded on some misconception, it is the duty of the counsel who cross-examine him to question him as to the sources of his knowledge ; his reasons for believing the fact to be as he has stated ; his reasons for recollecting it : the circumstances attending its occurrence ; whether it was light or dark ; and whether he was near or distant at the time it occurred, and the like : so that the jury may be able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuses

to answer such questions, or does not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

Disinterestedness.]—A witness, to be perfectly credible, must not be in the slightest degree biassed or partial to one party or the other. Therefore, if it appears that the witness is prejudiced against the party against whom he appears, or has before expressed sentiments indicative of such prejudice, or if it appears that a prosecution is pending against him for the same or a similar offence, and he comes to disprove some of the facts charged in the indictment against the defendant—all these are circumstances which detract proportionably from his credit. That the prosecutor will derive an advantage from a conviction of the defendant is no objection to his competency, as we have seen, *ante*, p. 457; it goes to his credit merely. A father is a competent witness for his son, and a son for his father; and husband and wife for each other (*see ante*, pp. 457, 472); but the interest arising from the relationship detracts proportionately from the credit of the witness. *See* 2 Hale. 276; Gilb. Evid. 149, 155.

Integrity.]—Since the *Evidence Act*, 1843 (6 & 7 Vict. c. 85, s. 1 (*ante*, p. 455)), the fact that a witness has been convicted of crime affects only his credit, and not his competency. As to prior law, *see R.* v. *Teal*, 11 East, 307. Whether a witness has or has not been convicted, witnesses may be called to speak as to his general character, although not as to any particular offence of which he may be guilty. 2 Hawk. c. 46, s. 207; *R.* v. *Rookwood*, 13 St. Tr. 139, 211: *R.* v. *Watson*, 2 Stark. (N. P.) 116, 149; 32 St. Tr. 1. In order to impeach the credit of a witness for veracity, witnesses may be called by the other side to prove that his general reputation is such that they would not believe him upon his oath. *R.* v. *Brown*, L. R. 1 C. C. R. 70; 36 L. J. (M. C.) 59. They need not have heard him on oath. *R.* v. *Bispham*, 4 C. & P. 392. As to cross-examination, see *post*, p. 491.

All other questions (not being questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture, as to which *see ante*, p. 469) for the purpose of impeaching a witness's character not only may be put, but must be answered, although the answer may degrade the witness's character. *Cundell* v. *Pratt*, M. & M. 108. And a witness may not refuse to produce a document kept by him under the authority of an Act of parliament, on the ground that it may criminate himself. *Bradshaw* v. *Murphy*, 7 C. & P. 612. If the witness be examined as to the offence or improper conduct imputed to him, and deny it, his denial is conclusive, if the question is merely collateral to the point in issue, and it is not permissible to call witnesses or offer other evidence to contradict him. *R.* v. *Watson*, 2 Stark. (N. P.) 116, 149; 32 St. Tr. 1: *Harris* v. *Tippett*, 2 Camp. 637: *R.* v. *Burke*, 8 Cox, 44 (Ir.): *R.* v. *Cracknell*, 10 Cox, 408, Willes, J.; and *see R.* v. *Cargill* [1913] 2 K. B. 271; 82 L. J. (K. B.) 655; 23 Cox, 382; 77 J. P. 347; 108 L. T. 816; 29 T. L. R. 382. But if the question is relevant to the point at issue, and the witness denies the thing imputed, he may be contradicted. *Yewin's case*, 2 Camp. 638. In that case the witness was asked whether he had not said that he would be avenged on his master, and would fix him in gaol. This he denied,

but he was allowed to be contradicted. So where a witness for the prosecution denied on cross-examination that he had had a quarrel with the prisoner and had threatened to be revenged on him, evidence was allowed to be given to contradict him. *R.* v. *Shaw*, 16 Cox, 503, Cave, J. By s. 6 of *Denman's Act* (28 & 29 Vict. c. 18, which by s. 1 extends to all courts of criminal judicature), "a witness may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the *cross-examining* party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of 5*s*. and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." This enactment seems to apply where a defendant, giving evidence on his own behalf, denies previous convictions lawfully put to him under s. 1 (*f*) (iii.) of the *Criminal Evidence Act*, 1898 (*ante*, pp. 459, 464).

Where general evidence is given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination. It has been held that where a witness refuses to answer a question his not answering ought not, legally, to have any effect with the jury. *R.* v. *Watson*, 2 Stark. (N. P.) 116, 157; 32 St. Tr. 1: *Rose* v. *Blakemore*, Ry. & M. 382: *Lloyd* v. *Passingham*, 16 Ves. 59; but the soundness of this rule is very questionable: *see* Taylor, Evid. (11th ed.), s. 1467.

In *Queen Caroline's case*, 2 B. & B. 284, 311; 1 St. Tr. (N. S.) 1348, it was held that where a witness for the prosecution had been examined in chief, the defendant could not afterwards give evidence of any declaration by such witness, or of acts done by him to procure persons corruptly to give evidence in support of the prosecution, unless he had previously cross-examined such witness as to such declarations or acts.

Veracity.]—The character of a witness for habitual veracity is an essential ingredient in his credibility: for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury; and if he has formerly sworn the contrary, the fact (although no objection to his competency, *R.* v. *Teal*, 11 East, 309) is almost conclusive against his credibility. As to the modes of testing veracity, *see post*, p. 491, *Cross-examination*.

A consideration of the probability of a fact also may aid in forming a

judgment of the credit that should be given to a witness for veracity. If he tells of a fact having occurred which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge should be indisputable to induce any one to believe it : but if, on the contrary, the fact stated by him is very likely to have happened, persons may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, etc. The strength of the evidence should always be great in proportion to the improbability of the fact to be established by it.

Oath.]—The general common law rule is that the testimony of a witness to be examined *vivâ voce* in a criminal trial is not admissible unless he has previously been *sworn* to speak the truth. Counsel has no privilege from being sworn, even if he acts only as interpreter. *R.* v. *Kelly* [1848] 3 Cox, 75, Patteson, J. Even a peer, who in a court of equity was allowed to give in his answer to a bill without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness on a criminal trial or in a court of common law. *Earl of Lincoln's case*, Sir W. Jones, 152, 154; Cro. Car. 64 : *Meers* v. *Lord Stourton* [1711] 2 Salk. 513; 1 P. Wms. 146; 24 Eng. Rep. 332; *and see* 2 Mod. 99. It will be seen (*post*, pp. 478, 479) that this general common law rule is subject to important statutory exceptions. The witness must be sworn in open court by the judge, or, as is the usual course, by the clerk of the Court or the crier or some other officer, often the judge's clerk. *R.* v. *Tew*, Dears. 429; 24 L. J. (M. C.) 62. By whatever officer or person the witness is so sworn in court by authority of the law of the land the oath is taken before the Court. *R.* v. *Tew*, *supra;* 2 Russ. Cr. (7th ed.) 2296; *and see R.* v. *Shuttleworth* [1909] Victoria L. R. 431.

Form of oath.]—The standard form of oath is now that prescribed by the *Oaths Act*, 1909 (9 Edw. 7, c. 39).

By s. 2, " (1) Any oath may be administered and taken in the form and manner following :—

" The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words 'I swear by Almighty God that . . .', followed by the words of the oath prescribed by law.

" (2) The officer shall (unless the person about to take the oath *voluntarily objects* thereto or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question :

" Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful."

By s. 3, " In this Act the word 'officer' shall mean and include any and every person duly authorized to administer oaths."

Under this Act it is not for the officer to inquire what form of oath the witness desires, but it is for the witness to say whether he desires to adopt any

other than the statutory form of oath. The witness may still be sworn in the old way if he wishes. *R.* v. *Palm*, 4 Cr. App. R. 201.

Where the witness voluntarily objects to take an oath in the above form, the form which he may lawfully take varies according to his religion or nationality or his personal inclination. *See R.* v. *Mildrone*, 1 Leach, 412. Christians are usually sworn on the New Testament; Jews, on the Old Testament; Mahometans, on the Koran; and persons of other religions according to the form prescribed for that purpose by the religion they profess. Bull. (N. P.) 292. Christians are sworn with their hats off; Jews, with their hats on. As to swearing in Christian form a man born a Jew and married according to Jewish rites and unbaptized, but professing to be a member of the Established Church, *see R.* v. *Gilham* [1775] 1 Esp. 285. As to the mode of swearing Chinamen, *see R.* v. *Entrehman*, C. & Mar. 248; Stringer on Oaths (2nd ed.) 86, 124. Even among the different sects of Christians there may be different modes of taking the oath. *R.* v. *Mildrone*, 1 Leach, 412; *and see R.* v. *M'Carther*, 1 Peake (3rd ed.) 211 Each witness, in short, may claim to take the oath in the particular form accepted or prescribed by his religion or his national law. The only general rule that can be laid down upon the subject is, that the oath must be such as the witness deems obligatory upon his conscience. *See R.* v. *Taylor*, 1 Peake (3rd ed.) 14. Sect. 5 of the *Oaths Act*, 1888 (51 & 52 Vict. c. 46), which enacts that "if any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland (*a*), he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question," appears only to be declaratory of the common law. The right to be sworn in this manner is not affected by the *Oaths Act*, 1909, *supra*. *R.* v. *Mildrone*, *supra*. By the *Oaths Act*, 1838 (1 & 2 Vict. c. 105), it is expressly declared that, in all cases in which an oath may lawfully be administered, the party is bound by the oath administered, provided it have been administered in such form and with such ceremonies as he may declare to be binding. By the *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), part of s. 1 of the *Oaths Act*, 1838, is repealed, and by s. 15 (1) it is enacted that for the purposes of this Act the forms and ceremonies used in administering an oath are immaterial, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection or has declared to be binding on him. And by the *Oaths Act*, 1888 (51 & 52 Vict. c. 46),

(*a*) The oath administered in court in Scotland is in the following terms:—"I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth." It is administered by the judge, the witness repeating the words after the judge, and the judge and witness each standing and holding up the right hand. As the oath is rather long to be followed by a witness if administered in one sentence, it is in practice divided into parts, thus: "I swear by Almighty God" (these words repeated by witness), "and as I shall answer to God" (these words repeated by witness), "at the great day of judgment" (these words repeated by witness), "that I will tell the truth" (these words repeated by witness), "the whole truth, and nothing but the truth" (these words repeated by witness).

s. 3, "where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath." The cases immediately following were decided before the passing of 51 & 52 Vict. c. 46 (*Oaths Act*, 1888). A witness may be asked, after he is sworn, whether he considers the oath he has taken obligatory upon his conscience; but if he answers in the affirmative his answer is conclusive, and he cannot further be asked whether there is any other mode of swearing more binding upon his conscience than that which has been used. *Queen Caroline's case*, 2 B. & B. 284; 1 St. Tr. (N. S.) 1348. The more correct and proper way in case of doubt is to ask the witness, before he is sworn, whether he considers the oath he is about to take obligatory upon his conscience. *Id.* A witness, however, may, either before he is sworn, or after he has been sworn upon the *voire dire* (*Maden* v. *Catanach*, 7 H. & N. 360; 21 L. J. (Ex.) 118), or, *semble*, even after he has been sworn in the cause (*Queen Caroline's case*, *supra*), be asked whether he believes in the being of a Deity, and in a future state of rewards and punishments: *Maden* v. *Catanach*, *supra:* but he cannot be questioned as to the particular tenets of his religion. *See R.* v. *Taylor*, 1 Peake (3rd ed.) 14: *R.* v. *White*, 1 Leach, 430: *R.* v. *Serva*, 2 C. & K. 53, as to whether when the witness does not object to be sworn on the ground of his having no religious belief, an objection to him on that ground may successfully be made by the opposite party, notwithstanding 51 & 52 Vict. c. 46. s. 1 (*infra*).

Affirmation in lieu of oath.—1. Quakers and Moravians.]—By 3 & 4 W. 4, c. 49, a Quaker or Moravian, required to give evidence in any legal proceeding whatsoever, instead of taking an oath in the usual form, is permitted to make a solemn affirmation or declaration (instead of taking an oath), which has the same force and effect in all courts of justice and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form. The same rule is, by 1 & 2 Vict. c. 77, extended to any person who *shall have been* a Quaker or Moravian; it having been held that a person formerly a Quaker, who had seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refusing to affirm under the form given in 3 & 4 W. 4, c. 49, was not admissible as a witness in a criminal case on making the affirmation under 9 G. 4, c. 32 (*rep.*). *R.* v. *Doran*, 2 Mood. 37. 3 & 4 W. 4, c. 49, and 1 & 2 Vict. c. 77, are not repealed: but their effect is equally attained by s. 1 of the *Oaths Act*, 1888 (51 & 52 Vict. c. 46), *infra*. Perjury and kindred offences are now dealt with in the *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), s. 15 (2).

The form of the affirmation of a Quaker or Moravian is as follows:—

"*I*, A. B., *being one of the people called Quakers* [or, *one of the persuasion of the people called Quakers*, or *of the United Brethren, called Moravians*], *do solemnly, sincerely, and truly declare and affirm that*," etc. (3 & 4 W. 4, c. 49, s. 1).

The affirmation of a person formerly a Quaker or Moravian is as follows:—

"*I*, A. B., *having been one of the people called Quakers* [or, *one of the*

persuasion of the people called Quakers, or *of the United Brethren, called Moravians*], *and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm that*," etc. (1 & 2 Vict. c. 77).

2. Affirmation in lieu of oath where witness objects to be sworn on religious or other grounds.]—" Every person *upon objecting to being sworn*, and stating, as the ground of such objection, either that he has *no religious belief*, or that *the taking of an oath is contrary to his religious belief*, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath." 51 & 52 Vict. c. 46 (*Oaths Act*, 1888), s. 1.

The form of affirmation to be taken under this section instead of an oath is as follows :—

"*I*, A. B., *do solemnly, sincerely, and truly declare and affirm*," then proceeding with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness (51 & 52 Vict. c. 46, s. 2).

Unsworn evidence of a child of tender years.]—A child of tender years can be examined without being sworn in any criminal proceedings (*ante*, p. 453), and may be liable to be punished summarily for perjury. 8 Edw. 7, c. 67, s. 30; 4 & 5 Geo. 5, c. 58, s. 28 (2).

Witness under subpœna duces tecum.]—A witness producing documents under a *subpœna duces tecum* need not be sworn, if the party who calls him does not wish to examine him. *Perry* v. *Gibson*, 3 L. J. (N. S.) K. B. 158; 1 A. & E. 48 : *Summers* v. *Moseley*, 2 Cr. & M. 477 : *Daris* v. *Dale*, M. & M. 514.

5. The Number of Witnesses requisite.

General rule—One witness sufficient.]—At common law, one witness is sufficient in all cases (with the exception of perjury), at the trial. 2 Hawk. c. 46, ss. 2, 10; Fost. 233. As to evidence by accomplices, *see ante*, p. 455. As to witnesses before the grand jury, *see ante*, p. 74.

Exceptions—1. Treason.]—In high treason or misprision of treason two witnesses are in general required, both before the grand jury and at the trial: both of the witnesses to the same overt act, or one of them to one overt act, and another of them to another overt act of the same species of treason; unless the defendant willingly, and without violence, confesses the same. 7 & 8 W. 3, c. 3, ss. 2, 4; 2 Hawk. c. 46, ss. 3-9. And if the jury do not give credit to both of the witnesses, the defendant must be acquitted. *R.* v. *Palmer*, 7 St. Tr. 1067, Scroggs, C.J. But where the overt act is composite, made up of several circumstances and passing through several stages, it is not necessary that there should be two witnesses to each circumstance and at each stage. It is enough if the joint testimony of two or more witnesses establish the act as a whole.

R. v. *M'Cafferty*, 10 Cox, 603; Ir. Rep. 1 C. L. 363. And one witness is sufficient to prove a collateral fact: Fost. 242; as, for instance, to prove that the defendant is a natural-born subject, *R.* v. *Vaughan*, 13 St. Tr. 485, or the like.

But where the overt act alleged is the assassination of the King, or any direct attempt against his life, or person, one witness is sufficient. 39 & 40 G. 3, c. 93; 5 & 6 Vict. c. 51, s. 1. *See post, tit.* "*Treason.*"

2. Perjury.]—A person may not be convicted of any offence against the *Perjury Act*, 1911, or of any offence declared by any other Act to be perjury or subornation of perjury or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false. 1 & 2 Geo. 5, c. 6, s. 13.

3. Personation.]—Upon a charge of personation at a parliamentary or municipal election it is necessary, in order to justify committal for trial, that not less than two credible witnesses should testify that the accused knowingly personated, and falsely assumed to vote in the name of, another: 6 & 7 Vict. c. 18, s. 88; 35 & 36 Vict. c. 33, s. 24; and this provision seems equally applicable to the trial.

4. Blasphemy and offences against religion.]—Two witnesses are necessary on a prosecution for blasphemy under 9 W. 3, c. 35 (*see* s. 1), or for offences under 1 Eliz. c. 1 (*see s.* 21; *and* 1 Russ. Cr. (7th ed.) 395).

5. Offences against females.]—The 2nd section of the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69), which makes it a misdemeanor to procure women or girls for the purpose of prostitution, and the 3rd section of the same statute, which makes it a misdemeanor to procure the defilement of women or girls by threats or fraud, or administering drugs, contain provisoes, that no person shall be convicted of any offence under such sections upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused. In the case of rape corroboration is required in practice, though not as a rule of law. *See* 1 Russ. Cr. (7th ed.) 941, 943, and *post, tit. Rape.*

6. Unsworn evidence of children.]—Sect. 30 of the *Children Act*, 1908 (8 Edw. 7, c. 67), which (as amended by 4 & 5 Geo. 5, c. 58, s. 28 (2)) renders admissible the evidence of a child of tender years, though not given upon oath, in any proceeding for an offence, provides that no person may be convicted on testimony admitted by virtue of the section on behalf of the prosecution unless corroborated by some other material evidence in support thereof implicating the accused.

6. *Process against Witnesses.*

Where there has been a preliminary inquiry under the *Indictable Offences Act*, 1848, followed by a committal for trial, the witnesses are generally, and ought always to be, bound over by recognizance to appear at the trial and give

evidence (*see* 11 & 12 Vict. c. 42, s. 20), except where from infancy or other cause they are incompetent to enter into a recognizance. *See R.* v. *Smith*, 17 Cox, 601. As to cases where the indictment is removed for trial at the Central Criminal Court, *see* 19 & 20 Vict. c. 16, ss. 8, 10. A magistrate has no power to issue a warrant for the apprehension of a person to attend to find bail for his appearance as a witness in a civil or criminal case. *Evans* v. *Rees*, 12 A. & E. 55; 9 L. J. (M. C.) 83.

1. Subpœna ad testificandum.]—Where the witnesses have not been so bound over, but are in England, if it is not certain that they will attend voluntarily, their appearance at the trial may be compelled by *subpœna*. In ordinary cases the common *subpœna* is sufficient. It may be sued out either at the Crown Office of the High Court, at the Royal Courts of Justice, in London (*R.* v. *Ring*, 8 T. R. 585; Short & Mellor, Cr. Pr. (2nd ed.) 405); or from the clerk of the peace, or clerk of assize of the Court in which the defendant is to be tried. It is sometimes more advisable to sue it out at the Crown Office, on account of the readiness with which the witness may be subjected to attachment in case of his non-attendance. *R.* v. *Ring*, *supra*. *See* the forms of Crown Office subpœna, Cr. Off. Rules, 1906, Appendix, Forms 151 *et seq.* Under the old practice the names of four witnesses might be inserted in one writ. 2 Cowp. 846. But in a Crown Office *subpœna* the names of three witnesses only can be inserted. Short & Mellor, Cr. Pr. (2nd ed.) 407. As soon as you have obtained the writ, make out a copy of it for each witness, and serve it upon him personally, at the same time showing him the writ. The service should be personal: for otherwise if the witness disobeys the *subpœna*, he cannot be proceeded against as for a contempt. *Smalt* v. *Whitmill*, 2 Str. 1054. And it should be served a reasonable time before the trial: *Hammond* v. *Stewart*, 1 Str. 510; but if the witness is in court at the time of the trial, a service of the *subpœna* ticket upon him there would perhaps be deemed sufficient if he were subpœnaed on the part of the defendant (*see* 2 Cowp. 845; 1 W. Bl. 36), and would certainly be sufficient if he were subpœnaed on the part of the prosecution. Indeed, in a criminal case, a person who is present in court when called as a witness is bound to give his evidence, although he has not been subpœnaed. *R.* v. *Sadler*, 4 C. & P. 218: *Blackburn* v. *Hargreave*, 2 Lew. 259. A *subpœna* vexatiously issued from the Crown Office may be set aside on motion. *R.* v. *Baines*, *Ex Parte Asquith* [1909] 1 K. B. 258; 78 L. J. (K. B.) 119.

By the *Writ of Subpœna Act*, 1805 (45 G. 3, c. 92), ss. 3, 4, the service of a writ of *subpœna* in any one part of the United Kingdom is as effectual to compel the appearance of a witness in any other part of the same, as if the *subpœna* were served in that part of the kingdom in which the defendant is required to appear; and in case of non-attendance the Court from which the *subpœna* issued may transmit a certificate thereof in the manner pointed out in the statute; *i.e.*, in the case of an English court to the High Court of Justiciary in Scotland, or the King's Bench Division of the Supreme Court of Ireland; and the Court to which it is so transmitted may punish the party for his default, in like manner as if he had refused to appear to a *subpœna* issuing

out of that court, provided it appear that a reasonable and sufficient sum of money to defray the witness's expenses of coming, attending to give evidence, and returning, were tendered to him at the time he was served with the *subpœna*. "Part of the United Kingdom" means "England," "Scotland," or "Ireland," not "county." *R.* v. *Brownell*, 3 L. J. (N. S.) M. C. 118; 1 A. & E. 598.

Where a *subpœna* is served in England, a tender of expenses does not seem to be necessary either on the part of the Crown or of the prisoner: 2 Hawk. c. 46, s. 173: *R.* v. *Cooke*, 1 C. & P. 321; Short & Mellor, Cr. Pr. (2nd ed.) 407; yet if the witness is so poor as not to be able to go to the assizes or sessions at his own cost, the fact of the expenses not having been tendered would probably be deemed by the Court a sufficient excuse for his non-attendance.

Provision is made by 13 G. 3, c. 63, ss. 40, 44, as to witnesses resident in India, and by 42 G. 3, c. 85, as to witnesses outside Great Britain, in prosecutions of public officers for offences. Sect. 689 of the *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), provides for the taking of evidence abroad in cases of offences at sea, or by British seamen; and s. 691 appears to give power to take depositions abroad as to any criminal offence whatever committed outside Great Britain subject to the conditions there stated, including the presence of the accused. *See ante*, p. 440.

2. Subpœna duces tecum.]—If any person (not being the defendant) have in his possession a document which may be requisite as evidence in the cause, then, instead of the common *subpœna*, he should be served with a *subpœna duces tecum*, commanding him to bring it with him, and produce it at the trial. *See* the form, Cr. Off. Rules, 1906, Appendix, forms 151 *et seq.* "Document" has been held to include a sealed packet deposited with bankers. *R.* v. *Daye* [1908] 2 K. B. 333. It is sued out and served in the same manner as the common *subpœna*. Upon being served with this *subpœna* the witness must attend at the trial with the document required, and produce it in evidence, unless he has some lawful and reasonable excuse for withholding it, of the validity of which excuse the Court, and not the witness, is to judge. *R.* v. *Daye*, *supra*: *Amey* v. *Long*, 9 East, 473; 6 Esp. 116; 1 Camp. 14, 180, n.; *and see* 5 Esp. 90. It is no excuse that the legal custody of the instrument belongs to another, if it is in the actual possession of the witness: *R.* v. *Daye*, *supra*: *Amey* v. *Long*, *supra*: *Corsen* v. *Dubois*, Holt (N. P.), 239. But the Court will not compel him to produce it, if it tends to criminate himself (*see* 1 Esp. 105, *and ante*, p. 469), or his client (if the witness is a solicitor), *R.* v. *Dixon*, 3 Burr. 1687); or if it is his title-deeds: *Pickering* v. *Noyes*, 1 B. & C. 262; 2 D. & R. 386: *R.* v. *Hunter*, 3 C. & P. 591. If the witness, instead of bringing the paper, etc., required, delivers them to the opposite party, by whom they are withheld, the Court will allow secondary evidence of the contents of them to be given, without a notice to produce the originals. *Leeds* v. *Cook*, 4 Esp. 256. A witness producing documents on *subpœna duces* need not be sworn. *See ante*, p. 479.

A *subpœna duces tecum* may not be served on a defendant in a criminal case. Notice to produce the document must be given instead (*vide ante*, p. 368).

3. Habeas corpus ad testificandum.]—If the witness at the time of the trial be in *civil custody or under process in a civil* action, suit, or proceeding, he may be brought into court to give evidence. The application for *habeas corpus* must be made on affidavit to a judge at Chambers : Cr. Off. Rules, 1906, r. 228. For forms of affidavit, *see* Appendix to Crown Office Rules, 1906, Nos. 181, 182. and for form of writ, *Id.*, No. 183, and as to the preparation and indorsement of the writ, *see* Cr. Off. Rules, 1906, r. 210. It is not necessary, where the evidence of the witness is required on a criminal trial, that the affidavit should state that he is willing to attend. Short & Mellor, Cr. Pr. (2nd ed.) 335. *Engross the writ; see the forms* supra. *It must be directed to the person in whose custody the witness is. As soon as you get the writ signed, etc., leave it with the officer to whom it is directed; pay or tender to him his reasonable charges for bringing up the witness, and he will bring him into court on the day of trial, according to the exigency of the writ.* A prisoner in execution may be brought up in this manner to give evidence : *Geery* v. *Hopkins*, 2 Ld. Raym. 851 : *R.* v. *Burbage*, 3 Burr. 1440, although it was formerly held otherwise. Barnes, 222 : Comb. 17, 48. So, a sailor on board a king's ship may be brought up by this writ, if he has been previously subpœnaed. *R.* v. *Roddam*, 2 Cowp. 672. But the Court will not grant the writ to bring up a prisoner of war; the proper way of proceeding in that case is by application to the Secretary of State. *Furly* v. *Newnham*, 2 Doug. 419. So, where the application appeared to be a mere contrivance to remove a prisoner in execution. the Court refused to grant it. *R.* v. *Burbage*, 3 Burr. 1440.

4. Judge's order.]—With regard to witnesses in *criminal custody* at the time of the trial, by the *Criminal Procedure Act*, 1853 (16 & 17 Vict. c. 30), s. 9, any judge of the superior courts has the power, on application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial, or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal; to be so brought under the same care and custody, and to be dealt with in the like manner in all respects as a prisoner brought up for the like purpose under a writ of *habeas corpus*. The application, if made to a judge under this section, may be made on affidavit for an order. Cr. Off. Rules, 1906, r. 229. For forms of affidavit *see* Appendix to Cr. Off. Rules, 1906, Nos. 181, 182, and for form of order, No. 184.

5. Secretary of State's Order.]—The powers of the Secretary of State under 16 & 17 Vict. c. 30, s. 9, are repealed and superseded by s. 11 of the *Prison Act*, 1898 (61 & 62 Vict. c. 41), which appears to apply to prisoners in civil or criminal custody, and to be available in all cases in which a *habeas corpus testificandum* or a judge's order could be issued. The section provides that " (1) A Secretary of State on proof to his satisfaction that the presence of any prisoner at any place is required in the interest of justice, or for the purposes of any public inquiry, may, by writing under his hand, order that the prisoner

be taken to that place. (2) A prisoner taken from a prison in pursuance of an order made under this section, or of a warrant issued under s. 9 of the *Criminal Procedure Act*, 1853 (*supra*), shall whilst outside the prison be kept in such custody as the Secretary of State may by general rules prescribe, and whilst in that custody shall be deemed to be in legal custody. (3) For the purposes of this section the expression 'prisoner' shall include any person lawfully confined under any sentence, or under commitment for trial or otherwise, and the expression 'prison' shall include any place in which any such prisoner is lawfully confined."

Privilege of witnesses from arrest.]—A person subpœnaed as a witness, or bound over by recognizance, either to prosecute or give evidence, enjoys a privilege from arrest on civil process whilst attending the Court, not only on the day mentioned in the *subpœna*, etc., but also on every day of the same sittings, assizes, or sessions, until the cause is tried; he is also privileged in like manner during a reasonable time before and after the trial, while coming to or returning from the place where the sittings, assizes, or sessions are held. *See Lightfoot* v. *Cameron*, 2 W. Bl. 1113: *Arding* v. *Flower*, 8 T. R. 534: *Re Freston*, 11 Q. B. D. 545; 52 L. J. (Q. B.) 545; Taylor, Evid. (11th ed.), ss. 1330 *et seq.* And this privilege has also been held to extend to witnesses attending voluntarily, and not subpœnaed. *See Meekins* v. *Smith*, 1 H. Bl. 629, 636. If a witness, under these circumstances, is arrested, the Court out of which the *subpœna* issued, or the judge of the Court in which the cause has been or is to be tried, will, upon application, order him to be discharged. *See* 3 Stark. (N. P.) 132.

Penalty for non-attendance.]—Where a witness wilfully neglects to attend or to produce documents at the sessions or assizes, etc., in obedience to a Crown Office *subpœna ad testificandum* or *duces tecum*, the High Court (K. B. D.) may grant an attachment against him (*R.* v. *Ring*, 8 T. R. 585: *R.* v. *Daye* [1908] 2 K. B. 333; 77 L. J. (K. B.) 659), if the witness was served personally with the *subpœna* (*Smalt* v. *Whitmill*, 2 Str. 1054: *Wakefield's case*, Cas. (K. B.) temp. Hardw. 313), and was served a reasonable time before the trial: *Hammond* v. *Stewart*, 1 Str. 510: *and see* 1 Marshall, 410. It is immaterial whether the cause was in fact called on or not, if it satisfactorily appears that the witness would not have been forthcoming when called on to give evidence. *Barrow* v. *Humphreys*, 3 B. & Ald. 598: *Mullett* v. *Hunt*, 1 Cr. & M. 752: *Dixon* v. *Lee*, 1 Cr. M. & R. 646: *R.* v. *Stretch*, 3 A. & E. 503: *Lamont* v. *Crook*, 9 L. J. (N. S.) Ex. 253; 6 M. & W. 615. It is doubtful whether a court of quarter sessions has authority to issue an attachment; the only mode of proceeding against the witness in such a case seems to be by indictment. As to the mode of proceeding where the *subpœna* has been served in Ireland or Scotland, *see* 45 G. 3, c. 92, *ante*, p. 481. Where a witness does not attend at the Court and time specified in his recognizance, the recognizance may be estreated and the penalty levied in the manner stated, *ante*, p. 95. Failure to attend in obedience to a *subpœna* issued by a court of quarter sessions does not fall within 45 G. 3, c. 92 (*ante*, p. 481), and has been held

not to be punishable by attachment in the Court of King's Bench, *R.* v. *Brownell*, 3 L. J. (N. S.) M. C. 118; 1 A. & E. 598.

Improper interference with witnesses.]—Any person preventing a witness duly summoned from attending court is liable to attachment or committal for contempt of court. *R.* v. *Hall*, 2 W. Bl. 1110: *Commonwealth* v. *Feely*, 2 Virg. Cas. 1. As to other offences which may be committed by interfering with witnesses, *see ante*, p. 131.

7. *Witnesses' Expenses, etc.*

At common law, a witness in criminal cases is not entitled to his expenses; 2 Hawk. c. 46, s. 173; at least, if he attend on the part of the prosecution. A witness subpœnaed for the defence cannot refuse to give evidence until his expenses are paid. *R.* v. *Cooke*, 1 C. & P. 321. The present statutory provisions as to expenses of witnesses in criminal cases are stated, *ante*, pp. 267 *et seq.*

8. *Examination of Witnesses.*

Ordering witnesses out of court.]—When the case is called on, or at any other period during the trial, the Court, at the request of the defendant (*R.* v. *Vaughan*, Cas. temp. Holt, 689; 13 St. Tr. 485, 494: *Peter Cook's case*, 13 St. Tr. 311, 348); or indeed at the request of either party, will order such of the witnesses of the opposite party as have not yet been examined, or are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side who are to be examined after him. *Southey* v. *Nash*, 7 C. & P. 632. This rule has been applied when a legal argument arises as to the witnesses' evidence. *R.* v. *Murphy*, 8 C. & P. 297 (*and see post*, p. 487 n.). The solicitor for either party is said not to be within this rule. *Pomeroy* v. *Baddeley*, Ry. & M. 430. It has been said that if, after such an order, a witness is present during the examination of the other witnesses, he cannot be examined; *Att.-Gen.* v. *Bulpit*, 9 Price. 4: *R.* v. *Webb*, 1 Stark. Evid. (3rd ed.) 189; but the conduct of the witness seems to be no ground for depriving the Crown, or the defendant, of a witness, and the practice is to allow him to be examined, subject to observation as to his conduct in disobeying the order; *R.* v. *Colley*, M. & M. 329: *R.* v. *Brown*, 4 C. & P. 588, n. This was formerly held to be a matter for the discretion of the judge. *Parker* v. *M'William*, 6 Bing. 683: *Beamon* v. *Ellice*, 4 C. & P. 585: *R.* v. *Wylde*, 6 C. & P. 380: *Cook* v. *Nethercote*, 6 C. & P. 471: 40 R. R. 855: *Thomas* v. *David*, 7 C. & P. 351. It seems now, however, to be the better opinion, that the judge has no right to reject the testimony of a witness who has remained in court after an order to withdraw: *Chandler* v. *Horne*, 2 M. & Rob. 423: *Cobbett* v. *Hudson*, 22 L. J. (N. S.) Q. B. 11; 1 E. & B. 11, 14; except, perhaps, in revenue cases. Taylor, Evid. (11th ed.), s. 1401.

Witness on back of indictment.]—Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the

indictment, it has been usual to do so, that the defendant may cross-examine them: *R.* v. *Simmonds*, 1 C. & P. 84: *R.* v. *Beezley*, 4 C. & P. 220: *R.* v. *Bull*, 9 C. & P. 22: *R.* v. *Vincent*, 9 C. & P. 91: *R.* v. *Barley*, 2 Cox, 191. If counsel will not call the witness, the judge in his discretion may. *R.* v. *Simmonds*, *supra*: *R.* v. *Bodle*, 6 C. & P. 186: *R.* v. *Holden*, 8 C. & P. 606: *R.* v. *Stroner*, 1 C. & K. 650: *R.* v. *Thompson*, 13 Cox, 181, Lush, J.: *R.* v. *Edwards*, 3 Cox, 82. In the last-mentioned case, Erle, J., referred to *R.* v. *Belaney*, 20 C. C. C. Sess. P. 441, where, the judge refusing to interfere, the prisoner in a trial for murder had to call some of the witnesses on the back of the indictment. Where a witness called before the coroner was not called for the Crown at the trial, the Court has refused to require him to be called. *R.* v. *Wiggins*, 10 Cox, 562. However, the prosecutor is not *bound* to call them all; though he ought, it has been said, to have them in court, that they may be called for the defence, if the prisoner chooses. *R.* v. *Woodhead*, 2 C. & K. 520: *R.* v. *Cassidy*, 1 F. & F. 79: *R.* v. *Thompson*, *supra*. If counsel for the prosecution, at the instance of the prisoner's counsel, calls a witness, but does not ask him a question, the former is entitled to re-examine the witness after he has been examined by the prisoner's counsel. *R.* v. *Beezley*, 4 C. & P. 220: *R.* v. *Harris*, 7 C. & P. 581; *and see post*, p. 497. The defendant is entitled to inspect the indictment to see the names of the witnesses. *R.* v. *Lacy*, 3 Cox, 517, Erle, J. But the Court cannot compel the prosecution to give their descriptions or addresses. *R.* v. *Gordon*, 12 L. J. (M. C.) 84, Patteson, J.

Witnesses not on depositions.]—Witnesses may be called for the Crown whose depositions were not taken before the committing magistrate, and whose names are not on the back of the indictment. *R.* v. *Ward*, 2 C. & K. 759. But notice of intention to call such additional witnesses with a copy of the evidence which it is proposed that they should give, ought to be given to the prisoner and sent to the Court. In *R.* v. *Connor*, 1 Cox, 233, Patteson, J., said, that he had no power to interfere in a case in which, after the prisoners were committed, a great body of additional evidence had been obtained, copies of which had been refused to the prisoners. In *R.* v. *Flannagan*, 15 Cox, 403, Butt, J., offered the defence an adjournment on a trial of murder to give time to rebut new evidence, of which notice had not been given, and in *R.* v. ——, Cent. Crim. Ct., Oct., 1893, Charles, J., refused to admit new evidence unless the prosecution could prove service of the proof on the defence. In *R.* v. *Hawkins* (Q. B. D., 1896), Russell, C.J., also required proof of notice of new evidence. In *R.* v. *Stiginani*, 10 Cox, 552, Willes, J., is said to have ruled that the evidence of a witness, whose deposition had not been taken before the committing magistrate, and in respect of whom the prosecution had given no notice to the prisoner that it was their intention to call him, was not admissible when tendered on the part of the prosecution. The same point, however, having been raised in *R.* v. *Greenslade*, 11 Cox, 412, Brett, J., after consulting Willes, J., said that he had the authority of the latter for saying that his ruling in *R.* v. *Stiginani*, *supra*, was incorrectly reported, and that evidence tendered under the circumstances above mentioned, if

relevant, ought to be received, although the fact of notice of its intended production not having been given to the prisoner or his solicitor was a subject of strong comment.

Questions by the judge.]—The judge may, of course, question any witness at any stage in the course of the trial; and, even though counsel for the prosecution has closed his case, and counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witness that he thinks fit, in order to answer the objection. *R.* v. *Remnant*, R. & R. 136.

Witness called by the judge.]—Where the judge calls a witness not called by either party (which he is not entitled to do in a civil case if either party objects) (*Re Enoch and Zaretzky* [1910] 1 K. B. 327, 332, 337; 79 L. J. (K. B.) 363), neither party is entitled to examine or cross-examine as of right. *Coulson* v. *Disborough* [1894] 2 Q. B. 316 : *R.* v. *Cliburn*, 62 J. P. 232 (Fulton, Recorder); but if the evidence is adverse to either party, such leave should be given. *Id.*

Reswearing witnesses.]—Where there are two prosecutions against the same party for felony, the judge cannot, even by consent, take the evidence on the first trial as given in the second. Sometimes witnesses have been resworn in the second case, and their evidence read over to them from the judge's notes; *R.* v. *Foster*, 7 C. & P. 495; and a similar course was adopted in a case of misdemeanor. *R.* v. *Lovett*, 3 St. Tr. (N. S.) 1177, 1179; 9 C. & P. 462. Where, however, on the trial of a prisoner, the jury, not being able to agree, were discharged, and the prisoner was again tried before another jury, and the judge, at the request of the prisoner and of his counsel, and with the consent of counsel for the Crown, instead of again taking the evidence *viva voce*, read over to the witnesses the evidence taken by himself at the first trial, asking each witness if he had anything to add or alter in his evidence, and also informing counsel for the prisoner and counsel for the Crown that if either of them wished to ask the witness any question he could do so, this mode of taking the evidence on the second trial was strongly disapproved by the Judicial Committee. *R.* v. *Bertrand*, L. R. 1 P. C. 520; L. J. (P. C.) 51 (*and see ante*, pp. 209, 221). A trial on admissions is not allowed unless they are made in open court by the defendant, or by his advocate with his authority. *R.* v. *Thornhill*, 8 C. & P. 575 (*ante*, p. 379).

Examination in chief.]—After the witness has been sworn or has made the necessary affirmation or declaration (*see* pp. 476, 478), counsel for the party who calls him proceeds to examine him. In doing this, the questions should be pertinent to the matter immediately in issue (*a*): and they should not be leading questions.

(*a*) In the United States it is common practice to send the jury out when objections to the admissibility of evidence are being argued. In *R.* v. *Freeman* [1895] 6 Queensland, L. J. 281, it was held by Griffith, C.J., that under the English practice the jury must be present throughout the proceedings. But in *R.* v. *Thompson* [1917] 2 K. B. 630; 12 Cr. App. R. 261, the Court of Criminal Appeal ruled that whenever the judge, in his

Firstly. The questions must be pertinent to the matter immediately in issue. No question may be asked of a witness upon a direct examination, the probable answer to which cannot have a tendency to prove the offence or defence, or other matter put in issue by the pleadings. In the case of circumstantial evidence the courts of necessity allow of a greater latitude in this respect; but still, in this case, the questions must be such as are likely to elicit evidence of facts from which the jury may reasonably presume the guilt or innocence of the prisoner. Upon an indictment for a conspiracy, general evidence of a conspiracy charged may be received in the first instance, although it cannot affect the defendant, unless afterwards brought home to him or to an agent employed by him. *Queen Caroline's case*, 2 B. & B. 284, 302; 1 St. Tr. (N. S.) 1348. (*See ante*, p. 354.) And the same rule applies where a defendant seeks, by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence (provided the proposed evidence is previously opened to the Court), as in the case of a prosecution for a conspiracy. *Id.* So, if A. commits a burglary, and B. stays outside the house for the purpose of preventing an interruption; upon the trial of B., the prosecutor first proves the offence committed by A., and then brings the guilt home to B. by proving his share in it. In these cases, however, the matter to be proved naturally branches itself into two propositions, that a certain conspiracy existed, and that the defendant was engaged in it; that A. committed the burglary, and that B. aided and assisted him in the commission of it.

Secondly. It is a general rule, that, in a direct examination of a witness, he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. *See R.* v. *Wilson*, 9 Cr. App. R. 124. To this rule, however, there are a few exceptions. To identify a person whom the witness has already described the person may be pointed out to him, and he may be asked, in direct terms, if that is the person he meant. *R.* v. *Watson*, 2 Stark. (N. P.) 116; 32 St. Tr. 1: *R.* v. *De Berenger*, Stark. Evid. (4th ed.) 167, n. As to the proper questions to be asked to prove identification, *see R.* v. *Blackburn*, 6 Cox, 333. Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked, in direct terms, whether that fact ever took place. *Courteen* v. *Touse*, 1 Camp. 43.

Questions which are merely introductory to others that are material are in general allowed to be asked in direct terms, without objection. *R.* v. *Robinson*, 61 J. P. 520.

If an irrelevant or leading question is put, the counsel on the other side should immediately interpose and object to it. So, if a witness is asked whether a certain representation was made, the opposite counsel may interpose, and ask him whether the representation in question were by parol or

discretion, thinks it will unfairly prejudice the defence if the argument should be heard in the presence of the jury, he should direct the jury to retire to their room, and he should hear the argument in open court so that it may appear on the shorthand note.

in writing; for, if the latter, the writing must be produced. *Queen Caroline's case*, 2 B. & B. 284; 1 St. Tr. (N. S.) 1348.

When a witness is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. *Doe* v. *Roe*, 2 Camp. 280.

Hostile witness.]—By s. 3 of *Denman's Act* (28 & 29 Vict. c. 18) (which, by s. 1, is applied to all courts of criminal judicature), "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." As to statements admissible under s. 3 (on cross-examination of a witness) against one prisoner, but not against another, *see R.* v. *Dibble* [1908] 72 J. P. 498. To be inconsistent within the meaning of the section the statements need not be directly or absolutely at variance. *Jackson* v. *Thompson*, 31 L. J. (Q. B.) 11. The word "adverse" in this section means "hostile," and not merely "unfavourable." *Greenough* v. *Eccles*, 5 C. B. (N. S.) 786; 28 L. J. (C. P.) 160, decided on s. 22 of the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125 (*rep.*)). The discretion of the judge is absolute to give or refuse leave to cross-examine the party's own witness however hostile he may be; *Rice* v. *Howard*, 16 Q. B. D. 681: 55 L. J. (Q. B.) 311: *Price* v. *Manning*, 42 Ch. D. 372 (C. A.); 58 L. J. (C. L.) 649. 28 & 29 Vict. c. 18, s. 3, appears to get rid of what was supposed to be the former rule that a party could not show that his own witness had at any time given a different account of the same transaction. *Ewer* v. *Ambrose*, 3 B. & C. 746: *R.* v. *Farr*, 8 C. & P. 768: *R.* v. *Ball*, 8 C. & P. 745. Before the Act of 1854, if a witness called to prove a fact proved the contrary, his credit could not be impeached by general evidence; Bull. (N. P.) 297: *Ewer* v. *Ambrose*, 3 B. & C. 746, 751; but the party was at liberty to make out his case by other and contradictory evidence, for the other witnesses were not called directly to impeach the credit of the first. *Id.*: *R.* v. *Ball*, *supra*. If the witness appears evidently to be hostile to the party who has called him, counsel may put leading questions to him, having first obtained permission of the Court to do so. *Price* v. *Manning*, *supra*, overruling on this point *Clarke* v. *Saffery*, Ry. & M. 126; *and see Bastin* v. *Carew*, *Id.* 127: *R.* v. *Chapman*, 8 C. & P. 558: *R.* v. *Ball*, *supra*.

Where on a trial for rape a witness for the prosecution, to whom the prosecutrix had made a communication shortly after the commission of the alleged offence, being asked on cross-examination as to the particulars of such communication, gave an answer different from that which prosecuting counsel was instructed was the truth, it was held by Day, J. (after consulting

Cave, J.), that it was competent for prosecuting counsel, on re-examination, to ask the witness, under 28 & 29 Vict. c. 18, s. 3, whether she had not at another time made a statement inconsistent with her present testimony to a person named, and also to call such person to give evidence of the statement so made to him. *R.* v. *Little*, 15 Cox, 319. In that case the prisoner's counsel objected that there was nothing in the demeanor of the witness to show that she was hostile, and the report does not state whether the learned judges considered her to be so. In one case, before 28 & 29 Vict. c. 18, s. 3, where a judge called a witness upon the back of the indictment, who gave evidence in form against the defendant, and the judge ordered the deposition of the witness before the coroner to be read, to show its inconsistency with the testimony then given, the twelve judges thought him right in so doing, and Lord Ellenborough and Sir J. Mansfield, C.J., thought that the prosecutor had the same right. *R.* v. *Oldroyd*, R. & R. 88. *See also R.* v. *Beardmore*, 8 C. & P. 260 : *R.* v. *Williams*, 6 Cox, 343 (*post*, p. 494).

The question as to whether a witness may be treated as hostile or not is one for the exercise of the discretion of the judge at the court of trial, and can only be raised on appeal under very exceptional circumstances. *R.* v. *Williams*, 77 J. P. 240.

Refreshing memory.]—We have seen (*ante*, pp. 451, 473) that a witness can be allowed only to speak of facts within his own knowledge and recollection, except in matters of science, in which case his opinion is admissible. *See R.* v. *Wright*, R. & R. 456. He cannot, therefore, be permitted to read his evidence. But he will be allowed to refresh his memory from any book or paper made by himself, or seen and examined by him shortly after the fact occurred to which it relates, if he can afterwards swear to the fact from his recollection. *Doe* v. *Perkins*, 3 T. R. 749, explained in *R.* v. *St. Martin's, Leicester*, 4 L. J. (N. S.) K. B. 52; 2 A. & E. 210, 215 : *Kensington* v. *Inglis*, 8 East, 273, 289 : *Burrough* v. *Martin*, 2 Camp. 112 : *Bolton (Lord)* v. *Tomlin*, 5 A. & E. 856. *See R.* v. *Guinea* [1841] Ir. Circ. Rep. 167 : *R.* v. *Laidler*, 19 Cox, 360 : *R.* v. *Robinson*, 61 J. P. 520 : Taylor, Evid. (11th ed.), ss. 1406 *et seq.* If he knew the fact, however, *only* from seeing it in the book or paper, the original book or paper must be given in evidence, and proved by other means. *Doe* v. *Perkins*, *supra*. In like manner, depositions made by an old witness have been allowed to be read to him, for the purpose of refreshing his memory as to dates, etc. *Vaughan* v. *Martin*, 1 Esp. 440. A witness may not refresh his memory with *copy* of an instrument which might itself be used for refreshing his memory, unless the copy were made by himself, or in his presence, and he knew it to be correct. *Burton* v. *Plummer*, 4 L. J. (N. S.) K. B. 53; 2 A. & E. 341; 4 Nev. & M. 315. And where upon an indictment for forgery it was sought to prove the numbers of the notes given in payment for the forged instrument by a witness, whose memory it was proposed to refresh by a written memorandum made by himself of the numbers of the notes, the material for which memorandum had been supplied by an entry made by himself at the time he paid the notes, the original entry itself not being produced, Blackburn, J., refused to allow the

witness so to refresh his memory, saying that the original entry must be produced. *R.* v. *Harvey*, 11 Cox, 546. The prisoner was a timekeeper, and T. C. was pay-clerk, in the employment of the prosecutor. It was the prisoner's duty every fortnight to give a list of the days worked by the prosecutor's workmen to a clerk, who entered the days and the wages due in respect of them in a time-book. At pay-time it was the prisoner's duty to read from the time-book the number of days worked by each workman to T. C., who paid the wages accordingly. T. C. saw the entries in the time-book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences, it was held that T. C. might refresh his memory by referring to the entries in the time-book, in order to prove the sums paid by him to workmen. *R.* v. *Langton*, 2 Q. B. D. 296; 46 L. J. (M. C.) 136; 13 Cox, 345; *and see R.* v. *Mullins*, 3 Cox, 526; 7 St. Tr.(N. S.) 1110.

Cross-examination generally.]—When the examination-in-chief is finished, the witness may be cross-examined by counsel for the opposite party. Or, if the party calling a witness does not think proper to examine him after he is called and sworn, the witness may nevertheless be examined by the counsel for the opposite party. *R.* v. *Brooke*, 2 Stark. (N. P.) 472. *See Morgan* v. *Brydges*, *Id.* 314: *Phillips* v. *Eamer*, 1 Esp. 355. (*See ante*, pp. 485, 486). Where a witness was called, and had only answered an immaterial question, when he was stopped by the judge, Gurney, B., ruled that the opposite party had no right of cross-examination. *Creevy* v. *Carr*, 7 C. & P. 64.

Where two prisoners are jointly indicted and evidence is called on behalf of one prisoner which tends to criminate the other, the latter is entitled to cross-examine the witness. *R.* v. *Woods*, 6 Cox, 224. So where A., B., and C. were jointly indicted, and separately defended, and at the close of the case for the prosecution C. was acquitted, and was then called as a witness for A., and gave evidence tending to criminate B., it was held that B.'s counsel had a right to cross-examine C., and to reply. *R.* v. *Burdett*, Dears. 431; 24 L. J. (M. C.) 63; 6 Cox, 458. The reason for the rule is that such evidence, though given in defence of one prisoner, becomes in fact evidence for the prosecution against the other.

The rule is equally applicable where one of the prisoners is called in his own defence under the *Criminal Evidence Act*, 1898, and gives evidence incriminating or exculpating his fellow-prisoner; *R.* v. *Hadwen* [1902] 1 K. B. 882; 71 L. J. (K. B.) 581; and to this extent s. 1 (*f*) (iii.) of the Act (*ante*, p. 459) has the effect of abrogating the common law rule expressed in *R.* v. *Payne*, L. R. 1 C. C. R. 349; 35 L. J. (M. C.) 170; *and Allen* v. *Allen* [1894] Prob. 248, 253; 63 L. J. (P. D. & A.) 120, that the evidence of one defendant on a criminal trial cannot be received for or against another defendant.

When a witness is produced, the first thing that claims the attention of counsel for the opposite party is, whether the witness is competent, and if not, then in what manner the objection to his competency must be made. (*See ante*, pp. 452 *et seq.*)

The next thing that claims opposite counsel's attention, in the course of the

examination, is, whether parol evidence is the best evidence of the facts to which the witness deposes; and if not, whether grounds have been laid for its admission as secondary evidence; whether the questions are relevant and pertinent to the matter in issue; and whether they are leading questions. If the evidence of the witness is objectionable in any of these respects, counsel should immediately interpose and make his objection.

Supposing, however, the witness and his evidence are not open to these preliminary objections, counsel must then proceed to cross-examine him, if, in his judgment, a cross-examination is necessary or advisable. In giving his evidence a witness tells the truth, wholly or partially, or tells a falsehood. If he tells the whole truth, cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; and it is better, in such a case, either not to cross-examine him at all, or to confine your questions to his credibility, by impugning his means of knowledge, his disinterestedness, or his integrity. (*See ante*, pp. 473, 474.)

If the witness tells only part of the truth, then counsel for the opposite party, if the residue is favourable to his client, will immediately proceed to cross-examine him as to it; but, if unfavourable, counsel will either refrain altogether from cross-examining him, or will confine his questions to the witness's credibility, as above mentioned.

If, on the other hand, the evidence of the witness is false, then the whole force of the cross-examination must be directed to his credibility (*see ante*, p. 475); and the truth may afterwards be proved by other witnesses.

In cross-examining a witness, counsel may ask him leading questions; that is, he may lead the witness, so as to bring him directly to the point in which he requires the answer; and this whether the witness is a willing or an adverse one; *see Parkin* v. *Moon*, 7 C. & P. 408; but he will not be allowed to put into the witness's mouth the very words he is to echo back again. *R.* v. *Hardy*, 24 St. Tr. 199, 755, Buller, J.; *and see* Taylor, Evid. (11th ed.), s. 1431. Cross-examination of witnesses for the Crown is not permitted as to matters involving state secrets. *R.* v. *Watson*, 2 Stark. (N. P.) 116; 32 St. Tr. 1. (*See ante*, p. 472.) As to the mode of suggesting, in cross-examination of a witness, that he is a spy, *see R.* v. *Bernard*, 1 F. & F. 240; 8 St. Tr. (N. S.) 887. As to incriminating questions, *see ante*, p. 469.

Questions put in cross-examination must be either relevant and pertinent to the matter in issue, or calculated to elicit the witness's title to credit. It is not usual to cross-examine witnesses to character, unless counsel has some distinct charge on which to cross-examine them; *see R.* v. *Hodgkiss*, 7 C. & P. 298; and it is improper to examine as to mere circumstances of suspicion occurring on the day when the offence is charged. *R.* v. *Rogan*, 1 Cox, 291, Erle, J. If the only evidence called on the prisoner's part is evidence as to character, though counsel for the prosecution is in strictness entitled to a reply, it is not usual to exercise it, except in extreme cases. *See R.* v. *Stannard*, 7 C. & P. 673: *R.* v. *Whiting*, *Id.* 771, and *ante*, p. 205.

It is improper for counsel, in cross-examining the accused, to suggest to the jury the contents of documents inadmissible in evidence which he flourishes

in his hands, while asking the accused to look at them and then say whether he adheres to his answer. *R.* v. *Jousry*, 24 Cox, 523; 31 T. L. R. 27; 11 Cr. App. R. 13.

Cross-examination as to documents.]—The practice as to cross-examination as to documents is now regulated by s. 5 of *Denman's Act* (28 & 29 Vict c. 18), which is in the following terms:—"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

Under s. 5 a witness may be cross-examined upon a letter or other statement made by him in writing without reading it or putting it in as evidence. If a witness refreshes his memory from entries in a book, counsel may cross-examine on those entries without making them his evidence, and the jury may see them if they think fit; but, if counsel cross-examines as to *other* entries in the same book, he makes them his evidence. *Gregory* v. *Tavernor*, 6 C. & P. 281. If cross-examining counsel puts a paper into the witness's hands, and puts questions on it, and anything comes of those questions, his opponent has a right to see the paper, and re-examine on it; but if the cross-examination founded on the paper entirely fails and nothing comes of it, opposite counsel cannot demand to see the paper. *R.* v. *Duncombe*, 8 C. & P. 369: *R.* v. *Ramsden*, 2 C. & P. 603.

Depositions.]—Prior to 28 & 29 Vict. c. 18, the judges had laid down the following rules (*see* 7 C. & P. 676; 6 L. J. (M. C.) 37) as to the mode of cross-examining witnesses for the Crown with respect to what they had previously sworn before the magistrate, and which had been *reduced into writing* in their depositions:—I. That where a witness for the Crown has made a deposition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. II. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to reply. And in case counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and counsel for the prosecution will be entitled to reply

upon it. III. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, counsel for the prisoner may proceed with his cross-examination; and if the witness admits such statement to have been made, he may comment upon such omission or upon the effect of it upon the other part of his testimony; or, if the witness denies that he made such statement, counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and counsel for the prosecution will be entitled to reply.

The first of these rules appears to be superseded by 28 & 29 Vict. c. 18, s. 5 (*ante*, p. 493). They were binding on the prisoner's counsel; but the judge who tried the case, might, notwithstanding, if he thought fit, himself look at the depositions, and question a witness as to any discrepancy which appeared between his deposition and his evidence. And, by the judge's permission, the prisoner's counsel might, "as his mouthpiece," do the like. *R.* v. *Peel*, 2 F. & F. 21, Willes, J. Whether, if such examination introduced new facts in evidence, that would give counsel for the prosecution the right of reply, was not settled. *See R.* v. *Edwards*, 8 C. & P. 26. The witness could not be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his depositions. *R.* v. *Taylor*, 8 C. & P. 726. Where an accomplice who could not read gave evidence falling very short of what he had stated before the magistrate, the judge allowed his deposition, signed with his mark, to be shown to him, but would not allow it to be read to him, in order that prosecuting counsel might examine upon it. *R.* v. *Beardmore*, 8 C. & P. 260. Where a witness examined for the Crown gave an answer different from what was expected, counsel for the prosecution was allowed to show the witness his deposition to refresh his memory; and on his persisting in the answer was also allowed to put the question in a leading form. *R.* v. *Williams*, 6 Cox, 343. Except as above mentioned, the prosecution cannot use or refer to the depositions taken before the magistrate, without putting them in as their evidence. *R.* v. *Muller*, 10 Cox, 43. If the witness denies his signature or mark to the deposition, it may be proved by the evidence of any competent person who heard it taken; and it is not necessary to prove it by the magistrate or his clerk, any more than in the case of a confession. *R.* v. *Hallett*, 9 C. & P. 748, Coleridge, J.: *R.* v. *Hearn*, C. & Mar. 109, Coltman, J.: *see ante*, p. 394.

Under Rule 1 the prisoner's counsel was not permitted, in cross-examining a witness for the prosecution, to put his deposition into his hand that he might read it, and then to ask him whether, having read it, he still persevered in the statement which he had made in court; the proper course was to read the deposition to him at the time, and to cross-examine him upon it, or to put it in afterwards as evidence for the prisoner. *R.* v. *Ford*, 2 Den. 245; 20 L. J. (M. C.) 171: *R.* v. *Brewer*, 9 Cox 409, Blackburn, J. In *R.* v. *Ford*, Campbell, C.J., said, "the proper course to be pursued is that pointed out in *Queen Caroline's case*, 2 B. & B. 284, 289." *R.* v. *Ford* seems not

now to be an authority, having regard to the change in practice effected by 28 & 29 Vict. c. 18, s. 5 (*ante*, p. 493). Under that section, although a witness may be cross-examined as to what he said before the magistrate, and the deposition may be put into his hand for that purpose, without reading it as a part of the evidence of the cross-examining party, yet the latter is bound by the answer of the witness, unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in. *R.* v. *Riley*, 4 F. & F. 964 : *R.* v. *Wright*, *Id.* 967, Channell, B.

As to variations between a witness's deposition and his evidence at the trial, Cockburn, C.J., said in *R.* v. *Wainwright*, 13 Cox, 171, 173, that he did not attach much importance to the accordance between what a witness said at the trial and what he was reported in his deposition to have said before the magistrate. He knew, from his own experience, how difficult it was to take down a witness's exact words. A witness expressed himself in a long sentence, the magistrate's clerk struck out a particular word, and with that omission it went down on the notes, and was not the whole sentence. The whole meaning of the sentence which the witness had uttered might thereby be entirely altered. Too much importance ought not, therefore, to be attached to such variations, and if there was a substantial agreement between the evidence at the preliminary inquiry and that adduced at the trial, that was sufficient.

Former statements not in writing.]—It is provided by s. 4 of *Denman's Act* (28 & 29 Vict. c. 18, which by s. 1 applies to all courts of criminal judicature), that "if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

This enactment is wide enough to cover all statements, but is specially applicable to a statement not in writing. You may cross-examine the witness on such statement; and if he denies it, you may call another witness to prove it. So, if a witness admits that when before the magistrate he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he may be questioned by the prisoner's counsel as to the answers he gave. *R.* v. *Edwards*, 8 C. & P. 26 : *R.* v. *Curtis*, 2 C. & K. 763, Erle, J. So, if it appears that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the magistrate, the witness may be cross-examined as to such statement without producing the writing. *R.* v. *Griffiths*, 9 C. & P. 746, Coleridge, J. : *see Jeans* v. *Wheedon*, 2 M. & Rob. 486, *and the note*. Witnesses for the prosecution were duly sworn and examined before the magistrate, and cross-examined by the prisoner; minutes thereof were duly made by the magistrate's clerk, and then sent to his office to be copied

as draft depositions. The witnesses attended there also. T., the copying clerk, while copying the minutes, asked the witnesses some questions, for the purpose of making the depositions more correct, clear, and complete, and inserted their answers to such questions in the depositions. The prisoner was not then present. The depositions thus written were sent back to the magistrate; and the witnesses, in the presence of the prisoner, after being resworn, and after hearing the depositions read over to them, and full opportunity for cross-examination being given to the prisoner, signed them. At the trial, a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the questions so put to him by T. It was held that such answer formed no part of the depositions, but was wholly independent of them, and therefore that the question might be asked without putting in the depositions. *R.* v. *Christopher*, 1 Den. 536; 2 C. & K. 994, 995; 19 L. J. (M. C.) 103. So a witness may be cross-examined as to his statement before the grand jury in the same case. *R.* v. *Gibson*, C. & Mar. 672, Parke, B. But cross-examination as to the state of his recollection when examined before the magistrate has been rejected as inadmissible, and as an attempt by a side-wind to evade putting in the deposition. *R.* v. *Newton*, 4 Cox, 262, Patteson, J. If, however, a witness, when examined in chief as to the occurrence of a fact, answers that he does not remember it, counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he has in cross-examination questioned the witness as to such a declaration; for the fact may have occurred, and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. *Queen Caroline's case*, 2. B & B. 284, 292; 1 St. Tr. (N. S.) 1348.

Previous convictions.]—As to the cross-examination of a witness as to whether he has been convicted of felony or misdemeanor, and proof of such conviction, *see* 28 & 29 Vict. c. 18, s. 6 (*ante*, p. 475); 61 & 62 Vict. c. 36, s. 1 (*f*) (*ante*, p. 458).

If, upon the trial of an indictment, it appears on cross-examination of one of the witnesses for the prosecution, that J. S. was employed by the prosecutor for the purpose of procuring and examining evidence and witnesses in support of the indictment, the defendant cannot give evidence of J. S.'s having offered a bribe to a certain person, to induce him to give evidence touching the matter of the indictment, unless such person has been examined as a witness. *Queen Caroline's case*, 2 B. & B. 284, 302; 1 St. Tr. (N. S.) 1348.

Cross-examination of prisoners.]—(*See ante*, p. 491). Prisoners called as witnesses on their own behalf may be cross-examined like any other witness, subject to the limitations imposed by s. 1 (*f*) of the *Criminal Evidence Act*, 1898. (*See* that section, *ante*, p. 458).

Recalled witness.]—If a witness for the Crown is recalled by the judge or by leave of the judge the prisoner's counsel is allowed to cross-examine him on the new evidence given. *R.* v. *Watson*, 6 C. & P. 653.

Re-examination.]—If any new fact arises out of the cross-examination, the witness may be examined as to it by the counsel who first examined him. In the same manner he may be re-examined when necessary, in order to explain any part of his cross-examination. In *Queen Caroline's case* (*supra*) it was held, that if a witness, upon his cross-examination, admits having used certain expressions in a conversation with a person not a party to the cause, re-examination of the witness is confined to such questions as may elicit the meaning of the expressions, and the motives of the witness for using them. But where a witness deposes to certain expressions being used by a party to the cause, counsel for that party is entitled to re-examine the witness as to the whole of the conversation in which the expressions occurred; because the expressions are given in evidence, in such a case, as an admission of the party, and the whole of his admission should be taken together. 2 B. & B. 284, 294; 1 St. Tr. (N. S.) 1348. If a witness whose name is on the back of the indictment is called merely to allow the prisoner to cross-examine him, any question put by prosecuting counsel afterwards must be considered as a re-examination, and nothing can be asked which does not arise out of the cross-examination. *R.* v. *Beezley*, 4 C. & P. 220, Littledale, J.

In re-examination questions tending to prove the commission by the defendant of an offence other than that charged in the indictment have been allowed where the object was to explain away an apparently contradictory fact elicited by cross-examination. *R.* v. *Chambers*, 3 Cox, 92, Rolfe, B.

BOOK II.

PLEADING, PRACTICE, AND EVIDENCE IN PARTICULAR CASES.

PART I.

OFFENCES AGAINST INDIVIDUALS.

CHAPTER I.

OFFENCES AGAINST THE PROPERTY OF INDIVIDUALS.

SECT. 1.

LARCENY.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 1.—*Definition.*]—For the purposes of this Act—(1) a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of

such taking, permanently to deprive the owner thereof: Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner: (2) (i.) the expression "takes" includes obtaining the possession—(*a*) by any trick; (*b*) by intimidation; (*c*) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; (*d*) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps; (ii.) the expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached; (iii.) the expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen: (3) Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen: Provided that—(*a*) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof; and (*b*) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase. [*This is the first statutory definition of larceny:* see post, p. 511.]

Sect. 2.—*Simple larceny.*]—Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with penal servitude for any term not exceeding five years, and the offender, if a male under the age of sixteen years, shall be liable to be once privately whipped in addition to any other punishment to which he may by law be liable. [*This section is taken from* 24 & 25 Vict. c. 96, ss. 4, 26, 27. See post, p. 509.]

Sect. 35.—*Accessories and abettors.*]—Every person who knowingly and wilfully aids, abets, counsels, procures or commands the commission of an offence punishable under this Act shall be liable to be dealt with, indicted, tried and punished as a principal offender. [*This section reproduces the provisions of* 24 & 25 Vict. c. 94, s. 1.]

Sect. 36.—*Husband and wife.*]—(1) A wife shall have the same remedies and redress under this Act for the protection and security of her own separate property as if such property belonged to her as a *feme sole:* Provided that no proceedings under this Act shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife. (2) A wife doing an act with respect to any property of her husband, which, if done by the husband

in respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall be in like manner liable to criminal proceedings by her husband. [*This section reproduces* 45 & 46 Vict. c. 75, ss. 12, 16.]

Sect. 37.—*Punishments.*]—(1) Every person who commits the offence of simple larceny after having been previously convicted of felony shall be liable to penal servitude for any term not exceeding ten years. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 7.] (2) Every person who commits the offence of simple larceny, or any offence made punishable like simple larceny, after having been previously convicted—(*a*) of an indictable misdemeanor punishable under this Act; or (*b*) twice summarily of any offence punishable under s. 6 of the Summary Jurisdiction (Ireland) Act, 1851, 14 & 15 Vict. c. 92, or under the Larceny Act, 1861, 24 & 25 Vict. c. 96, or under the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, or under this Act (whether each of the convictions has been in respect of an offence of the same description or not, and whether such convictions, or either of them, have been before or after the passing of this Act); shall be liable to penal servitude for any term not exceeding seven years. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, ss 8, 9.] (3) In every case in this section before mentioned the offender, if a male under the age of sixteen years, shall be liable to be once privately whipped in addition to any other punishment to which he may by law be liable. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, ss. 7, 8, 9.] (4) Where a sentence of penal servitude may be imposed on conviction of an offence against this Act, the court may instead thereof impose a sentence of imprisonment, with or without hard labour, for not more than two years. [*This sub-section reproduces* 54 & 55 Vict. c. 69, s. 1 (2), ante, p. 239.] (5)—(*a*) On conviction of a misdemeanor punishable under this Act the court, instead of or in addition to any other punishment which may be lawfully imposed, may fine the offender. (*b*) On conviction of a felony punishable under this Act the court, in addition to imposing a sentence of penal servitude or imprisonmen, may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace *and being of good behaviour.* (*c*) On conviction of a misdemeanor punishable under this Act the court, instead of or in addition to any other punishment which may lawfully be imposed for the offence, may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace and being of good behaviour. (*d*) Provided that a person shall not be imprisoned for more than one year for not finding sureties. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 117, *the words in italics being new.* Cf. 3 & 4 Geo. 5, c. 27, s. 12 (2) (*b*), post, p. 827.] (6) Where a sentence of whipping may be imposed under this Act—(*a*) in the case of an offender whose age does not exceed sixteen years, the number of strokes at such whipping shall not exceed twenty-five and the instrument used shall be a birch-rod; (*b*) in the case of any other offender, the number of strokes at such whipping shall not exceed fifty; (*c*) in each case the court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used; (*d*) such whipping shall not take place after

the expiration of six months from the passing of the sentence; (*e*) such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he is removed to a convict prison with a view to his undergoing his sentence of penal servitude. [*This sub-section is taken from* 26 & 27 Vict. c. 44, s. 1, *as amended* by 4 & 5 Geo. 5, c. 58, s. 36 (1), ante, p. 244.]

Sect. 38.—*Jurisdiction of quarter sessions.*]—(1) A court of quarter sessions —(*a*) notwithstanding anything in the Quarter Sessions Act, 1842, 5 & 6 Vict. c. 38, shall in England have jurisdiction to try an indictment for burglary; (*b*) shall not have jurisdiction to try an indictment for any offence against ss. 20, 21, and 22 of this Act. (2) A justice of the peace in England when committing for trial a person charged with burglary shall commit him for trial before a court of assize unless, owing to the absence of any circumstances which makes the case a grave or difficult one, he thinks it expedient in the interest of justice to commit him for trial before a court of quarter sessions; and the Assizes Relief Act, 1889, 52 & 53 Vict. c. 12, shall apply. [*This section reproduces* 24 & 25 Vict. c. 96, s. 87, and 59 & 60 Vict. c. 57.]

Sect. 39.—*Venue.*]—(1) A person charged with any offence against this Act may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place. [*This sub-section is new, and creates a uniform venue for all offences under the Act.* Cf. 3 & 4 Geo. 5, c. 27, s. 14.] (2) Every person who steals or otherwise feloniously takes any property in any one part of the United Kingdom may be dealt with, indicted, tried, and punished in any other part of the United Kingdom where he has the property in his possession in the same manner as if he had actually stolen or taken it in that part. (3) Every person who receives in any one part of the United Kingdom any property stolen or otherwise feloniously taken in any other part of the United Kingdom may be dealt with, indicted, tried, and punished in that part of the United Kingdom where he so receives the property in the same manner as if it had been originally stolen or taken in that part. [*This and the preceding sub-section re-enact* 24 & 25 Vict. c. 96, s. 114.]

Sect. 40.—*Procedure.*]—(1) On the trial of an indictment for obtaining or attempting to obtain any chattel, money, or valuable security by any false pretence, it shall not be necessary to prove an intent to defaud any particular person, but it shall be sufficient to prove that the person accused did the act charged with intent to defraud. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 88.] (2) An allegation in an indictment that money or banknotes have been embezzled or obtained by false pretences can, so far as regards the description of the property, be sustained by proof that the offender embezzled or obtained any piece of coin or any banknote or any portion of the value thereof, although such piece of coin or banknote may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly. [*This sub-section is*

taken from 14 & 15 Vict. c. 100, s. 18.] (3) In an indictment for feloniously receiving any property under this Act any number of persons who have at different times so received such property or any part thereof may be charged and tried together. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 93.] (4) If any person, who is a member of any co-partnership or is one of two or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners he shall be liable to be dealt with, tried, and punished as if he had not been or was not a member of such co-partnership or one of such beneficial owners. [*This sub-section re-enacts* 31 & 32 Vict. c. 116, s. 1.] (5) In Ireland (*a*) the following provisions shall have effect with respect to indictments :—(*a*) In an indictment for an offence against this Act with reference to any instrument, it shall be sufficient to describe such instrument by any name or designation by which it is usually known, or by its purport, without setting out any copy or facsimile thereof or otherwise describing it or its value. [*This paragraph re-enacts* 14 & 15 Vict. c. 100, s. 5.] (*b*) In an indictment for any offence of stealing under this Act, distinct acts of stealing, not exceeding three, which have been committed by the person accused against the same person within the space of six months, may be charged in separate counts of the same indictment and tried together. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, s. 5. *It does not authorise the joinder in one indictment of a count for larceny against one defendant alone with a count for another larceny against the same defendant and another defendant jointly.* R. *v.* Edwards [1913] 1 K. B. 287; 88 L. J. (K. B.) 347; 23 Cox, 380; 108 L. T. 815; 77 J. P. 135; 29 T. L. R. 181. *Nor does it extend to indictments for receiving only, though under paragraph* (*j*), infra, *a count for receiving may be added to each of the three larceny counts.*] (*c*) If on the trial of an indictment for stealing any property it appears that the property alleged in such indictment to have been stolen at one time was taken at different times, such separate takings may be tried together to a number not exceeding three, provided that not more than the space of six months elapsed between the first and the last of such takings. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, s. 6.] (*d*) In an indictment for any offence of embezzlement or of fraudulent application or disposition against this Act, distinct acts of embezzlement or of fraudulent application or disposition not exceeding three, which have been committed by him against the same person within the space of six months, may be charged in separate counts of the same indictment and tried together; and where such offence relates to any money or valuable security it shall not be necessary to specify any particular coin or valuable security; and such allegation shall be sustained whether the offender is proved to have embezzled or to have fraudulently applied or disposed of any amount, although the particular coin or valuable security of which such amount was composed is not proved, or whether he is proved to have embezzled or to have fraudulently applied or disposed of any valuable security which has been delivered to him in order that some part of the value thereof should

(*a*) The Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), does not apply to Ireland. It has therefore been necessary to re-enact many provisions affecting indictments which are obsolete as regards England.

be returned to any person and such part has been returned accordingly. [*This paragraph re-enacts* 24 & 25 Vict. c. 100, s. 71.] (*e*) In every case of stealing any chattel or fixture under s. 16 of this Act (relating to tenants and lodgers) it shall be lawful to prefer an indictment in the same form as if the offender were not a tenant or lodger. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, s. 74. See also paragraph (*h*) *infra.*] (*f*) In an indictment for stealing any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, s. 28.] (*g*) In an indictment for an offence under this Act with respect to any will, codicil, or other testamentary document, record, or other legal document whatsoever, or anything made of metal fixed in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground, it shall not be necessary to allege the same to be the property of any person. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, ss. 29, 30, 31.] (*h*) In an indictment under s. 16 of this Act it shall be lawful to lay the property alleged to be stolen in the owner or person letting to hire. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, s. 74. See also paragraph (*e*), *supra.*] (*i*) In an indictment for obtaining or attempting to obtain any chattel, money, or valuable security by any false pretence, it shall be sufficient to allege that the person accused did the act with intent to defraud, without alleging an intent to defraud any particular person and without alleging any ownership of the chattel, money, or valuable security. [*This paragraph re-enacts* 24 & 25 Vict. c. 96, s. 88.] (*j*) Charges of stealing any property and of feloniously receiving the same property or any part thereof may be included in separate counts of the same indictment, and such counts may be tried together. (*k*) Any person or persons charged in separate counts of the same indictment with stealing any property and with feloniously receiving the same property or any part thereof may severally be found guilty either of stealing or of receiving the said property or any part thereof. [*This and the preceding paragraph re-enact* 24 & 25 Vict. c. 96, s. 92.]

Sect. 41.—*Arrest without warrant.*]—(1) Any person found committing any offence punishable under this Act except an offence under s. 31 may be immediately apprehended without a warrant by any person and forthwith taken, together with the property, if any, before a justice of the peace to be dealt with according to law. (2) Any person to whom any property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence has been committed against this Act with respect to such property, shall, if in his power, apprehend and forthwith take before a justice of the peace the person offering the same, together with such property, to be dealt with according to law. [*This and the preceding sub-section are taken from* 24 & 25 Vict. c. 96, s. 103.] (3) Any constable or peace officer may take into custody without warrant any person whom he finds lying or loitering in any highway, yard, or other place during the night, and whom he has good cause to suspect of having committed or being about to commit any felony against

this Act, and shall take such person as soon as reasonably may be before a justice of the peace to be dealt with according to law. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 104.]

Sect. 42.—*Search warrants.*]—(1) If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any property whatsoever, with respect to which any offence against this Act has been committed, the justice may grant a warrant to search for and seize the same. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 103. *At common law a justice has the general power to issue a search warrant for stolen goods* (see 2 Hale, 113, 149, 150; Entick *v.* Carrington, 19 St. Tr. 1067; Burn's J. P. (30th ed.), s. 1180), *and although the earlier authorities are not clear on the subject, it was expressly decided in* Elsee *v.* Smith, 1 D. & R. 97, *that an allegation of the actual commission of a felony is not necessary to justify a magistrate in granting a search warrant. The authorities were reviewed in* Jones *v.* German [1896] 2 Q. B. 418; 66 L. J. (Q. B.) 281, *in which* Elsee *v.* Smith, supra, *was approved, and the Court held that a search warrant may be issued on an allegation of reasonable suspicion of larceny, and, further, that it is not necessary to specify in the information the particular goods for which a search is desired. Lord Russell, C.J., doubted whether* 24 & 25 Vict. c. 96, s. 103, *from which this section is taken, applied to stolen goods, but thought that its object was to apply the practice as regards search warrants for stolen goods to goods in respect of which some offence under the Act (other than larceny) has been committed.* Jones *v.* German [1896] 2 Q. B. 418, at p. 424.] (2)—(*a*) Any constable or peace officer may, if authorised in writing by a chief officer of police, enter any house, shop, warehouse, yard, or other premises, and search for and seize any property he believes to have been stolen, and, where any property is seized in pursuance of this section, the person on whose premises it was at the time of seizure or the person from whom it was taken shall, unless previously charged with receiving the same knowing it to have been stolen, be summoned before a court of summary jurisdiction to account for his possession of such property, and such court shall make such order respecting the disposal of such property and may award such costs as the justice of the case may require. (*b*) It shall be lawful for any chief officer of police to give such authority as aforesaid—(i.) when the premises to be searched are or within the preceding twelve months have been in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves; or (ii.) when the premises to be searched are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty and punishable with penal servitude or imprisonment. (*c*) It shall not be necessary for such chief officer of police on giving such authority to specify any particular property, but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods. [*This sub-section re-enacts* 34 & 35 Vict. c. 112, s. 16.]

Sect. 43.—*Evidence.*]—(1) Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in

his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—(*a*) the fact that other property stolen within the period of twelve months preceding *the date of the offence charged* was found *or had been* in his possession; (*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last-mentioned fact may not be proved unless—(i.) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given; (ii.) evidence has been given that the property in respect of which the offender is being tried was found *or had been* in his possession. [*This sub-section re-enacts* 34 & 35 Vict. c. 112, s. 19, *with the addition of the words in italics.* See post, p. 730.] (2) No person shall be liable to be convicted of any offence against ss. 6, 7 sub-s. (1), 20, 21, and 22 of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been *bonâ fide* instituted by any person aggrieved. [*This sub-section is taken from* 24 & 25 Vict. c. 96, ss. 29, 85.] (3) In any proceedings in respect of any offence against ss. 6, 7 sub-s. (1), 20, 21, and 22 of this Act, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 85, *as amended by* 53 & 54 Vict. c. 71, s. 27. *It alters the law with regard to stealing wills and documents of title to lands.* See post, p. 560.]

Sect. 44.—*Verdict.*]—(1) If on the trial of any indictment for robbery it is proved that the defendant committed an assault with intent to rob, the jury may acquit the defendant of robbery and find him guilty of an assault with intent to rob, and thereupon he shall be liable to be punished accordingly. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 41.] (2) If on the trial of any indictment for any offence against s. 17 of this Act (relating to embezzlement) it is proved that the defendant stole the property in question, the jury may find him guilty of stealing, and thereupon he shall be liable to be punished accordingly; and on the trial of any indictment for stealing the jury may in like manner find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be, and thereupon he shall be liable to be punished accordingly. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 72.] (3) If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly. [*This sub-section re-enacts* 4 & 5 Geo. 5, c. 58, s. 39 (2).] (4) If on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences it is proved that the defendant stole the property in question, he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences.

[*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 88.] (5) If on the trial of any two or more persons indicted for jointly receiving any property it is proved that one or more of such persons separately received any part of such property, the jury may convict upon such indictment such of the said persons as are proved to have received any part of such property. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 94.]

Sect. 45.—*Restitution.*]—(1) If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative. (2) In every case in this section referred to the court before whom such offender is convicted shall have power to award from time to time writs of restitution for the said property or to order the restitution thereof in a summary manner: Provided that where goods as defined in the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, have been obtained by fraud or other wrongful means not amounting to stealing, the property in such goods shall not re-vest in the person who was the owner of the goods or his personal representative, by reason only of the conviction of the offender: And provided that nothing in this section shall apply to the case of—(*a*) any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration without any notice or without any reasonable cause to suspect that the same had been stolen; (*b*) any offence against ss. 20, 21, and 22 of this Act. [*This and the preceding sub-section re-enact* 24 & 25 Vict. c. 96, s. 100, *as affected* by 56 & 57 Vict. c. 71, s. 24. See ante, p. 294.] (3) On the restitution of any stolen property if it appears to the court by the evidence that the offender has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the offender on his apprehension, the court may, on the application of such purchaser, order that out of such moneys a sum not exceeding the amount of the proceeds of such sale be delivered to the said purchaser. [*This sub-section reproduces* 30 & 31 Vict. c. 35, s. 9.]

Sect. 46.—*Interpretation.*]—(1) In this Act, unless the context otherwise requires,—The expression "**chief officer of police**" means—(*a*) In the city of London, the Commissioner of City Police; (*b*) In the Metropolitan Police District, the Commissioner of Police of the Metropolis; (*c*) In any other police district in England, the officer having the chief command of the police in such police district; (*d*) In the police district of Dublin Metropolis, either of the commissioners of police for the said district; (*e*) In any other police district in Ireland, the sub-inspector of the Royal Irish Constabulary; and shall include any person authorised by such said chief officer of police to act in his behalf. [*This definition is taken from* 34 & 35 Vict. c. 112, s. 21.] The expression "**document of title to goods**" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for

the delivery or transfer of any goods or valuable thing, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. [*This definition re-enacts* 24 & 25 Vict. c. 96, s. 1.]—The expression "**document of title to lands**" includes any deed, map, *roll*, *register*, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate or to any interest in or out of any real estate. [*This definition re-enacts* 24 & 25 Vict. c. 96, s. 1, *with the addition of the words italicised.*] The expressions "**mail,**" "**mail bag,**" "**officer of the Post Office,**" "**postal packet,**" "**post office,**" and "**in course of transmission by post,**" shall have the same meanings in this Act as in the Post Office Act, 1908. [*See post*, p. 585.] The expression "**night**" means the interval between nine o'clock in the evening and six o'clock in the morning of the next succeeding day. [*This definition re-enacts* 24 & 25 Vict. c. 96, s. 1. See post, p. 657.] The expression "**property**" includes any description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise. [*This definition re-enacts* 24 & 25 Vict. c. 96, s. 1.] The expression "**trustee**" means a trustee on some express trust created by some deed, will, or instrument in writing, and includes the heir or personal representative of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official receiver, assignee, liquidator, or other like officer acting under any present or future Act relating to joint stock companies or bankruptcy. [*This definition re-enacts* 24 & 25 Vict. c. 96, s. 1. See post, p 635.] The expression "**valuable security**" includes any writing entitling or evidencing the title of any person to any share or interest in any public stock, *annuity*, fund, *or debt of any part of His Majesty's Dominions*, or of any foreign state, or in any *stock*, *annuity*, fund, *or debt* of any body corporate, company, or society, *whether within or without His Majesty's Dominions*, or to any deposit in any bank, and also includes any *scrip*, debenture, bill, note, warrant, order, or other security for payment of money, *or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal*, and any document of title to lands or goods as herein-before defined. [*This definition substantially re-enacts* 24 & 25 Vict. c. 96, s. 1, *with the additions italicised. "Valuable security" has been held to include a transfer of shares in a limited liability company.* R. *v.* Smith, 62 J. P. 231. *It includes currency notes.* 4 & 5 Geo. 5, c. 14, s. 1 (5). *As to money orders*, see 8 Edw. 7, c. 48, s 59 (1), post, p. 582.] (2) The expression "**dwelling-house**" does

not include a building although within the same curtilage with any dwelling-house and occupied therewith unless there is a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from one to the other. [*This definition re-enacts* 24 & 25 Vict. c. 96, s. 53. See post, p. 657.] (3) References in this Act to any Act in force at the commencement of this Act shall be held to include a reference to that Act as amended, extended, or applied by any other Act.

Sect. 47.—*Savings.*]—(1) Where, by virtue of some other Act, an offence against this Act subjects the offender to any forfeiture or disqualification, or to any penalty other than penal servitude or fine, the liability of the offender to punishment under this Act shall be in addition to and not in substitution for his liability under such other Act. (2) Where an offence against this Act is by any other Act, whether passed before or after the commencement of this Act, made punishable on summary conviction, proceedings may be taken either under such other Act or under this Act: Provided that where such an offence was at the commencement of this Act punishable only on summary conviction, it shall remain only so punishable.

Sect. 48.—*Repeals.*]—(1) The enactments specified in the Schedule to this Act are hereby repealed as to England and Ireland to the extent specified in the third column thereof. (2) For the purposes of the First Schedule to the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the first sub-section of the thirty-third section of this Act shall be substituted for the ninety-first and ninety-fifth sections of the Larceny Act, 1861.

Sect. 49.—*Extent.*]—This Act shall not extend to Scotland, except as hereinbefore otherwise expressly provided.

Sect. 50.—*Short title and commencement.*]—This Act may be cited as the Larceny Act, 1916, and shall come into operation on the first day of January, nineteen hundred and seventeen.

Indictment for Simple Larceny (a).

THE KING *v.* A. B.

Surrey Quarter Sessions
held at Kingston.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence:—

STATEMENT OF OFFENCE.

Larceny, contrary to section 2 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, stole a bag, the property of C. D.

(a) The forms of indictment throughout this edition are framed in accordance with 5 & 6 Geo. 5. c. 90. For precedents of indictments applicable to Ireland, the reader is referred to the 24th edition of this work.

Upon this indictment the accused may be convicted as accessory before the fact to the larceny: 6 & 7 Geo. 5, c. 50, s. 35, ante, p. 500; and see R. *v.* Goodwin, 3 Cr. App. R. 276.

Felony: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour; 54 & 55 Vict. c. 69, s. 1 (ante, p. 239; 6 & 7 Geo. 5, c. 50, ss. 2, 37 (4) (ante, pp. 500, 501); *and, if a male under sixteen years, with or without whipping;* 6 & 7 Geo. 5, c. 50, s. 2 (ante, p. 500); *the offender if sentenced to whipping, to be once privately whipped with a birch rod, the number of strokes not to exceed twenty-five and to be specified in the sentence.* Id. s. 37 (6) (ante, p. 501). *The defendant may also be required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour.* Id. s. 37 (5) (b) (ante, p. 501). *If the defendant has previously been convicted of an indictable misdemeanor under* 6 & 7 Geo. 5, c. 50, *or twice summarily under* 14 & 15 Vict. c. 92, s. 6, *or* 24 & 25 Vict. cc. 96, 97, *he may be sentenced to penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.* 54 & 55 Vict. c. 69, s. 1 (*ante*, p. 239); 6 & 7 Geo. 5, c. 50, s. 37, sub-ss. 2, 3, 4 (ante, p. 501). *If he has been previously convicted of felony, he may be sentenced to penal servitude for not more than ten nor less than three years, or imprisonment for not more than two years with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.* 6 & 7 Geo. 5, c. 50, s. 37, sub-ss. 1, 3, 4 (ante, p. 501). *As to the statement and proof of the former convictions*, see ante, pp. 53 and 421.

As to the sentence where the defendant is already under sentence for another crime, see 7 & 8 Geo. 4, c. 28, s. 10 (ante, p. 232).

Upon this indictment the defendant may be acquitted of larceny, but convicted of embezzlement or of obtaining by false pretences, if the facts so warrant, and he may be punished accordingly. 6 & 7 Geo. 5, c. 50, s. 44, sub-ss. 2, 3 (ante, p. 506). *But a general verdict of guilty cannot be sustained upon evidence of embezzlement only.* R. *v.* Gorbutt, Dears. & B. 166; 26 L. J. (M. C.) 47.

Evidence (*a*).

A. B.]—It is immaterial whether this is the correct name of the defendant or not. (*See ante*, p. 49.) The prosecutor has only to prove that the defendant is the person who actually committed the offence; which is done either by identifying him as the party who committed it, or by circumstantial evidence. (*See ante*, p. 396.)

"On the 1st day of June," etc.]—The time here stated need not be proved as laid: it is sufficient if the offence is proved to have been committed at any

(*a*) The evidence is considered, throughout this book, with reference to principal offenders. Accessories before the fact are triable in all respects as principals: 24 & 25 Vict. c. 94, s. 1.

time before or after the date alleged, provided it be some day before the finding of the indictment (*ante*, p. 51).

"In the county."]—At common law, where a larceny is committed in one county and the thief, at any distance of time (*R.* v. *Parkin*, 1 Mood. 45), carries the goods into another county, he is in contemplation of law guilty not only of a carrying away but also of a taking in every county through or into which he has carried the goods. 1 Hale, 507; 1 Hawk. c. 33, s. 52; 3 Co. Inst. 113: *R.* v. *Fenley* [1903] 20 Cox, 252, Jelf, J. (*and see ante*, p. 42). If it is proved that the larceny was actually committed by the defendant in another part of the United Kingdom (*i.e.*, in Scotland or Ireland), and that he carried the goods at any distance of time through or into the county or other place within the extent of the Court's jurisdiction, it will be sufficient (*ante*, p. 42); unless the nature of the property be changed, and the indictment be for stealing the article in its original state. *R.* v. *Edwards*, R. & R. 497: *R.* v. *Holloway*, 1 C. & P. 127. So it is sufficient if the offence is either begun or completed in the county in which the defendant is indicted; or is committed within five hundred yards of the boundary of such county (*ante*, p. 37). And where a larceny is committed on a person, or with respect to property in or upon any coach, etc., or vessel, during a journey or voyage, it will be sufficient if the coach or vessel in the progress of the journey or voyage, passed through the county or by the boundary of the county in which the defendant is indicted. By the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 39 (1) (*ante*, p. 502), the thief may be tried in any county or place in which he was apprehended or is in custody, as if the offence had been committed there.

Stole.]—For the purposes of the *Larceny Act*, 1916, a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof: provided that a person may be guilty of stealing any such thing, notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner. 6 & 7 Geo. 5, c. 50, s. 1 (*ante*, p. 499). This is the first statutory definition of larceny: it makes no change in the law, but merely harmonises the accepted definitions of larceny at common law with certain statutory provisions relating to bailees and part owners, as to which *see post*, pp. 534, 540. In all cases of larceny, the question whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ fide* under a claim of right, or otherwise—and whether he took them with an intent to return them to the owner, or fraudulently, with an intent to deprive the owner of them altogether, and to appropriate or convert them to his own use—are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case. *R.* v. *Farnborough* [1895] 2 Q. B. 484; 64 L. J. (M. C.) 270. Where a man was charged with stealing three hare-wires and a pheasant it was ruled that if he really believed that the wires and pheasant belonged to him he was not guilty of larceny even

though he might have committed an offence against the *Game Acts*. *R.* v. *Hall*, 3 C. & P. 409, and *cf. R.* v. *Boden*, 1 C. & K. 395, and *R.* v. *Knight*, 73 J. P. 15, where the defendant had retaken his fowls from a sheriff's officer, who had seized them in execution as belonging to the defendant's wife (*a*). Larceny at common law may correctly be defined thus : the wrongful or fraudulent taking and carrying away the personal goods of another, from any place, with a felonious intent to convert them to the taker's own use, and make them permanently his own property, without the consent of the owner; 2 East, P. C. 553; the word "felonious" being explained to mean that there is no colour of right to excuse the act; and the "intent" being to deprive the owner, not temporarily, but permanently of his property. *R.* v. *Thurborn*, 1 Den. 387; 2 C. & K. 831; 18 L. J. (M. C.) 140 : *R.* v. *Guernsey*, 1 F. & F. 394, Martin, B. If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another. 1 Hale, 507. If, under colour of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony. 1 Hale, 509. If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be. *Id.* 506. So, if a man having done work upon a chattel, returns it to the owner, and, a dispute afterwards arising between him and the owner as to the price to be paid for the work, he seizes and carries off the chattel, against the will of the owner, honestly intending to hold it as a security for the amount which he alleges to be due to him, this is no felony, although, in fact, nothing may be due to him. *R.* v. *Wade*, 11 Cox, 549, Blackburn, J. A creditor who violently assaults his debtor, and so forces him then and there to pay him his debt, cannot be convicted of robbery, there being no felonious intent. *R.* v. *Hemmings*, 4 F. & F. 50, Erle, C.J. If a servant takes his master's horse without his knowledge, and brings it home again; if a man takes his neighbour's plough that is left in the field, and uses it upon his own land, and then returns it; these may be trespasses, but are not felonies, 1 Hale, 509, because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; for if it appears that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. *See* 1 Hawk. c. 34, s. 2; 1 Hale, 533; 2 Russ. Cr. (7th ed.) 1177, 1184. In *R.* v. *Phillips*, 2 East, P. C. 662, 663, it was proved that the defendants took two horses out of the prosecutor's stable at night without his leave, and having ridden them about thirty miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day at the distance of fourteen miles from the inn,

(*a*) In *R.* v. *Ford* [1907] 12 Canada Cr. Cas. 555, it was held not to be larceny or robbery forcibly to retake money won from the defendant at cards in the *bonâ fide* belief that the winner had cheated.

walking in a direction from it: the jury found the defendants guilty, but at the same time found specially that the defendants meant merely to ride the horses thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them: and ten of the judges held that this was no felony, as there was no intention in the prisoners to change the property, or make it their own. And where a person stole certain articles, and also took a horse, not with an intention to steal it, but merely to get off more conveniently with the property, this was held not to be a felonious stealing of the horse. *R.* v. *Crump*, 1 C. & P. 658. The Roman law recognised *furtum usûs* as an offence. *See R.* v. *Fortuin* [1883] 1 Buchanan (Cape Colony) 290. So, where the servant of a tanner took out of his master's warehouse dressed skins of leather, with intent to bring them in and charge them as his own work (which they were not), and to get paid by his master for them, this was held to be no larceny. *R.* v. *Holloway*, 1 Den. 370; 2 C. & K. 942; 18 L. J. (M. C.) 60: *see R.* v. *Webb*, 1 Mood. 431: *R.* v. *Poole*, Dears. & B. 345; 27 L. J. (M. C.) 53. *Cf. R.* v. *Richards*, 1 C. & K. 532 (*post*, p. 514). But where the jury found the defendant guilty of larceny in stealing plate, but recommended him to mercy on the ground that they believed he ultimately intended (not saying *when* he so intended) to return the property, this statement was held not to qualify the verdict, so as to bring the case within the principle of the above decisions. *R.* v. *Trebilcock*, Dears. & B. 453; 27 L. J. (M. C.) 103 (*a*). And where A. took B.'s goods wrongfully, and offered them for sale to B., as the goods of another, he was held guilty of larceny. *R.* v. *Hall*, 1 Den. 381; 2 C. & K. 947; 18 L. J. (M. C.) 62; *see R.* v. *Manning*, Dears. 21; 22 L. J. (M. C.) 21. Where, upon an indictment for larceny, it appeared that the prisoner had clandestinely taken the goods alleged to have been stolen from a young woman, for the mere purpose of inducing her to call for them, that he might have an opportunity of soliciting her to commit fornication with him, the judges held this not to be a felonious taking. *R.* v. *Dickinson*, R. & R. 420. The prisoner's goods having been seized under warrants of execution of a county court, and being in possession of the bailiff, the prisoner, with intent to deprive the bailiff of his authority, and so defeat the execution, forcibly took the warrants from him. On these facts it was held that the prisoner was not guilty of larceny of the warrants, but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 Vict. c. 96, s. 30 (*post*, p. 566). *R.* v. *Bailey*, L. R. 1 C. C. R. 347; 41 L. J. (M. C.) 61. *Cf. R.* v. *Jones*, 19 L. J. (N. S.) M. C. 162; 1 Den. 188; 2 C. & K. 236 (*post*, p. 515). So where the captain of a ship, taken as a prize, secreted some of the cargo, and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit of for that of his owners, he was recommended for a free pardon; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny. *R.* v. *Van Muyen*, R. & R. 118. Where the prosecutor met the prisoner, whom he knew to be a poacher, and seized him, and the prisoner, being rescued, seized the gun of the prosecutor, and ran away with it, and subsequently was heard to say that he would sell it, and the gun was never afterwards

(*a*) *See also Myerson* v. *R.*, [1907] 5 Austr. Com., L. R. 597.

heard of, Vaughan, B., upon an indictment for stealing the gun, told the jury that it would not be felony if the prisoner took the gun under the impression at the time that it might be used so as to endanger his life, and not with an intention of disposing of it, although he might afterwards have determined to dispose of it; and the jury, being of opinion that he had no intention of disposing of the gun at the time he took it, acquitted the prisoner. *R.* v. *Holloway*, 5 C. & P. 524. Where A., at the instigation of a police officer, concerted with three persons to commit a felony, in order that the officer might apprehend them, and upon their conviction receive the reward, which was to be divided between the officer and A., and A. with the others did commit the felony, it was held by the majority of the judges, that A., although he acted from a bad motive, namely, the reward, had not the felonious intention necessary to make him the principal, because he was present, not to aid and assist in committing the felony, but to detect it, and had no intention that the felony should be successful. *R.* v. *Dannelly*, R. & R. 310; 2 Marsh, 571 (Ex. Ch.).

Prior to the *Larceny Act*, 1916, there were cases which went to establish that it is not necessary that the taking should be *lucri causâ*, if it is fraudulent, and with intent wholly to deprive the owner of the property. *See* 2 Russ. Cr. (7th ed.) 1204. C., to screen his accomplice, who was indicted for horse stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal-pit and killed. C. was indicted for stealing the horse, and at the trial it was objected that the taking was not with an intention to convert the horse to the use of the taker, *animo furandi et lucri causâ*. Seven of the judges held that it was larceny, and six of that majority were of opinion that, to constitute larceny, it was not essential that the taking should be *lucri causâ*, if it were fraudulent and with intent wholly to deprive the owner of the property; but some of this majority thought that the object of the prisoner might be deemed a benefit, and the taking *lucri causâ*. *R.* v. *Cabbage*, R. & R. 292. Where the prisoners, servants in husbandry, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed, this was held to be larceny by a majority of the judges; but it was considered by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses; and therefore the *lucri causâ*, to give themselves ease, was an ingredient in the offence. *R.* v. *Morfit*, R. & R. 307. *See also R.* v. *Gruncell*, 9 C. & P. 365: *R.* v. *Handley*, C. & Mar. 547: *R.* v. *Privett*, 1 Den. 193; 2 C. & K. 114; which latter cases established that this was larceny, even if the intent of obtaining a private benefit is negatived. The law was altered by 26 & 27 Vict. c. 103, s. 1 (*post*, p. 602).

Where the defendant was supplied by his master with pig-iron to be put into a furnace to be melted, being paid according to the weight of the metal which ran out of the furnace into bars, and he put in also other iron belonging to his master, whereby, the weight of the melted iron being thus increased, he gained a larger remuneration, it was held that, if he did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. *R.* v. *Richards*, 1 C. & K. 532, Tindal, C.J.: *cf. R.* v. *Holloway*, 1 Den. 370; 18 L. J. (M. C.) 60 (*ante*, p. 513). So, the secreting and destroying of a post-

letter, in the hope of suppressing inquiries supposed by the defendant to be made in it respecting her character, was held to be larceny. *R.* v. *Jones*, 19 L. J. (N. S.) M. C. 162; 1 Den. 188; 2 C. & K. 236. *Cf. R.* v. *Bailey*, L. R. 1 C. C. R. 347; 41 L. J. (M. C.) 61 (*ante*, p. 513). Money was given to the prisoner by the prosecutor, his master, for the purpose of paying a turnpike toll on his journey about his master's business. Some days afterwards the prisoner was asked by his master if he had paid the toll. He said that he had not, having gone by another road by which he had evaded the turnpike, and that he had spent the money on beer for himself and his mates. The prisoner was convicted of larceny of the money, but it not appearing, on a case reserved as to whether these facts proved a larceny, that the question of felonious intent had been distinctly left to the jury, the conviction was quashed. *R.* v. *Deering*, 11 Cox, 298 (C. C. R.) Cockburn, C.J., Bramwell, B., and Montague Smith, J., seemed to be of opinion that the facts did not disclose any felonious intent. *Id.* 300, 301. *And see R.* v. *Sturgess*, 9 Cr. App. R. 120.

"Takes."]—To constitute stealing there must be a *taking* of the goods, either actual or constructive, on the ground that larceny involves a trespass. *See* 2 Russ. Cr. (7th ed.) 1178. At common law it was not larceny for a wife to carry away and convert to her own use the goods of her husband, for husband and wife were regarded as one person in law, and consequently there could be no taking so as to constitute larceny; 1 Hale, 514; 1 Hawk. c. 33, s. 32; and the same if the husband were jointly interested with others in the property so taken. *R.* v. *Willis*, 1 Mood. 375. Nor *at common law* could the husband be guilty of larceny of his wife's goods, as her goods became his property on the marriage. 2 Bl. Com. by Kerr, 388. But the common law was very materially modified by the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), under which a married woman may hold property in her own name separately from her husband, and he may, under certain circumstances set forth in s. 12 of that statute (*ante*, p. 48) be indicted for stealing it from his wife. And as the husband may be guilty of stealing from the wife, the wife may also be guilty of stealing from the husband, for "a wife doing an act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall, in like manner, be liable to criminal proceedings by her husband." 45 & 46 Vict. c. 75, s. 16. These provisions are reproduced by the *Larceny Act*, 1916 (6 & 7 Geo. 5), c. 50, s. 36. *See ante*, p. 500.

Constructive taking.]—The expression "takes" is defined by the *Larceny Act*, 1916, to include constructive taking in obtaining the *possession* (1) by any trick; (2) by intimidation; (3) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; (4) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps. 6 & 7 Geo. 5, c. 50, s. 1 (2) (i) (*ante*, p. 500).

As to the cases where, by a delivery of the goods, not only the possession, but the right of property also passes, it is well established that if the owner

of his own free will, parts with the *property* in the goods taken, there can be no felony in the taking, however fraudulent were the means by which the delivery of the goods was procured; *R.* v. *MacGrath*, L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7: *R.* v. *Lovell*, 8 Q. B. D. 185; 50 L. J. (M. C.) 90; 2 Russ. Cr. (7th ed.) 1212; 2 East, P. C. 668; *see* also *R.* v. *Russett*, [1892] 2 Q. B. 312; 76 J. P. 743, *per* Lord Coleridge, L.C.J. (approved by the Court of Criminal Appeal in *R.* v. *Fisher*, 74 J. P. 427; 22 Cox, 340), and *Whitehorn Brothers* v. *Davison* [1911] 1 K. B. 463, at p. 479, *per* Buckley, L.J., 80 L. J. (K. B.) 425. The ancient rule of law is respected in the definition of larceny in the Act of 1916, but it must be remembered that these authorities were for practical purposes undermined by s. 39 (2) of the *Criminal Justice Administration Act*, 1914 (repealed and re-enacted by s. 44 (3) of the *Larceny Act*, 1916 *ante*, p. 506), which provided that upon an indictment for larceny the defendant may be convicted of obtaining the property by false pretences where that offence is proved. The cases further establish the proposition that no subsequent conversion by the person in whom the *property* has thus vested can be construed into larceny, whatever the intent of the party may be. Where the defendant bought a horse, at a fair, of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "Very well:" the defendant rode the horse away, and never returned; this was held to be no larceny, because the property, as well as the possession, was parted with. *R.* v. *Harvey*, 1 Leach, 467; 2 East, P. C. 669. So, where a woman obtained from the prosecutor, in the name of one of his neighbours, half a guinea's worth of silver, and said that she would return presently with the half-guinea, it was held not to be larceny for the same reason. *R.* v. *Coleman*, 2 East, P. C. 672. So, where A. allowed B. to take a sovereign away to get change for it, and he never returned, this was held no larceny of the sovereign. *R.* v. *Thomas*, 9 C. & P. 741. So, where the defendant sent a letter to the prosecutor in the name of another person, requesting the loan of £3 for a few days, and obtained the money accordingly; eleven of the judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery. *R.* v. *Atkinson*, 2 East, P. C. 673. So, where the defendant obtained goods of a tradesman by means of a forged order from a customer. *R.* v. *Adams*, 1 Den. 38. And where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick, one of them won from him the money in question, which he paid, imagining it to have been won fairly: the judges held that it was no larceny, the prosecutor having parted with his property in the money under the idea that it had been fairly won. *R.* v. *Nicholson*, 2 Leach, 610. And where the goods are obtained not from the owner, but from his servant, who has an authority co-equal with his master, and parts with his master's goods, intending to part with the property in them, such goods cannot be said to be stolen, inasmuch as the servant intends to part with the property in them, and has authority to do so. *R.* v. *Prince*, L. R. 1 C. C. R. 150; 38 L. J. (M. C.) 8. If, however, the servant's authority is so limited, then he can only part with the possession and not with the property; if he is tricked out of the possession, the offence so committed will be

larceny. In *R.* v. *Longstreeth*, 1 Mood. 137 (*post*, p. 523), the carrier's servant had no authority to part with the goods, except to the consignee. His authority was not to act generally in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from *R.* v. *Jackson*, 1 Mood. 119, which the same judges, or at any rate some of them, had shortly before decided. There, the servant (*infra*), from whom the goods were obtained had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. See the judgment of Blackburn, J., in *R.* v. *Prince*, L. R. 1 C. C. R. at p. 155; 38 L. J. (M. C.) 11. And therefore where a person obtained money from the cashier of a bank by presenting, knowing it to be forged, a forged order purporting to be drawn by a customer of the bank, this was held not to be larceny, because the cashier, in paying the money, was acting within the scope of his general authority. *R.* v. *Prince, supra.* So, where the defendant bought goods and desired them to be sent to him with a bill and a receipt, and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. *R.* v. *Parkes*, 2 Leach, 614; 2 East, P. C. 671. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawner upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was held to be no larceny. *R.* v. *Jackson*, 1 Mood. 119. *And see R.* v. *Barnes*, 2 Den. 59; 30 L. J. (M. C.) 34: *R.* v. *Essex*, Dears & B. 371; 27 L. J. (M. C.) 20.

1. Larceny by a trick.]—Where a man, having the *animus furandi* (*see ante*, p. 511), obtains, in pursuance thereof, possession of goods by some trick or artifice, the owner not intending to part with his entire right of property, but with the temporary possession only (Cr. L. Com. 4th Rep., p. 50), this is considered such a taking (even although there is a delivery in fact) as to constitute larceny: *see* 1 Hawk. c. 33, ss. 15-23; 2 Russ. Cr. (7th ed.) 1210 *et seq.* It is not larceny by a trick to obtain goods on credit without making any false statements. *R.* v. *Jones*, 74 J. P. 168; 4 Cr. App. R. 17. But where the defendant offered to give the prosecutor gold for bank-notes, and upon the prosecutor's laying down some bank-notes, for the purpose of having them changed for gold, the defendant took them up, and went away with them, promising to return immediately with the gold, but never in fact returned; Wood, B., said that the property in the notes had never been parted with at all, and left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes, and said, that if they were of that opinion the case clearly amounted to larceny. *R.* v. *Oliver*, 4 Taunt. 274 cit.; 2 Leach, 1072; *see R.* v. *Rodway*, 9 C. & P. 784. The prisoner at a race-meeting made a bet with the prosecutor, laying odds against a particular horse, and the money for which the prosecutor backed the horse

was deposited with the prisoner. The prosecutor admitted that he would have been satisfied although he did not receive back the same coins. The horse won, but while the race was being run the prisoner fraudulently went off with the money. It was held that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass to the prisoner, and therefore there was evidence of larceny by trick. Manisty, J., said, in giving judgment: "On the authorities it is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny." *R.* v. *Buckmaster*, 20 Q. B. D. 182; 57 L. J. (M. C.) 25. This definition was adopted by Moulton, L.J., in *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50; 76 L. J. (K. B.) 806, at p. 72, and was approved by the Court of Criminal Appeal in *R.* v. *Hilliard*, 83 L. J. (K. B.) 439; 23 Cox, 617; 109 L. T. 750. The defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person with him to his lodgings, he would give him the amount, deducting the discount and commission; a person was sent accordingly, but upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned: the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it: the jury being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the defendant, and the judges afterwards held the conviction to be right. *R.* v. *Aickles*, 2 East, P. C. 675; 1 Leach, 294. Where the defendant obtained from a silversmith two cream-ewers, in order that the customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not at the time of the delivery intend to charge for either of them until he had ascertained which would be chosen, this was held by Bayley, J., to be larceny, because the possession only, and not the right of property, had been parted with. *R.* v. *Davenport*, M.S., 1 Archbold's Peel's Acts (3rd ed.) 271. So, where the prisoner went to a shop and said that A. wanted some shawls to look at, and the prosecutor gave her five shawls, which she converted to her own use, it was held by Patteson, J., that as the property in the shawls would continue in the prosecutor until the selection was made, it was larceny if A. did not send for them; but there being no evidence that A. did not send for them, the prisoner was acquitted, because it was assumed, in the absence of such evidence, that A. did send her, that she received the shawls properly, and that she only conceived the design of wrongfully converting them to her own use after she had rightfully obtained possession of them. *R.* v. *Savage*, 5 C. & P. 143; 2 Russ. Cr. (7th ed.) 1211. Where the defendant prevailed upon a tradesman

to take goods to a particular place, under pretence that the price would then be paid for them, and afterwards induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price, the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, *ab initio*, intended to get the goods without paying for them; this was held to be larceny. *R.* v. *Campbell*, 1 Mood. 179. So where the defendant induced a tradesman to send his goods by a servant to a particular place, with change for a crown piece, and on the way met the servant, and giving him a counterfeit crown piece, induced him to part with the goods and change, which he had no authority to do without receiving payment; this was held to be larceny. *R.* v. *Small*, 8 C. & P. 46. So, where the prisoners ordered goods of the prosecutor, and the latter sent them to their house by his servant with strict injunctions not to part with them without receiving the price, and the prisoners gave the servant a cheque which they knew to be worthless, upon which he left the goods with them; this was held to be larceny. *R.* v. *Stewart*, 1 Cox, 174; followed in *R.* v. *Brereton*, 10 Cr. App. R. 201, where the prosecutor sent his son with the thing ordered, with instructions not to leave it without getting the money for it, and the son was induced by a trick to part with the possession. If the owner had himself carried the goods and parted with them as the servant did, no doubt it would have been a case of false pretences; or if the servant had had a general authority to act, it would have been the same as if the master acted. But in this instance he had a limited authority which he chose to exceed. If the prisoners intended to get possession of these goods by giving a piece of waste paper, which they had no reasonable ground to believe would be of use to anybody, and the servant had received positive instructions not to leave the goods without cash payment, the charge of larceny is made out. *Per* Alderson, B., in *R.* v. *Stewart*, *supra*. *See also* *R.* v. *Longstreeth*, 1 Mood. 137 (*post*, p. 523). So, where the defendant having bargained for goods, which, by the custom of trade, should have been paid for before they were taken away, took them away without the consent of the owner, and when he bargained for them did not intend to pay for them, but meant to get them into his own possession, and dispose of them for his own benefit; this was held to be larceny. *R.* v. *Gilbert*, 1 Mood. 185. And where the defendant, intending *ab initio* to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them; this was held to be larceny. *R.* v. *Pratt*, 1 Mood. 250; *R.* v. *Cohen*, 2 Den. 249: *R.* v. *Stephens*, 4 Cr. App. R. 52. The prosecutor sold goods to the prisoner, who agreed to pay ready money for them, and the goods were then delivered by the prosecutor to the prisoner, who then refused either to pay the money or restore the goods, having never intended to pay for them, and having meditated the fraud from the beginning; this was held to be larceny. *R.* v. *Slowly*, 12 Cox, 269 (C. C. R.). The accused went to a tailor and ordered a suit of clothes. A few days later he was fitted, and on a subsequent day he saw the clothes completed, and asked the tailor to send them on to him as he had forgotten his purse, and promised

to pay on delivery. He received the clothes, with the bill, but shut the door in the face of the person delivering them, and never paid for them. It was held that this was larceny by a trick. *R.* v. *Edmundson*, 8 Cr. App. R. 107. So, obtaining money or goods by the practice of *ring dropping* (as it is termed) has been held to be larceny. Thus, where the defendant, in the presence of the prosecutor, picked up a purse in the street, containing a receipt for 147*l.* for a "*rich brilliant diamond ring*," and also the ring itself, it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10*s.* only, and the watch and money were never returned: it was left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury, being of that opinion, convicted the defendant. *R.* v. *Patch*, 1 Leach, 238; 2 Russ. Cr. (7th ed.) 1235. In *R.* v. *Moore*, 1 Leach, 314; 2 East, P. C. 679, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of *ring dropping* amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with, the property in the goods was not. *See also R.* v. *Watson*, 2 Leach, 640; 2 East, P. C. 680. On the same principle it has been held, that a gipsy who obtains and keeps money or goods by a false pretence of witchcraft, the person from whom she obtains them merely intending to part with the possession and expecting them to be returned, is guilty of larceny. *R.* v. *Bunce*, 1 F. & F. 523, Channell, B. Where the defendant, in the presence of the prosecutor, picked up a purse containing a watch chain and two seals, which the defendant and his confederate represented to be gold, and worth 18*l.*, and the prosecutor purchased the defendant's share for 7*l.*, intending to part with the property in the money as well as the possession of it, Coleridge, J., held that this was not larceny. *R.* v. *Wilson*, 8 C. & P. 111. So, where the prisoner, by means of what is known as the *purse trick*, induced the prosecutor to give him a shilling for a purse, by showing the prosecutor three shillings, and then making it appear as if the prisoner had dropped them into the purse whereas he had in fact only dropped three halfpence into the purse, this was held not to be larceny but false pretences. *R.* v. *Solomons*, 17 Cox, 93 (C. C. R.). In *R.* v. *Ward*, 64 J. P. 776, Fulton, Recorder, suggested that the purse trick should be dealt with under the Vagrancy Acts and not by indictment for larceny. Where the defendants decoyed the prosecutor into a public-house, and then introduced the play of cutting, and one of them prevailed on the prosecutor, who did not play on his own account, to cut the cards for him; and then under the pretence that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained; and that it would be felony should they find that the money was obtained

upon a preconcerted plan to steal it. *R.* v. *Horner*, 1 Leach, 270; Cald. 295. So, where the prosecutor was induced, by a preconcerted plan, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stake-holder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false colour of winning the bet, and the jury found that there was: this was held to be larceny; because at the time the defendants obtained the money from the prosecutor he parted with the possession only, and the property was to pass eventually only if the other party won the wager. *R.* v. *Robson*, R. & R. 413. *See R.* v. *Buckmaster*, 20 Q. B. D. 182; 57 L. J. (M. C.) 25 (*ante*, p. 518). The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once, and the remainder upon delivery of the horse. Prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. It was held that the prisoner was rightly convicted of larceny by a trick of the 8*l.*, on the ground that the prosecutor had not intended to part with his property in the 8*l.* until the prisoner had fulfilled his part of the bargain, which he never intended to do. *R.* v. *Russett* [1892] 2 Q. B. 312; 17 Cox, 534; 67 L. T. 124; 56 J. P. 743. This is a strong case, for the prosecutor in the course of his evidence said, "I never expected to see the 8*l.* back, but to have the horse." *Id.* Where two men, J. and W., acting in concert, and intending to defraud the prosecutor, entered his shop, and by means of an artifice induced him to draw a cheque on his banker for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to the prosecutor of 42 sovereigns, and that the prisoner W. was to remain at the shop till they went to and returned from the bank; at the bank, by the prosecutor's desire, and in his presence, the banker handed four 10*l.* notes and two sovereigns to the prisoner J.; the prosecutor and J. then left the bank together, and while on their way back to the shop J. absconded with the notes and two sovereigns, which he and W., who had in the meantime gone off from the shop, appropriated to their own use; this was held to be a larceny by both prisoners of the notes and the two sovereigns, the prosecutor never having parted with the property in and possession of them, and J. having no more than the bare custody of them until the payment to the prosecutor of the 42 sovereigns. *R.* v. *Johnson*, 2 Den. 310; 21 L. J. (M. C.) 32. Where the defendant by false representations induced the prosecutrix to buy from him a dress for 25*s.*, promising that if she would do so he would give her another dress worth 12*s.*; then took a guinea from her hand, gave her a dress worth much less than a guinea, and refused to give her the other dress he had promised: this, it being found by the jury that it was a part of the defendant's scheme to obtain the money by means of a pretended sale, was held to be larceny. *R.* v. *Morgan*, Dears. 395;

6 Cox, 408. Where the prisoner went into a shop and asked for change for half a crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown; upon an indictment for stealing the two shillings and sixpence, Parke, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *R.* v. *Williams*, 6 C. & P. 390. So also, where A. and B. went into a shop, and A. put down sixpence in silver and sixpence in copper, and asked the prosecutrix to give him one shilling in change, upon which she took one shilling from the till and put it on the counter beside the sixpence in silver and the sixpence in copper; A. then said to the prosecutrix that she might as well give him a florin and take it all; she took a florin from the till and put that on the counter, expecting she was to receive two shillings of the prisoner's money, and the prisoner went away with the florin; the prosecutrix did not discover her mistake till she was putting the change into the till, but at the same moment B. distracted her attention by asking the price of some article: it was held that the prosecutrix never intended to part with her property in the florin till she had received two shillings of the prisoner's money, and that the offence was larceny. *R.* v. *McKale*, L. R. 1 C. C. R. 125; 37 L. J. (M. C.) 97, approved in *R.* v. *Buckmaster*, *ante*, p. 518. F., in execution of a design concocted between himself and S., took two bicycles to an auctioneer for sale. At the auction S., by arrangement with F., bid for the bicycles, and they were knocked down to him. F. then took advantage of the practice of the auctioneer to pay the vendor before he received the purchase money, and applied for and received the amount bid by S., who left without paying the auctioneer. It was held that the offence was not larceny by a trick, but false pretences or conspiracy to defraud. *R.* v. *Fisher*, 103 L. T. 320; 22 Cox, 340; 74 J. P. 427; 26 T. L. R. 589; 5 Cr. App. R. 102; where *R.* v. *Russett* and *R.* v. *McKale*, *supra*, were considered and followed by the Court of Criminal Appeal. F. entered a shop and asked for twopennyworth of tobacco, and gave the shopwoman a half-sovereign, which she put down on the counter. While she was getting change F. took back the half-sovereign and received the change, 9*s*. 10*d*. He then asked her if she could give him a sovereign for ten shillings and half a sovereign. She refused, and missing the half-sovereign, asked F. where it was, and he gave it back to her. Held, that F. had been guilty of larceny of the half-sovereign, and not merely of an attempt to steal. *R.* v. *Greenaway*, 72 J. P. 389 (C. C. A.). So where two persons by a series of tricks fraudulently induced a barmaid to pay over money of her master to them without having received from them in return the proper change, the barmaid having no authority to pay over the money without receiving the proper change, and having no intention of, or knowledge that she was so doing, it was held that they were guilty of larceny. *R.* v. *Hollis*, 12 Q. B. D. 25; 23 L. J. (M. C.) 38. Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodging, out of which the defendant chose six pairs, which were laid on the back of a chair, the defendant then sent the prosecutor back to his shop for some articles, and,

while he was absent, absconded with the stockings; the judges held that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. *R.* v. *Sharpless*, 1 Leach, 92; 2 East, P. C. 675. So where the prosecutor having told his servant in the defendant's hearing to go to S. and pay him some money, the defendant offered to take it, falsely stating that he lived a few doors from S., which statement induced the prosecutor to deliver the money to the defendant to take to S., instead of which he appropriated it to his own use; and the jury, finding the defendant guilty, stated that their verdict was founded on the belief that the defendant had obtained the money by a trick, intending at the time to appropriate it to his own use; the conviction was held right. *R.* v. *Brown*, Dears. 616. Where the prisoner went to an inn, on a fair-day, and desired the ostler to bring out his horse, and, upon the latter saying he did not know which was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare, which the prisoner attempted to mount, but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured: Garrow, B., held this to be larceny. *R.* v. *Pitman*, 2 C. & P. 423. If a man, *animo furandi*, sues out a replevin, and by that means obtains the possession of another man's horse, and rides away with it: or by a fraudulent ejectment gets possession of another's house, and carries away the goods out of it, he is guilty of larceny. 1 Hale, 507; 1 Hawk. c. 33, s. 12; 3 Co. Inst. 108: *and see R.* v. *Farre*, (Kel. J.) 43; 2 Leach, 1064 n. Where the defendant obtained the mail bags from the post-office, pretending that he was the mail guard, and then ran away with them; the jury, being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges held the conviction to be right. *R.* v. *Pearce*, 2 East, P. C. 603. In this case the property did not pass, for the postmaster had no property in the mail bags to part with. 2 East, P. C. 673. Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was held to be larceny; because the servant had no authority to part with the goods but to the right person. *R.* v. *Longstreeth*, 1 Mood. 137. And where a carrier's servant left goods at the prisoner's house by mistake, but without any inducement from the prisoner, who, afterwards, knowing that they had been left by mistake, and did not belong to him, converted them to his own use; this was held to be larceny. *R.* v. *Little*, 10 Cox, 559. So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendant by fraud induced the servant to part with the possession of the horse, under colour of an exchange for another, intending all the while to steal it; this was held to be larceny. *R.* v. *Sheppard*, 9 C. & P. 121, Coleridge, J. T. J., the owner of a watch, sent it to be regulated to A., the person from whom he had bought it, and who had no authority to deliver it to anybody but the owner. The defendant fraudulently induced A. to believe that T. J. desired the watch to be sent by post to the postmaster at B., in a letter; and the watch having been so sent, the defendant personated T. J., and induced the postmaster to deliver

it to him as T. J. It was held that, on the receipt of the watch by the postmaster, the special property of A. ceased, and the general property of the owner, being unincumbered, drew to it the possession; that the postmaster had only the custody of the watch for the purpose of delivering it to the owner, and so, his possession being the possession of the owner, the obtaining of it by the defendant was a larceny from T. J. *R.* v. *Kay*, Dears. & B. 231; 26 L. J. (M. C.) 119. Where an "automatic box," the property of a company, was placed in a public passage, and was so constructed that upon a penny being placed in it a cigarette was ejected from it, and the prisoner, instead of putting a penny in the box, put into it a metal disc of the size of a penny, and so obtained a cigarette, it was held that he was guilty of larceny. *R.* v. *Hands*, 16 Cox, 188 (C. C. R.). Prosecutor was owner of a coal yard, at which coal and slack were sold; the price of slack being about half the price of coal. By the custom of the yard, with which the prisoner was acquainted, the carts were weighed on entering the yard empty, and after being loaded were again taken to the machine and weighed, and the weight of the coal on the cart being thus ascertained, the price was paid *before the carts were permitted to leave the yard.* The prisoner went to the yard with his cart, and asked for a load of coal, which was loaded on his cart by the prosecutor's servant. After the cart was loaded, the prisoner placed slack over the coal so as to conceal it, and took the cart to the weighing-machine. Being asked by the man at the weighing-machine what he had in his cart, he replied "Slack." The cart was then weighed, and, the contents having been paid for after the rate of slack, was driven away by the prisoner. It was held, that if the prisoner went into the yard with the preconceived plan of obtaining the coal by the above artifice, he might be convicted of stealing the coal. *R.* v. *Bramley*, 31 L. J. (N. S.) M. C. 11; L. & C. 21; 8 Cox, 468. Where the defendant, by artifice, obtained possession of a request-note at the India-House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor (to whom he was a perfect stranger), and the chest of tea was thereupon delivered to him: the judges held this to be larceny, notwithstanding the possession had been obtained by means of a regular request-note and permit. *R.* v. *Hench*, R. & R. 163. A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered, "To Mr. Heath's": the defendant replied that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return, to take home to his master: the boy accordingly gave him the parcel; but the parcel he took from him for his master contained nothing but old rags of no value: the judges held this to be larceny. *R.* v. *Wilkins*, 1 Leach, 520; 2 East, P. C. 673; *and see Cundy* v. *Lindsay*, 3 App. Cas. 459; 47 L. J. (Q. B.) 481. Where the prosecutor supplied the accused with bread, being told that it could not be paid for till after it had been sold by the accused, and the accused failed to return to the prosecutor with the money after he had sold the bread, it was held that a conviction for larceny by a trick was unsafe, and it was quashed. *R.* v. *Jones*, 74 J. P. 168. It is incumbent on the judge to direct the jury as to the legal requisites to constitute the offence, and where this has

not been done a conviction may be quashed. *R.* v. *Hilliard*, 83 L. J. (K. B.) 439; 23 Cox, 617; 9 Cr. App. R. 171.

Distinction between larceny and obtaining by false pretences.]—The offence of larceny by a trick in some cases so nearly resembles that of obtaining by false pretences as to create some difficulty in distinguishing them upon principle. Between the crime of false pretences and that of larceny the most intelligible distinction seems to be this:—In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. *White* v. *Garden*, 20 L. J. (N. S.) C. P. 166; 10 C. B. 919, 927, Talfourd, J.: *R.* v. *Barnes*, 2 Den. 59; 20 L. J. (M. C.) 34: *R.* v. *Robins*, 6 Cox, 420; Dears. 418: *Oppenheimer* v. *Frazer* [1907] 2 K. B. 50; 76 L. J. (K. B.) 806; 97 L. T. 3; 23 T. L. R. 410: *Whitehorn Bros.* v. *Davison* [1911] 1 K. B. 463, *per* Buckley, L.J., at p. 479; 80 L. J. (K. B.) 425; 104 L. T. 234. *See also R.* v. *Russett* [1892] 2 Q. B. 312; 56 J. P. 743 (*ante*, p. 521), approved in *R.* v. *Fisher*, 74 J. P. 427; 22 Cox, 340 (*ante*, p. 522), *R.* v. *Wilks*, 10 Cr. App. R. 16. "If," says Parke, B., "a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." *Powell* v. *Hoyland*, 6 Ex. 67, 70: *R.* v. *Adams*, R. & R. 225: *Cundy* v. *Lindsay*, *supra*: *Bentley* v. *Vilmont*, 12 App. Cas. 471; 57 L. J. (Q. B.) 18. The distinction between larceny and obtaining by false pretences is now little more than academic, because of the provisions of 6 & 7 Geo. 5, c. 50, s. 44, sub-ss. 3, 4 (*ante*, p. 506).

2. Larceny by intimidation.]—Where a man, having the *animus furandi* (*see ante*, p. 511), obtains possession of goods by frightening the owner, as by threatening him with temporary imprisonment unless he delivers up his goods, and the owner does deliver them under the influence of the fear inspired by this threat, this is considered such a taking (although there is a delivery in fact) as to constitute larceny. *R.* v. *MacGrath*, L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7: *R.* v. *Lovell*, 8 Q. B. D. 185; 50 L. J. (M. C.) 90. The prisoner, acting as auctioneer at a mock auction, knocked down a piece of cloth to the prosecutrix for 26*s*., she not having bid, as he knew. The prosecutrix denied that she had bid; the prisoner asserted that she had, and must pay before she could leave the auction room. The prosecutrix tried to go out of the room, when a confederate of the prisoner prevented her doing so. She then in fear paid the 26*s*. and took away the cloth which was given to her. These facts were held to constitute a larceny of the 26*s*. *R.* v. *MacGrath*, *supra*. The learned judges who decided this case expressed a doubt whether upon these facts the prisoner might not have been indicted for robbery, but they all agreed that even if a robbery had in fact been committed, that did not preserve the prisoner from the liability to be convicted of larceny, as a robbery includes a larceny. *See* the judgment of Blackburn, J., in *R.* v.

MacGrath, supra. As to whether the facts in that case would have sustained an indictment for robbery, *see R.* v. *Knewland*, 2 Leach, 721 : *R.* v. *Wood*, 2 East, P. C. 732, from which it would seem that they would not.

3. Larceny under a mistake on the part of the owner.]—The third kind of constructive taking, expressly included in the statutory definition of larceny (*ante*, p. 500), is the case where the possession is obtained under a mistake on the part of the owner, with knowledge on the part of the taker that possession has been so obtained. A good illustration of this form of larceny is afforded by the case of *R.* v. *Middleton*, L. R. 2 C. C. R. 38; 42 L. J. (M. C.) 73. In that case the prisoner was a depositor in a post-office savings bank, in which 11*s.* stood to his credit. He gave notice in the ordinary form to withdraw 10*s.*, and a warrant for that amount was issued to him, and a letter of advice was sent to the post-office at N. to pay him 10*s.* He went to that office and handed his deposit-book and the warrant to the clerk. The clerk, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for £8 16*s.* 10*d.*, and placed the latter amount upon the counter. The clerk entered the amount paid, £8 16*s.* 10*d.*, in the prisoner's deposit-book and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an *animus furandi*, and knowing the money to be the money of the Postmaster-General. Upon these facts, it was held by eleven of the judges that the prisoner was guilty of larceny, and by four that he was not. Seven of the eleven held that, even assuming the clerk to have the same authority to part with the possession of and property in the money which the Postmaster-General, the owner, would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property, and that as the property did not actually pass, although it was intended to pass, and as the prisoner took up the money *animo furandi*, there was both a taking and a stealing within the definition of larceny. Three of the eleven held the prisoner guilty of larceny, on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and, therefore, no property passed to the prisoner, and the prisoner took up the money *animo furandi*. One of the eleven held the prisoner guilty on the ground that the mistaken act of the clerk in placing the money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny. The minority, consisting of four judges, who held that the prisoner was not guilty, based their opinion on the ground that the clerk had a general authority to part with the property in the money, and that he intended, although acting under a mistake, to part with such property to the prisoner at the time he handed over the money to him, and that having such general authority and such intention, and acting upon them, there was no felonious taking by the prisoner without the consent and against the will of the owner. *See also R.* v. *Hollis*, 12 Q. B. D. 25; 53 L. J. (M. C.) 38 (*ante*, p. 522) : *R.* v. *Hehir*, 18 Cox, 267 (C. C. R. Ir.). As to the effect on the right to a restitution order of the transfer of property in goods by means not amounting to larceny, *see ante*, pp. 293, 295.

Whether, when property is given by the owner to a person *under a mistake*

of which the latter was not aware when he received it, and afterwards, on finding out the mistake, he fraudulently converts such property to his own use, such person is guilty of larceny, is a question which, after having been argued before fourteen judges, still remains unsettled, seven of their lordships having answered it in the affirmative, and seven in the negative. *R.* v. *Ashwell*, 16 Q. B. D. 190; 55 L. J. (M. C.) 65; *and see R.* v. *Riley*, *post*, p. 535. The facts of *R.* v. *Ashwell* were that the prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign, believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then fraudulently appropriated it to his own use. The prisoner having been convicted of larceny of the sovereign, it was held by the Court for Crown Cases Reserved that the prisoner had not been guilty of larceny as a bailee, but the Court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood. *Id.* *R.* v. *Ashwell* does not affect the old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny. *R.* v. *Flowers*, 16 Q. B. D. 643; 55 L. J. (M. C.) 179. *See* Stephen, Dig. Cr. L. (6th ed.), p. 261.

4. Larceny of goods found.]—It was at one time considered that if a man lost goods, and another found them, and, not knowing the owner, converted them to his own use, this was not larceny, 3 Co. Inst. 108; 1 Hawk. c. 33, s. 2, even although he denied the finding of them or secreted them. 1 Hale, 506. But this doctrine was always treated as subject to narrow limitations. *Id.*: 2 East, P. C. 664: *R.* v. *Kerr*, 8 C. & P. 176: *R.* v. *Reed*, C. & Mar. 306: *R.* v. *Peters*, 1 C. & K. 245: *R.* v. *Mole*, *Id.* 417. And the true rule of law resulting from the authorities on this subject has been pronounced to be, that, "if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them, with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." *R.* v. *Thurborn*, 1 Den. 387; 2 C. & K. 831; 18 L. J. (M. C.) 140; 13 J. P. 459: *R.* v. *Wood*, 3 Cox, 453: *R.* v. *Dixon*, Dears. 580; 25 L. J. (M. C.) 39: *R.* v. *Shea*, 7 Cox, 147 (C. C. R. Ir.): *R.* v. *Christopher*, Bell, 27; 28 L. J. (M. C.) 35. The rule as stated above was approved by the Court of Criminal Appeal in *R.* v. *Mortimer*, 99 L. T. 204; 1 Cr. App. R. 20; 72 J. P. 349. And where property has been left by a passenger in a train or coach it would seem always to have been treated as larceny, if a servant of the railway company or coach owner appropriated it instead of taking it to the lost property office. *See R.* v. *Pierce*, 6 Cox, 117. In *R.* v. *Moore*, L. & C. 1; 30 L. J. (M. C.) 77, on an indictment for stealing a bank-note, the jury found that the prosecutor had dropped the note in the defendant's shop; that the defendant had found it there; that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge who the owner was, and after that converted the note to his own use; that

he intended, when he found the note, to take it to his own use, and deprive the owner of it, whoever he was; and that he believed, when he found it, that the owner could be found. It was held that, upon these findings, the defendant was rightly convicted of larceny. It is to be observed, that in the last-mentioned case, although the defendant at the time he found the bank-note did not know, nor had reasonable means of knowing, who the owner was, yet he *did* believe at the time of the finding that the owner could be found. The case of *R.* v. *Glyde*, L. R. 1 C. C. R. 139; 37 L. J. (M. C.) 107, shows that the belief by the prisoner at the time of the finding of the chattel that he could find the owner is a necessary ingredient in the offence, and that it is not sufficient that he intended to appropriate the chattel at the time of finding it, and that he acquired the knowledge of who the owner was before he converted it to his own use. In that case the prisoner found a sovereign on the highway, believing it had been accidentally lost; but, nevertheless, with the knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should become known to him who the owner was. The owner was speedily made known to him, and the prisoner refused to give up the sovereign. There was, however, no evidence that he believed, at the time of finding the sovereign, that he could ascertain who the owner was, and the prisoner was therefore held not to be guilty of larceny. *See also* *R.* v. *White*, 23 Cox, 190; 107 L. T. 528; 76 J. P. 384. In *R.* v. *Deaves*, 11 Cox, 227; Ir. Rep. 3 C. L. 306, the facts were that the prisoner's child, having found six sovereigns in the street, brought them to the prisoner, who counted them and told some bystanders that the child had found a sovereign. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. On the same evening, about two hours after the finding, the prisoner was told that a woman had lost money, upon which the prisoner told her informant to mind her own business and gave her half a sovereign. It was held by the majority of the Irish Court of Criminal Appeal, that this case could not be distinguished from *R.* v. *Glyde*, *supra*, that there was nothing to show that at the time the child brought her the money the prisoner knew the property had an owner, or, at all events, to show that she was under the impression that the owner could be found, and that therefore the conviction of the prisoner for larceny must be quashed. The proper question to be put to the jury is not whether they are satisfied that the prisoner could have found the owner, but whether they are satisfied that the prisoner himself *believed* that he could have found the owner. *R.* v. *Knight*, 12 Cox, 102 (C. C. R.). It is clearly larceny, if the defendant at the time he finds and appropriates the lost property knows the owner; and, therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was held to be a larceny. *Cartwright* v. *Green*, 8 Ves. 405; 2 Leach, 952. So if a hackney coachman converts to his own use a parcel left by a passenger in his coach by mistake, it is felony, if he knows the owner, or if he took him or set him down at any particular place where he might have inquired for him. *R.* v. *Wynne*, 2 East, P. C. 664; 1 Leach, 413: *R.* v. *Lamb*, 2 East, P. C. 664; *R.* v. *Sears*, 1 Leach, 415 n. So, in every case where

the property is not, properly speaking, lost, but only *mislaid*, under circumstances which would enable the owner to know where to look for and find it (as where a purchaser at a stall of the defendant in a market left his purse on the stall), the person who fraudulently appropriates property so mislaid is guilty of larceny. *R.* v. *West*, Dears. 402; 24 L. J. (M. C.) 4. Where a person purchased at an auction a bureau, in which he afterwards discovered, in a secret drawer, a purse of money, which he appropriated to his own use, it was held, that, if he had express notice that the bureau only, and not its contents, if any, were sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny: but that, if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny. *Merry* v. *Green*, 7 M. & W. 623; 10 L. J. (M. C.) 154. And in every case in which there is any *mark* upon the property by which the owner may be traced, or means of knowing who the owner is, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny. *R.* v. *Preston*, 2 Den. 353; 21 L. J. (M. C.) 41; 15 J. P. 802: *R.* v. *Pope*, 6 C. & P. 346: *R.* v. *Mole*, 1 C. & K. 417: *R.* v. *Mortimer*, 72 J. P. 349. If *at the time of the finding* the defendant had the means of knowing who the owner was, or reasonably believed that he could be found, his subsequent retention or appropriation of the property, with such means of knowledge, may be evidence of such a conversion even if it be not shown that he meant to steal the property when it got first into his hands. *R.* v. *Mortimer*, *supra*. *But see R.* v. *Preston*, *supra*: *R.* v. *York*, 1 Den. 335; 18 L. J. (M. C.) 38; 2 C. & K. 841: *R.* v. *Dixon* (ante, p. 527): *R.* v. *Christopher* (*ante*, p. 527): *R.* v. *Matthews*, 12 Cox, 489; 29 J. P. 596 (C. C. R.). A boy having found a lost cheque, the prisoner by some pretence got it from him, and kept it in hopes of getting a reward, but not being satisfied with the reward offered by the owner, he refused to deliver it either to the owner or to the boy. Under this state of facts it was held that the prisoner could not be convicted of stealing the cheque either from the owner or the boy. *R.* v. *Gardner*, L. & C. 243; 32 L. J. (M. C.) 35; 9 Cox, 253.

Where the finder of a lost purse containing money and documents retained it, not feloniously but in the hope of a reward, and showed it to the prisoner in order to get his opinion as to the amount of the reward likely to be offered, and for this purpose handed the purse and its contents to the prisoner to examine, and the prisoner retained the purse and its contents against the will of the finder, it was held that the prisoner could be convicted of larceny on a count laying the property in the finder. *R.* v. *Swinson*, 64 J. P. 72, Bosanquet, Common Serjeant.

Things abandoned.]—Things of which the ownership has been abandoned are not capable of being stolen. 2 East, P. C. 606; Steph. Dig. C. L. (2nd ed.) 253. If there is any ground for supposing that the accused may have believed the article found to have been abandoned by its owner, the jury must be carefully directed with regard to the matter, since, if the jury find that belief

as a fact, the accused is not guilty. *See R.* v. *White*, 76 J. P. 384; 23 Cox, 190; 107 L. T. 528.

Delivery of physical, without legal, possession.]—If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny, even at common law: 1 Hale, 506; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. It was the duty of the prisoner, who was in the prosecutor's service as foreman, to enter weekly on a pay-sheet the amount due to each workman for the week's wages, to present this sheet to the cashier, and, the total amount due to the several workmen having been reckoned up, to obtain such total amount from the cashier, and to pay thereout the amounts due to the respective workmen. The prisoner, intending at the time to defraud his master, falsely represented on the pay-sheet that 1*l.* 10*s.* 4*d.* was due to a certain workman, whereas a sum of 1*l.* 8*s.* only was due to him, and having obtained the total amount for the week from the cashier, which included such sum of 1*l.* 10*s.* 4*d.*, fraudulently appropriated the difference of 2*s.* 4*d.* to his own use. This was held to be larceny of the 2*s.* 4*d.*, for although it had been obtained by the prisoner from the cashier by a false pretence, it was merely handed to the prisoner as the servant of the master, and continued the property and in the constructive possession of the master. *R.* v. *Cooke*, L. R. 1 C. C. R. 295; 40 L. J. (M. C.) 68. Where a person employed to drive cattle, or to take them to a particular place for a special purpose, and bring them back, sells them, it is larceny; for he has the custody merely, and not the right to the possession: *R.* v. *Stock*, 1 Mood. 87: *R.* v. *M'Namee*, 1 Mood. 368; although the intention to convert them was not conceived until after they were delivered to him: *R* v. *Harvey*, 9 C. & P. 353, Alderson, B.: *R.* v. *Jackson*, 2 Mood. 32: *see R.* v. *Goode*, C. & Mar. 582, Patteson, J.: *R.* v. *Jones*, *Id.* 611, Cresswell, J.: *R.* v. *Smith*, 1 C. & K. 423, Coleridge, J. Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, it was held to be felony. *R.* v. *Robinson*, 2 East, P. C. 565. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them, the judges held this to be felony. *R.* v. *Bass*, 2 East, P. C. 566. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the daytime, received from his master a bill of exchange, with directions to send it enclosed in a letter to J. S. in London; the defendant absconded with the bill, and the judges held this to be felony. *R.* v. *Paradise*, 2 East, P. C. 565. So, if money or a valuable security (as a cheque drawn by the prosecutor on a banker: *R.* v. *Heath*, 2 Mood. 33) is given by a master to his servant to carry to another, or to purchase goods with, and the servant applies it to his own use, it is larceny. *R.* v. *Lavender*, 2 East, P. C. 566; 2 Russ. Cr. (7th ed.) 1366: *R.* v. *Beaman*, C. & Mar. 595, Patteson, J. So, if a man, having purchased corn on board a vessel, sends his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman

misappropriates a part of it, this has been held larceny. *R.* v. *Abrahat*, 2 Leach, 824 : *R.* v. *Spears*, 2 Leach, 825; 2 East. P. C. 568. So, where the servant of a master carman, employed to cart goods, by collusion with others suffered the goods, and the cart, to be taken away, it was held to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner. *R.* v. *Harding*, R. & R. 125. So, where a servant got ten guineas from her master, in order to get silver for them, and, instead of doing so, ran away with the guineas, it was held to be larceny. *R.* v. *Atkinson*, 1 Leach, 302 n. Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange, unindorsed, got it discounted, and absconded with the proceeds of it, it was held to be felony. *R.* v. *Chipchase*, 2 Leach, 699; 2 East, P. C. 567; *and see R.* v. *Murray*, 1 Leach, 344. In *Farquharson* v. *King* [1902] App. Cas. 325; 71 L. J. (K. B.) 667, a firm of merchants warehoused with a dock company their timber imported by them, and instructed the dock company to accept all transfer or delivery orders signed by a particular clerk, who had a limited authority to make sales to known customers. The clerk under an assumed name fraudulently sold his master's timber to K., who did not know the firm nor the clerk under his real name. Halsbury, L.C., held this to be a clear case of larceny by the clerk. Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank-notes, entering the payment in the books as being made to "a man"; this was held by the judges to be a larceny of the bank-notes. *R.* v. *Hammon*, R & R. 221; 2 Leach, 1083; 4 Taunt. 304; 13 R. R. 596. So, if a sheriff's officer clandestinely sell, for his own use, part of the goods which he has seized under a *fi. fa.*, he is guilty of larceny, because he has the custody of the goods merely, like a servant, and has not the legal possession. *R.* v. *Eastall*, 2 Russ. Cr. (7th ed.) 1288, 1360. An unauthorized *gift* by the servant of his master's goods is as much a felony as if he sold or pawned them. *R.* v. *White*, 9 C. & P. 344. And where a third party receives goods from a servant under colour of a pretended sale, knowing that the servant has no authority to sell them, and is in fact defrauding his master, this is larceny in both. *R.* v. *Hornby*, 1 C. & K. 305, Coltman, J. This case was approved in *R.* v. *Tideswell* [1905] 2 K. B. 273; 74 L. J. (K. B.) 725. The prisoner was in the habit of buying from time to time from a manufacturing company portions of the accumulated ashes of the company's works, at an agreed price per ton. The company's weigher fraudulently and in collusion with the prisoner weighed and delivered to the prisoner 32 tons 13 cwt. of the ashes, and entered the weight in the company's book as being 31 tons 3 cwt. only. Held, that on these facts the prisoner was rightly convicted of larceny of 1 ton 10 cwt. But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this is held not to be larceny at common law. 2 East,

P. C. 568. Therefore, if a shopman receives money from a customer of his master, and, instead of putting it into the till, secretes it : *R.* v. *Bull*, 2 Leach, 841, cit.; or, if a banker's clerk receives money at the counter, and, instead of putting it into the proper drawer, purloins it; *R.* v. *Bazeley*, 2 Leach, 835; or receives a bond for the purpose of being deposited in the bank, and, instead of depositing it, converts it to his own use : *R.* v. *Waite*, 1 Leach, 28; 2 East, P. C. 570; in these cases it has been held that the clerk or shopman is not guilty of larceny. *See post*, p. 614, *tit. Embezzlement.* So, where a servant was sent by his master to get silver for a 5*l.* note, which he did, and absconded with the silver, it was held not to be larceny, because the silver had never been in the possession of his master, except by the hands of the servant. *R.* v. *Sullens*, 1 Mood. 129. And where the prosecutor, having employed the defendant to purchase Exchequer bills for him, gave him a cheque upon his bankers for the amount, and the defendant received the amount of the cheque in bank-notes, and absconded, it was held not to amount to a larceny of the notes, because the prosecutor never had possession of them except by the hands of the defendant. *R.* v. *Walsh*, R. & R. 215; 2 Leach, 1054; 4 Taunt. 258. What is a sufficient delivery to the master for this purpose must depend upon the nature of the goods. Thus, the putting down, by the servant, of a load of hay which the master had sent him for, at the master's stable door, was held a sufficient delivery to the master to make the servant guilty of larceny in then appropriating a part of it to his own use. *R.* v. *Hayward*, 1 C. & K. 518, Tindal, C.J.

If the owner of goods delivers them to another, but is present all the time they are in the other's possession, and there is no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them makes away with them and converts them to his own use, he will be guilty of larceny. 2 East, P. C. 683, 684; 1 Hawk. c. 30, s. 2. As, for instance, if the owner gives the goods to a man to carry and accompanies him at the same time—if the man runs away with the goods, he is clearly guilty of larceny. The law laid down in this paragraph was cited with approval, and formed the ground of decision in *R.* v. *Thompson*, L. & C. 225; 32 L. J. (M. C.) 53. In that case a lady, wishing to get a railway ticket, finding a crowd at the pay place, asked the prisoner, who was nearer to the pay place, to get a ticket for her, and handed him a sovereign to pay for it. He took the sovereign, intending to steal it, and immediately ran off with it. On these facts he was held to have been guilty of larceny at common law, as the lady being present retained the dominion and possession in point of law, after she had handed the sovereign to him for the intended purpose. *Id.*

So, if a man have the bare charge or special use of the goods of another, this does not divest the owner of the possession in law; and if the person who thus has the use of them fraudulently converts them, it is larceny. As, for instance, if a guest robs his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 Hale, 506; 1 Hawk. c. 33, s. 6.

Although the taking must, in strictness, be *invito domino*, yet where a servant being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come; it was held that this conduct of the master was no defence to an indictment against the robbers. *R.* v. *Egginton*, 2 Leach, 913; 2 B. & P. 508; *cf. R.* v. *Williams*, 1 C. & K. 195. Where the prisoner asked a clerk of the prosecutor to procure him a deed in the possession of the latter, and the clerk told his employer of the request, and by his direction gave the deed to the prisoner, it was held that if the clerk gave the deed into the prisoner's hand the prisoner could not be convicted of stealing it, but that if the clerk put down the deed and the prisoner took it up, he could be so convicted. *R.* v. *Lawrence*, 4 Cox, 440. *See also R.* v. *Johnson*, C. & Mar. 218; *R.* v. *Chandler* [1913] 1 K. B. 125; 82 L. J. (K. B.) 106; *post*, p. 665.

"Carries away."]—In order to constitute larceny, there must not only be a taking, but also *asportation*, or *carrying away*. A bare removal from the place in which the thief found the goods, though he does not make off with them, is a sufficient asportation. 1 Hale, 508; 4 Bl. Com. 231; 2 Russ. Cr. (7th ed.) 1178. By s. 1 (2) (ii.) of the *Larceny Act*, 1916, the expression "carries away" is defined to include any removal of anything from the place which it occupies, but in the case of a thing attached only if it has been completely detached. As, for instance, if a man is leading another's horse out of a close, and is apprehended in the act; or if a guest, stealing goods out of an inn, has removed them from his chambers downstairs; 3 Co. Inst. 108, 109; or if a servant, *animo furandi*, takes his master's hay from the stable, and puts it into his master's waggon; *R.* v. *Gruncell*, 9 C. & P. 365; or, if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but be surprised before he can make his escape with it; *R.* v. *Simson*, Kel. (J.) 31; 1 Hawk. c. 33, s. 28: *R.* v. *Amier*, 6 C. & P. 344; or if, intending to steal a cask of wine, he removes it from the head to the tail of the waggon in which it is placed, and is detected before he can effect his purpose of carrying it off. *R.* v. *Walsh*, 1 Mood. 14. And where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of his pocket; but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket; this was considered a sufficient asportation to constitute larceny. *R.* v. *Thompson*, 1 Mood. 78; *and see R.* v. *Taylor* [1911] 1 K. B. 674; 80 L. J. (K. B.) 311; 75 J. P. 126; 27 T. L. R. 108. In this case the accused put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its meeting a belt. The prosecutor grasped the purse and replaced it. It was held that there was sufficient evidence of asportation to support a charge of larceny, though not of larceny from the person. So, the transfer of a letter by a letter-carrier from

his pouch to his pocket is a sufficient asportation. *R.* v. *Poynton*, L. & C. 247; 32 L. J. (M. C.) 29. But where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents and was detected before he had accomplished his purpose; the judges held that this was not sufficient. *R.* v. *Cherry*, 2 East, P. C. 556; 1 Leach, 236, 321. So, where the thief was not able to carry off the goods on account of their being attached by a string to the counter: *Anon.*, 2 East, P. C. 556; or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket: *R.* v. *Wilkinson*, 1 Hale, 508; the Court in these cases held, that there was not sufficient carrying away to constitute larceny: to render the asportation in such cases complete, there must be a severance 2 Russ. Cr. (7th ed.) 1181; *and see R.* v. *Lapier*, 1 Leach, 320, where the defendant had assaulted a lady, and torn from her ear an earring which was subsequently found in her hair. Where, however, there is no asportation, the prisoner may be indicted for an attempt to steal, which is a misdemeanor at common law (*see ante*, p. 3), or upon an indictment for the full offence of larceny, he may be convicted of the attempt only. 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215). A man may be convicted of an attempt to steal when, even if no interruption had taken place, he could not have committed the complete offence, *e.g.*, when a thief puts his hand in an empty pocket. *R.* v. *Ring*, 61 L. J. (M. C.) 116; 17 Cox, 491: *R.* v. *Brown*, 24 Q. B. D. 357; 59 L. J. (M. C.) 47; 16 Cox, 715: overruling *R.* v. *Collins*, L. & C. 471; 33 L. J. (M. C.) 177. As to what is sufficient to constitute an attempt to steal, *see further*, *R.* v. *Cheeseman*, L. & C. 140; 31 L. J. (M. C.) 89; 9 Cox, 100, where the circumstances were peculiar. In an indictment for an attempt to steal, it is sufficient to aver that the prisoner attempted to steal the goods of A. B. without specifying the particular goods. *R.* v. *Johnson*, L. & C. 489; 34 L. J. (M. C.) 24.

"Owner."]—The essence of larceny is the taking of property without the consent of the owner, but the expression "owner" is not limited to the person who is legal owner of the property stolen. By s. 1 (2) (iii.) of the *Larceny Act*, 1916, "owner" is defined to include any part owner, or person having possession or control of, or a special property in, anything capable of being stolen. *See ante*, p. 500.

Larceny as a bailee.]—At common law, where goods were delivered to a man upon trust, or taken by him lawfully and *bonâ fide* and without any fraudulent design, and with the owner's consent, he was not guilty of larceny by converting them to his own use. Therefore, in all cases where goods were borrowed or hired from the owner, or were delivered by the owner to another to have work done upon them, or cattle were delivered to be agisted, or the like, and in all other cases where goods were in the possession of a *bailee* (*a*),

(*a*) As to the difference between a bailee and a fiduciary agent, *see Slattery* v. *R.* [1905] 2 Austr. C. L. R. 546.

and he, while the contract of bailment subsisted, converted the goods to his own use, this was not larceny, but only breach of trust because the original taking was *bonâ fide* and rightful: unless, indeed, the jury found, on evidence warranting them in so finding, that the goods were originally obtained by the defendant from the owner *animo furandi*, or that the defendant received them, harbouring at the time an intention wrongfully to convert them to his own use. (*See ante*, p. 518 *et seq.*) It is, however, no longer necessary to refer to the numerous cases decided on this subject, many of which turned upon very nice distinctions, because, under 24 & 25 Vict. c. 96, s. 3 (*rep.*), it was provided that a bailee of any chattel, money, or valuable security, who fraudulently takes or converts the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny. This section is reproduced by the proviso to s. 1, sub-s. 1, of the *Larceny Act*, 1916, which enacts that "a person may be guilty of stealing any such thing (*i.e.*, anything capable of being stolen), notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner." Even before 24 & 25 Vict. c. 96, s. 3, although the goods had in the first instance been obtained without a *felonious* intent, yet if the possession of them was obtained by a *trespass*, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, was a larceny. Thus where a man, driving a flock of sheep from a field drove with them a sheep belonging to another person, without knowing that he had done so, but afterwards, when he discovered the fact, sold that sheep and appropriated the proceeds of the sale to his own use; he was held to be rightly convicted of larceny. *R.* v. *Riley*, Dears. 149; 22 L. J. (M. C.) 48. As a general rule a bailee cannot be convicted of larceny unless the bailment was to redeliver the *very same* chattel or money. *R.* v. *Hassall*, L. & C. 58; 30 L. J. (M. C.) 175: *R.* v. *Hoare*, 1 F. & F. 647, Wightman, J.: *R.* v. *Garrett*, 2 F. & F. 14; 8 Cox, 368, Willes, J. A bailee is responsible when the article with which he has been intrusted is one which he is to return, or to deliver to somebody else, *in specie;* but he is not made responsible when he is at liberty, or is bound, to convert the particular article delivered to him into something else, before he returns it or delivers it to the other persons to whom he is instructed to deliver it. *Re Bellencontre* [1891] 2 Q. B. 122, at 137; 60 L. J. (M. C.) 83, Cave, J. The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday. On that day the prosecutor did not go himself to sell the mare, but sent his wife, who went to where the prisoner was, and saw him ride the mare about a horse-fair, and sell her, and receive on such sale some money. The prosecutor's wife then asked the prisoner to give her the money, saying that she would pay his expenses, which, however, he declined to do, and he absconded with the money. The jury having found upon these facts that the prisoner had authority to sell the mare and had converted the money to his own use, it was held (Stephen, J., diss.), that the prisoner was a bailee of the money so paid to him, and was

rightly convicted of stealing it. *R.* v. *De Banks*, 13 Q. B. D. 29; 53 L. J. (M. C.) 132: *Ex parte George*, 18 Cox, 631. C. contracted with a salvage association to save cargo from a wrecked ship. He saved some and wrote saying so and what he had saved. He then sold part and appropriated the proceeds. Held, that he could properly be convicted of larceny as a bailee. *R.* v. *Clegg* [1869] Ir. Rep. 3 C. L. 166 (C. C. R.). The prosecutor asked the prisoner to bring him half a ton of coals from a coal-staith, and gave him money to pay for them. The prisoner bought half a ton of coals accordingly in his own name. He then put the coals into his own cart, and on his way abstracted one cwt. of the coals, and afterwards delivered the residue to the prosecutor as the coals which he had required. The prisoner was not in the prosecutor's employment. On these facts it was held that the prisoner was guilty of larceny as a bailee, some of the judges thinking that the coals being purchased with money given by the prosecutor for that express purpose, the property in them vested in the prosecutor on the purchase; others holding that to make the prisoner a bailee there must be evidence of a specific appropriation of the coals to the prosecutor; and all the Court agreed that there was evidence on the facts of such an appropriation. *R.* v. *Bunkall*, L. & C. 371; 33 L. J. (M. C.) 75. The prosecutor placed a sum of money in the hands of the prisoner for the purpose of purchasing coals for the prosecutor from a colliery company, which coals the prisoner was to pay for with the money so placed in his hands by the prosecutor. The prisoner did not buy any coals, but fraudulently appropriated the money to his own use. On these facts he was held to have been rightly convicted of larceny as a bailee of the money so placed in his hands. *R.* v. *Aden*, 12 Cox, 512 (C. C. R.). A carter was employed by the owner of a cargo of coals to load the coals in the carter's own cart from the vessel, and deliver specified quantities to persons whose names were on a list given to him. He sold two loads of the coals fraudulently to persons whose names were not on the list, and appropriated the money to his own use. It was held that he was guilty of larceny as bailee of the two loads. *R.* v. *Davies*, 10 Cox, 239 (C. C. R.). The prosecutor delivered two brooches to the prisoner to sell for him at 200*l.* for one and 115*l.* for the other, and the prisoner was to have them for a period not exceeding ten days for that purpose. After the ten days had elapsed the prisoner sold the brooches, with other jewellery, for 250*l.*, but arranged with the vendee that he might redeem the brooches for 110*l.* before a certain time. The prisoner was held to be guilty of larceny as a bailee of the brooches, it having been his duty after the ten days had expired without his effecting a sale to return the brooches in specie to the prosecutor, whereas he had sold them after the ten days without the intention of repossessing himself of them so as to enable him to fulfil that duty. *R.* v. *Henderson*, 11 Cox, 593 (C. C. R.). *Quære*, whether if he had had such intention, that would have been a defence. In the judgment it is expressly said that that question did not arise in the case, as the jury must be taken to have found that he had no such intention. *Id.* Where the prisoner, a commercial traveller, was intrusted by the prosecutors with silk for sale, and it was his duty at the end of six months to send in an account for the entire six months, and to

return the unsold silk, and *before* the end of the six months he appropriated the silk to his own use. he was held to be rightly convicted of larceny as a bailee. *R.* v. *Richmond*, 12 Cox, 495 (C. C. R.). Where the prisoner was indicted for larceny as bailee of a coat, and the evidence was that the prosecutor had lent the coat to the prisoner to wear for a day, and that some few days afterwards the prisoner left the town, and was found wearing the coat on board a vessel bound for Australia, Martin, B., stopped the case on the ground that there was no evidence of a conversion sufficient to satisfy the statute. The determination of the bailment, said his lordship, must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. *R.* v. *Jackson*, 9 Cox, 505. Where the accused borrowed a bicycle from the prosecutor's wife, promising to return it the same evening but failed to do so, and on being taxed with the non-return claimed to be entitled to hold it as security for a claim against the prosecutor, but on arrest told a different story and many lies, it was held that there was evidence from which the jury could find a fraudulent intention and a sufficiently positive act of detention to distinguish it from the case of *R.* v. *Jackson*, *supra*, even assuming that case to be still good law. *R.* v. *Wakeman*, 8 Cr. App. R. 18. Where the accused hired a pony from A., and after paying hire for about a year sold the pony to B., it being agreed that the accused should still retain the pony in his possession, paying weekly hire for it, and should be at liberty to repurchase it at any time at the same price, it was held there was sufficient evidence from which the jury could determine that the transaction was a sale and not a loan, and that therefore there was a conversion by the accused. *R.* v. *Price*, 9 Cr. App. R. 15. In order to bring a bailee within 6 & 7 Geo. 5, c. 50, s. 1, there must be a taking or conversion by him with the intention *permanently* to deprive the owner of his property. If he pledges the goods wrongfully, yet with the intention of redeeming them and restoring them to the owner, such a conversion by him does not come within this section; but if he pledges them with no intention of redeeming them and restoring them to the owner, but with the intention of depriving the owner of them altogether, he is guilty of a fraudulent conversion within the section. *R.* v. *Wynn*, 16 Cox, 231 (C. C. R.): *and see R.* v. *Medland*, 5 Cox, 292. The drawer of an accommodation bill for 30*l.* received it from the acceptor, upon an arrangement to get it cashed and pay over to the latter all the proceeds, except 3*l.*, which the drawer was to retain for his trouble. Instead of carrying out this arrangement, the drawer handed the bill to one of his creditors who was pressing him for payment of a debt for 10*l.*, in order that the creditor might discount the bill, and retain out of it his debt of 10*l.*, and then hand over the balance to the drawer. The creditor, however, did not carry out this arrangement, and detained the bill. On these facts it was held by Chambers, Common Sergeant, that although the drawer was a bailee of the bill within the meaning of the statute, yet that there was no conversion of it by him analogous to larceny, and therefore that an indictment against him for larceny as bailee of the bill could not be sustained. *R.* v. *Weekes*, 10 Cox, 224. Whilst in treaty with a firm of solicitors for the transfer of a public-house licence, the prisoner was required by them to give security for the purchase-

money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which it was agreed that the latter should deposit with the solicitors by way of security, and that he should not negotiate or use them for any other purpose, and if the transfer was not effected that he should return them to the prosecutor. The prisoner, who, instead of depositing the bills with the solicitors, applied two of them to other purposes for his own benefit, was held not to have been a bailee of the bills within 24 & 25 Vict. c. 96, s. 3 (*rep.*). *R.* v. *Cosser*, 13 Cox, 187, Bramwell, B. But a person who receives a bill of exchange for the purpose of getting it discounted and handing the proceeds over to another, and instead of getting it discounted indorses it as his own to a creditor in payment of his account, intending to pass the property in the bill absolutely to the creditor, is a bailee of a valuable security, and guilty of a fraudulent conversion of the same to his own use. *R.* v. *Oxenham*, 46 L. J. (M. C.) 125; 13 Cox, 349. In delivering the judgment of the Court in this case, Coleridge, C.J., said that in his opinion the cases of *R.* v. *Weekes* and *R.* v. *Cosser*, *supra*, were rightly decided. *See Re Bellencontre* (*ante*, p. 535).

Husband and wife.]—Even before the *Married Women's Property Acts* it was held that a married woman might be a bailee within 24 & 25 Vict. c. 96, s. 3 (*rep.*); *R.* v. *Robson*, L. & C. 93; 31 L. J. (M. C.) 22; overruling *R.* v. *Denmour*, 8 Cox, 440, Martin, B. And where an infant fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for their hire, it was held that he was rightly convicted of larceny as a bailee of the goods. *R.* v. *Macdonald*, 15 Q. B. D. 323; 15 Cox, 757.

At common law if the goods of a husband are taken with the consent or privity of the wife, it is not larceny. *R.* v. *Harrison*, 1 Leach, 47: *R.* v. *Avery*, Bell, 150; 28 L. J. (M. C.) 185. But if a woman steals the goods of her husband, and gives them to her paramour, who, knowing it, carries them away, the paramour is at common law (or under the early statute, 13 Edw. 1, c. 34) guilty of felony: Dalt. c. 157; and where a stranger took the goods of the husband *jointly* with the wife, this was held to be larceny by him, he being her adulterer; *R.* v. *Tolfree*, 1 Mood. 243 (overruling *R.* v. *Clark*, 1 Mood. 376 n.): *R.* v. *Featherstone*, Dears. 369; 23 L. J. (M. C.) 127: *R.* v. *Berry*, Bell, 95; 28 L. J. (M. C.) 70: *R.* v. *Flatman*, 14 Cox, 396 (C. C. R.): *R.* v. *Bloom*, 4 Cr. App. R. 30. And so it is, even though no adultery had then been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger. *R.* v. *Tollett*, C. & Mar. 112, Coleridge, J.: *R.* v. *Thompson*, 1 Den. 549; 4 Cox, 191. And if a servant by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property with the intention of committing adultery, the servant may be indicted for stealing the property. *R.* v. *Mutters*, L. & C. 511; 34 L. J. (M. C.) 54; 10 Cox, 50. It seems, however, that if a wife elopes with an adulterer, it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel. *R.* v.

Fitch, Dears. & B. 187; 26 L. J. (M. C.) 169; Cox, 269. overruling on this point the direction of Coleridge, J., in *R.* v. *Tollett*, C. & Mar. 112. The prisoner, who had lodged at the prosecutor's house, left it, and the next day the prosecutor's wife also left, taking a bundle with her, which however was not large enough to contain the things which it was found had been taken away from the house on the evening when she left. Two days after, all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property knowing it to have been stolen by some evilly disposed person. *R.* v. *Deer*, L. & C. 240; 32 L. J. (M. C.) 33; 9 Cox, 225. In that case it was clear that all the things which the prisoner was charged with receiving could not have been taken away by the prosecutor's wife, and therefore the jury were justified in concluding that some one, other than the prosecutor's wife, had actually stolen the goods, and that the prisoner had received them from that other person. If the goods had been taken by the prosecutor's wife and received by the prisoner from her, he could not have been convicted of receiving. For a wife, although she may have committed adultery, cannot at common law steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, could not, under 24 & 25 Vict. c. 96, s. 91, be guilty of receiving stolen goods, because under that section receiving was only punishable in cases where the stealing amounted to a felony either at common law or by virtue of that Act. *R.* v. *Kenny*, 2 Q. B. D. 307; 46 L. J. (M. C.) 156. But by the combined effect of ss. 33 and 36 of the *Larceny Act*, 1916, an adulterer in certain circumstances may be convicted of receiving. *See post*, p. 728. An adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession. *R.* v. *Rosenberg*, 1 C. & K. 233; *and see R.* v. *Bloom*, 4 Cr. App. R. 30. Where a wife took her husband's goods from a place within the jurisdiction of the Central Criminal Court, and was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession, but there was no evidence that the goods had been under the prisoner's control at any place within the jurisdiction of the Central Criminal Court, it was held that the prisoner could not be indicted in that court for larceny. *R.* v. *Prince*, 11 Cox, 145.

These authorities, so far as they depend on the common law, must be read subject to the provisions of s. 36 of the *Larceny Act*, 1916 (*ante*, p. 500), which render one spouse liable to criminal proceedings for stealing the goods of the other when about to leave or desert the other. *See R.* v. *Streeter* [1900] 2 Q. B. 601; 69 L. J. (Q. B.) 915, *post*, p. 728 : *R.* v. *James*, [1902] 1 K. B. 540; 71 L. J. (K. B.) 211 : *R.* v. *King*, 24 Cox, 146; 10 Cr. App. R. 44. The effect of this section is that no crime is committed by a wife who takes her husband's goods or by a husband who takes his wife's goods unless they are taken in the circumstances mentioned in the proviso to the section. *R.* v.

Creamer [1919] 1 K. B. 564; 88 L. J. (K. B.) 594; 83 J. P. 120; 14 Cr. App. R. 19. A husband and wife do not cease to be "living together" within the meaning of s. 36 merely because the husband is temporarily absent from the joint home on military service abroad. *Id.*

Larceny of property by the owner or joint owner.]—The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken by the trustees under the assignment, but the prisoner himself remained in possession of the goods, and whilst in such possession he removed the goods, intending fraudulently to deprive the creditors of them. The jury found the prisoner guilty of larceny, at the same time finding that the goods were not in the prisoner's custody as the agent of the trustees. Under these circumstances it was held that the verdict of guilty was wrong, as the prisoner being in lawful possession of the goods could not be convicted of larceny. *R.* v. *Pratt*, Dears. 360; 6 Cox, 373. So, if a man take his own goods, it is no larceny, unless they be in the hands of a bailee, and the taking of them have the effect of charging the bailee. Where thirty bales of nux vomica, which paid no duty upon exportation, but a large duty if intended for home consumption, deposited by A. with B., who gave the usual bond to the custom-house, were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it, and shipped the bales on board the vessel, this was held, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom-house, and liable to a suit upon his bond. *R.* v. *Wilkinson*, R. & R. 470: *and see R.* v. *Wadsworth*, 10 Cox, 557. If one of several joint-tenants or tenants in common of a personal chattel carry away and dispose of it, this is not larceny, at common law; 1 Hale, 513; there was, in fact, no taking, for he was already in possession; it was merely the subject of an action of account, or bill in equity. But if he had taken it out of the possession of a person in whose hands it was for safe custody, and the effect of the taking would have been to charge the bailee, that was held to be a larceny at common law; as where a member of a benefit society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, this was held to be larceny, the bailee being answerable to the society for the funds. *R.* v. *Bramley*, R. & R. 478. So also where the prisoner, a member of an industrial society, fraudulently took money from the shop of the society, which was under the management of H., another member, who was responsible for all moneys coming into his possession, the prisoner was held to have been rightly convicted of larceny on an indictment laying the property in the money in H. *R.* v. *Webster*, L. & C. 77; 31 L. J. (M. C.) 17; 9 Cox, 13. So, where the prisoner, a member of a co-operative society and one of the committee of management, fraudulently took money from the society's shop, where B., a servant of the society, sold its goods and received payments and was accountable for the money, the prisoner was held to have been rightly convicted of

larceny on an indictment laying the property in the money in B. *R.* v. *Burgess*, L. & C. 299; 32 L. J. (M. C.) 185.

By the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), ss. 1, 40 (4) (*ante*, pp. 499, 503), theft by member of co-partnership and joint beneficial owner is punishable in the same way as if they had not had any interest in the thing stolen. *See R.* v. *Smith*, L. R. 1 C. C. R. 266; 39 L. J. (M. C.) 112. An association having for its object not the acquisition of gain, but the mental improvement of its members, is not a " co-partnership " within the meaning of 31 & 32 Vict. c. 116 (*rep., v.* 6 & 7 Geo. 5, c. 50, s. 40 (4)). *R.* v. *Robson*, 16 Q. B. D. 137; 55 L. J. (M. C.) 55. But persons who have the control and disposition of money, or who have the power of devoting it, for the purpose of their enjoyment or amusement, are beneficial owners within the statute. *R.* v. *Neat*, 69 L. J. (Q. B.) 118; 16 T. L. R. 109; 19 Cox, 424. In that case money collected for a *fête* by a committee was appropriated by a member of the committee. Where the property is laid in the individual beneficial owners, who together form an association which is illegal under the *Companies Acts*, the indictment is good. *R.* v. *Tankard* [1894] 1 Q. B. 548; 63 L. J. (M. C.) 61 (*and see post*, p. 609).

" A bag."]—The species of goods must be proved as laid; for instance, upon this indictment, if the prosecutor failed in proving that a bag was stolen, the defendant must be acquitted, although there were indisputable evidence of his having stolen other articles, unless the indictment were amended according to the evidence, under 5 & 6 Geo. 5, c. 90, s. 5. (*See ante*, p. 500.) It is not necessary to enumerate all the articles stolen at one time unless a restitution order is desired. (*See ante*, p. 293.) But an indictment which alleges that the accused stole a specified thing " and other goods " is bad. *R.* v. *Yates*, 15 Cr. App. R. 16. It is not necessary that the prosecutor should prove all the articles mentioned in the indictment to have been stolen; if he proves the defendant to have stolen any one of them, it is sufficient. Although it is necessary to prove that the prosecutor's goods have been taken, that may be proved by circumstances, even if the witnesses for the prosecution cannot swear to the loss of the articles said to have been stolen, nor that the property found upon the prisoner and alleged to have been stolen is the prosecutor's. *R.* v. *Burton*, Dears. 282; 23 L. J. (M. C.) 52 (*ante*, p. 398). *See also R.* v. *Mockford*, 11 Cox, 16 (C. C. R.). *R.* v. *Joiner*, 74 J. P. 200; 26 T. L. R. 265.

Distinct takings—How charged.]—An indictment charging that R. stole certain goods between October 21, 1908, and February 9, 1909, was held not to be bad for duplicity, and the allegation was held to be in substance that all the goods were stolen at one time. But strictly there should be different counts for takings at different dates. *R.* v. *Rye*, 2 Cr. App. R. 155. Where the acts constitute a continuous taking, the prosecutor ought not to be put to his election. *R.* v. *Bleasdale*, 2 C. & K. 765, Erle, J.: *R.* v. *Shepherd*, L. R. 1 C. C. R. 118; 37 L. J. (M. C.) 45: *R.* v. *Firth*, L. R. 1 C. C. R. 172; 38 L. J. (M. C.) 54: *cf. R.* v. *Henwood*, 11 Cox, 526 (C. C. R.) (*and see ante*,

p. 58). In *R.* v. *Wright*, Dears. & B. 431; 27 L. J. (M. C.) 65; 7 Cox, 413, where a bank clerk had misappropriated a large sum of money during a considerable period of his employment, and admitted the amount, it was held that it was not necessary for the jury to find that a specific amount was stolen on a particular day.

What can be stolen.]—By s. 1 (3) of the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen: Provided that (*a*) save as hereinafter expressly provided with respect to fixtures, growing things (*see* s. 8, *post*, p. 572), and ore from mines (*see* s. 11, *post*, p. 578), anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof; and (*b*) the carcase of a creature wild by nature, and not reduced into possession while living, shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase.

The above definition of what can be stolen practically sweeps away the common law restrictions, by which certain kinds of property could not be the subject of larceny. Many of those restrictions had already been abolished by statute, but the Act of 1916 goes farther in this direction than the Act of 1861, particularly with regard to animals. Under the Act of 1916 the test to be applied is simply whether the thing in question has value of any kind and is the property of any person. The extent of the departure from common law rules can be gauged by the following summary of the principal steps by which this branch of the law of larceny has developed:—

1. *Things real, or which savour of the realty*, cannot be the subject of larceny *at common law;* and so strict was the rule in this respect that a larceny could not be committed of title-deeds, 1 Hale, 510; 1 Hawk. c. 33, s. 35; or of any other charter or writing concerning the realty, *R.* v. *Westbeer*, 1 Leach, 12; 2 Str. 1133, 1137: *R.* v. *Walker*, 1 Mood. 155, or even of the box in which they were kept. 1 Hale, 510; 3 Co. Inst. 109. Larceny of title-deeds was punishable under 24 & 25 Vict. c. 96, s. 28, now repealed and re-enacted by 6 & 7 Geo. 5, c. 50, s. 7 (1), *post*, p. 563.

Lands, tenements and hereditaments (either corporeal or incorporeal), cannot, in their nature, be the subject of larceny. Of things, also, which adhere to the freehold, as corn, grass, trees, and the like, or lead or other thing attached to a house, no larceny can be committed at common law. 1 Hawk. c. 33, s. 34. The *Forester's case*, Y. B. 11 & 12 Edw. 3, f. 641. In *R.* v. *Clinton*, Ir. Rep. 4 C. L. 6, it was held not larceny to appropriate drifted and ungathered seaweed lying between high and low water mark on the shore exclusively owned by A. But it was always held at common law, that if the owner or a stranger sever things real, and another man come and steal them—or if the thief sever them at one time, and at another come and take them away—it is larceny. 3 Co. Inst. 109: 1 Hale, 510; *Lee* v. *Risdon*, 7 Taunt. 188, 191: *R.* v. *Foley*, 17 Cox, 142; 26 L. R. (Ir.) 299 (C. C. R. Ir.). It would

appear, however, that the mere severance by the wrongdoer at one time and the taking away by him at another, are not sufficient to constitute larceny, unless he had, between the severance and the taking away, intended to abandon his wrongful possession of the article severed. If the wrongdoer did not intend to abandon his possession, but merely left the article concealed on the land after severance until he could conveniently return and carry it away, then the severance and carrying away are one continuous act, although a considerable time may have elapsed between the severance and taking away, and there is no larceny at common law. *R.* v. *Townley*, L. R. 1 C. C. R. 315; 40 L. J. (M. C.) 144. The principle governing this decision is still preserved by proviso (*a*) to 6 & 7 Geo. 5, c. 50, s. 1 (3) *supra*. The carcass of a diseased pig, which has been buried in the land three feet below the surface, and which is dug up the same day by the prisoner, has not become so attached to the soil as to prevent its being the subject of larceny in an indictment against the prisoner for stealing it. *R.* v. *Edwards*, 13 Cox, 384 (C. C. R.). Larceny of ore from mines is now punished by 6 & 7 Geo. 5, c. 50, s. 11 (*post*, p. 578); larceny of certain materials affixed to buildings, by s. 8, sub-s. 1 (*post*, p. 572); and of vegetable products, by s. 8, sub-ss. 2, 3 (*post*, pp. 572, 573).

2. Bonds, bills, etc., being mere *choses in action*, are not the subject of larceny *at common law*, for they are of no intrinsic value. *Calye's case*, 8 Co. Rep. 33: 1 Hawk. c. 33, s. 35; 1 Hale, 510, n. Larceny of such documents was punishable under 24 & 25 Vict. c. 96, s. 27, and is now punishable under 6 & 7 Geo. 5, c. 50, s. 2 (*ante*, p. 500), and in the case of theft by persons in the public service, or the police, under 6 & 7 Geo. 5, c. 50, s. 17 (2) (*a*) (*post*, pp. 601 *et seq.*), and in the case of theft of postal packets by officers of the post office, under 6 & 7 Geo. 5, c. 50, s. 18, or 8 Edw. 7, c. 48, s. 55 (*post*, pp. 580, 581). For a definition of "valuable security" *see* 6 & 7 Geo. 5, c. 50, s. 46 (*ante*, p. 508).

3. Larceny at common law cannot be committed of *things which are not the subject of property*, as of a *corpse*; *R.* v. *Haynes*, 12 Co. Rep. 113; *and see* 2 East, P. C. 652; 1 Hawk. c. 33, s. 46. A corpse may possess such peculiar attributes as to justify its preservation on scientific or other grounds, and may under such circumstances become the subject of property. *Spence* v. *Doodeward* [1908] 6 Austr. Com. L. R. 406. Of things in which no person has any determinate property, as *treasure trove*, *wreck*, etc., till seized, it has been said that larceny cannot be committed; 1 Hale, 510; 1 Hawk. c. 33, s. 38: but it would seem that the true owner, though unknown, has still a property in them, before seizure by the lord, unless there be circumstances to show an intended dereliction of the property. 2 East, P. C. 606, 607. The same has been said of *wreck*. But theft from wrecks is now punishable under 6 & 7 Geo. 5, c. 50, s. 15 (3) (*post*, p. 598).

Animals.]—At common law larceny cannot be committed with respect to animals *feræ naturæ* (unless they are dead, tamed, or in confinement) as of deer, hares and conies in a forest, chase or warren: fish in an open river or pond; or wild fowls at their natural liberty. 1 Hale, 511: Fost. 366; 1 Hawk. c. 33, ss. 39, 40; Y. B. 18 Edw. 4, f. 8, pl. 7; *R.* v. *Rough*, 2 East, P. C. 607.

By the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), s. 1 (3), any creature, alive or dead, is capable of being stolen, if it has any value and is the property of any person, *i.e.*, reduced into possession. Larceny of horses, cattle and sheep is dealt with under s. 3 (*post*, p. 546), of dogs under s. 5 (*post*, p. 548) and of other animals under s. 2 (*ante*, p. 500). The coursing, hunting, etc., of deer is punishable by 24 & 25 Vict. c. 96, ss. 12-15 (*post*, p. 551), and the taking of hares and rabbits by night in warrens or grounds used for breeding or keeping them is punishable under 24 & 25 Vict. c. 96, s. 17 (*post*, p. 553). Taking or destroying fish in private waters is punishable under 24 & 25 Vict. c. 96, s. 24 (*post*, p. 555). As to property in oysters and mussels, *see* 31 & 32 Vict. c. 45, ss. 51, 52, 55 (*post*, p. 557). Animals *feræ naturæ* when killed upon the soil by a wrongdoer, become the absolute property of the owner of the soil: *Blades* v. *Higgs*, 11 H. L. C. 621; 34 L. J. (C. P.) 286: *Lord Lonsdale* v. *Rigg*, 1 H. & N. 923; 26 L. J. (Ex.) 196. If the wrongdoer kills them on the soil and leaves them there, *intending to abandon the possession of them*, but *afterwards* returns and takes them away, such taking amounts to larceny. But if the wrongdoer after killing them, leaves them concealed on the soil, *not with the intention of abandoning the possession*, but intending, on the other hand, to return and take them away when it should be convenient for him to do so, and afterwards does take them away, such taking away is not larceny, as the killing and taking away are one continuous act, although a considerable time may have elapsed between the killing and taking away. *R.* v. *Townley*, L. R. 1 C. C. R. 315; 40 L. J. (M. C.) 144. The rule of law laid down in this case is preserved by s. 1 (3) (*b*) of the *Larceny Act*, 1916. Poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon land belonging to the Crown. They placed the rabbits in a ditch upon the same land, some of the rabbits in bags, and some strapped together. They had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in a ditch as a place of deposit till they could conveniently remove them. About three hours afterwards the prisoner came back and began to remove the rabbits. It was held that the taking of the rabbits and the removal of them were one continuous act, and that the removal was therefore not larceny. *Id.* Prisoner was employed to trap wild rabbits, which he did, but, contrary to his duty, took them to another part of the land and placed them in a bag, intending to appropriate them to his own use, which a fellow servant observing, went and took some of the rabbits out of the bag during prisoner's absence, nicked them, and replaced them in the bag, his reason for nicking them being that he might know them again. Prisoner afterwards took away the bag and the rabbits. It was held that the act of the fellow servant in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them by carrying them away after they had been so nicked. *R.* v. *Petch*, 14 Cox, 116 (C. C. R.). It seems that the mere killing of an animal *feræ naturæ* by a sportsman is not such a reduction of it into his possession as to make it his property, so as to sustain a charge of larceny against a person who takes it fraudulently and with intent to deprive

the owner of it, before the sportsman has picked it up. *R.* v. *Roe*, 11 Cox, 554, 557, Willes, J. Fish taken at sea are in the possession of the owner of the smack by which they are taken, and are therefore the subject of larceny. *R.* v. *Mallison*, 20 Cox, 204; 66 J. P. 503.

If animals *feræ naturæ* are reclaimed or confined, or are practically under the care and dominion of the prosecutor, they may be the subjects of larceny. Prior to the *Larceny Act*, 1916, it was further necessary that they should serve for food in order to be capable of being stolen, but in future it is sufficient if they are the property of any person. On the former law *see* 1 Hale, 511; 1 Hawk. c. 33, s. 41 : *R.* v. *Garnham*, 8 Cox, 451 : *R.* v. *Head*, 1 F. & F. 350; *R.* v. *Cory*, 10 Cox, 23, Channell, B.; *R.* v. *Stride* [1908] 1 K. B. 617; 77 L. J. (K. B.) 490. By s. 47 (2) of the *Larceny Act*, 1916 (*ante*, p. 509), the stealing of many animals, and of their produce, eggs or young, will remain punishable on summary conviction only, subject to the election of the accused to be tried on indictment, *e.g.*, the stealing of any bird, beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law, and the unlawful possession of the plumage or skin of any such animal, are punishable summarily under 24 & 25 Vict. c. 96, ss. 21, 22; *see also* s. 23 as to pigeons, and *R.* v. *Howell*, 2 Den. 362 n.: *R.* v. *Brooks*, 4 C. & P. 131 : *R.* v. *Cheafor*, 2 Den. 361; 21 L. J. (M. C.) 43 : *Smith* v. *Dear*, 67 J. P. 244. Persons taking or destroying a swan's eggs out of the nest can be summarily punished under s. 24 of the *Game Act*, 1831.

Gas, water, and electricity.]—Gas passing through the consumer's pipes is the subject of larceny by him, if he fraudulently appropriates it at a point before that at which by his contract he is entitled to use it. *R.* v. *White*, Dears. 203; 22 L. J. (M. C.) 123 : *R.* v. *Firth*, L. R. 1 C. C. R. 172; 38 L. J. (M. C.) 54. Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law. *Ferens* v. *O'Brien*, 11 Q. B. D. 21; 52 L. J. (M. C.) 70. Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity is guilty of simple larceny, and punishable accordingly, 6 & 7 Geo. 5, c. 50, s. 10. *R.* v. *Armanni*, 130 Cent. Crim. Ct. Sess. Pap., p. 707.

Value.]—No statement need be made as to the value of the property stolen except in those cases where value or price is of the essence of the offence (5 & 6 Geo. 5, c. 90, r. 6 (1), *ante*, pp. 47, 52). And although, to make a thing the subject of larceny, it must be of *some* value, yet it need not be of the value of any coin known to the law, that is to say, of a farthing at the least. *R.* v. *Morris*, 9 C. & P. 349. *Cf. R.* v. *Edwards*, 13 Cox, 384 (C. C. R.), *ante*, p. 543. Where value is the essence of the offence sufficient articles must be named in the indictment to amount in value to the sum necessary to constitute the offence. *R.* v. *Forsyth*, R. & R. 274.

Ownership.]—It must be proved upon the trial, that the goods stolen are the absolute or special property of the person named in the indictment. Where

to steal the skins ("*the carcase, skin, or any part of the animal killed*") of the said sheep.

Felony: 6 & 7 *Geo.* 5, *c.* 50, *s.* 4. See the *last precedent. Sect.* 4 is not limited to the animals named in s. 3.

Evidence.

To support this indictment, you must prove two things—

1. That the defendant killed the sheep; and this is proved either positively, as by a witness who saw him do it; or by circumstantial evidence, as, for instance, that the skins were found in his possession, or were sold by him to another person, or the like. (*See ante*, p. 397.) Where the defendant was indicted for killing a lamb with intent to steal part of the carcase, and the evidence was that he cut off the leg of the lamb whilst it was alive, and carried the leg away before the animal died; and that the lamb afterwards died of the wound; the judge at the trial thought that as the death-wound was given before the theft, it was sufficient, and the defendant was convicted; the judges afterwards were unanimous that the conviction was right. *R.* v. *Clay*, R. & R. 387 : *see also R.* v. *Sutton*, 2 Mood. 29; 3 C. & P. 291 : *R.* v. *McCulley*, 2 Lew. 272; 2 Mood. 34.

2. That he killed the sheep with the intent stated in the indictment. The best proof of this is, that the part of the carcase mentioned was actually stolen. But if the defendant was caught in the act, that is, after killing the sheep, but before he had actually cut it up, then it is for the jury to say, upon a consideration of the facts of the case, whether he did not intend to steal the carcase. Upon an indictment, under 14 G. 2, c. 6 (*rep.*), for killing three sheep, with intent to steal the whole of the carcases, the jury found that the defendant intended to steal a part of the carcases only; but the judges were of opinion that the evidence was sufficient to sustain the indictment, as the statute meant to make it immaterial whether the intent was to steal the whole or a part only of the carcase. *R.* v. *Williams*, 1 Mood. 107.

STEALING DOGS.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 5.—*Larceny, etc., of dogs.*]—Every person who—(1) steals any dog after a previous summary conviction of any such offence; or (2) unlawfully has in his possession or on his premises any stolen dog, or the skin thereof, knowing such dog or skin to have been stolen, after a previous summary conviction of any such offence; or (3) corruptly takes any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any stolen dog, or any dog which is in the possession of any person not being the owner thereof; shall be guilty

of a misdemeanor, and on conviction thereof liable to imprisonment for any term not exceeding eighteen months, with or without hard labour. [*This section re-enacts the provisions of* 24 & 25 *Vict. c.* 96, *ss.* 18, 19, 20, *so far as they relate to indictable offences. For convenience, the sections of the Larceny Act*, 1861, *relating to the punishment on summary conviction of theft, etc., of animals not the subject of larceny at common law are set out below.*]

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 18.—*Stealing dogs.*]—Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding 20*l.*, as to the said justices shall seem meet. [*This section is taken from* 8 & 9 Vict. c. 47, s. 2. *The defendant can elect to be tried on indictment on a charge of a first offence.* 42 & 43 Vict. c. 49, s. 17, ante, p. 7.]

Sect. 19.—*Knowingly being in possession of stolen dogs, etc.*]—Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money not exceeding 20*l.*, as to such justices shall seem meet. [*This section is taken from* 8 & 9 Vict. c. 47, s. 3.]

Sect. 21.—*Stealing animals ordinarily kept in confinement or for domestic purposes.*]—Whosoever shall steal any bird, beast, or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast, or animal with intent to steal the same or any part thereof, shall on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned or kept to hard labour for any term not exceeding six months, or else shall forfeit and pay over and above the value of the bird, beast, or other animal such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence either against this or any former Act of parliament shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

[*This section is taken from* 7 & 8 G. 4, c. 29, s. 31. *The accused can elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17 (*ante*, p. 7). *As to what animals are within the section*, see 24 & 25 Vict. c. 97, s. 41, post, p. 788, tit. "Malicious Damage."]

Sect. 22.—*Persons found in possession of stolen animals liable to penalties.*]—If any such bird or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal or any part thereof, shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner thereof; and any person in whose possession

or on whose premises such bird or the plumage thereof, or such beast or the skin thereof, or such animal or any part thereof, shall be so found, (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is the part of a stolen animal), shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section. (*See* s. 21.) [*This section was framed from* 7 & 8 G. 4, c. 20, s. 32, *and* 8 & 9 Vict. c. 47, s. 3. Smith *v.* Dear, 20 Cox, 458; 88 L. T. 664; 67 J. P. 244, *where it was held that a prosecution under s.* 23 *need not be by the owner of the pigeon stolen, seems equally applicable to ss.* 21, 22.]

Indictment for stealing a Dog, after a Previous Conviction.

Commencement as ante, p. 509.

STATEMENT OF OFFENCE.

Dog-stealing, contrary to section 5 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole a dog the property of C. D.

A. B. has been previously convicted summarily of dog-stealing on the —— day of ——, A.D. ——, at the Marlborough Street Police Court, London.

Misdemeanor: imprisonment for not more than eighteen months, with or without hard labour. 6 & 7 Geo. 5, c. 50, s. 5. See also s. 37 (5) (ante, p. 501), *as to fine and sureties.*

Evidence.

Prove the subsequent offence, as directed, *ante*, pp. 510 *et seq.*; and if the defendant is found guilty, or pleads guilty, prove the former conviction in manner directed by 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 421), and the identity of the defendant. The mode of proceeding at the trial as to arraignment, etc., is regulated by 24 & 25 Vict. c. 96, s. 116 (*ante*, p. 167).

There cannot be a conviction for obtaining a dog by false pretences, under 6 & 7 Geo. 5, c. 50, s. 32: see *R.* v. *Robinson*, Bell, 34; 28 L. J. (M. C.) 58; 8 Cox, 115.

OFFENCES AKIN TO LARCENY OF ANIMALS.

Larceny of animals (other than horses, cattle, sheep and dogs) which are the property of any person, and the stealing of which was not on 1st January, 1917, punishable only on summary conviction, falls within s. 2 of the *Larceny Act*, 1916 (*ante*, p. 500). There are, however, several offences akin to larceny of animals which are punishable on indictment under other statutes, and these may conveniently be considered here.

(1) *Hunting, etc., deer.*

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 12.—*In uninclosed part of forest, etc.*]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever, having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 G. 4, c. 29, s. 26.]

Sect. 13.—*In inclosed ground.*]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 G. 4, c. 29, s. 26.]

Sect. 14.—*Suspected persons found in possession of venison, etc.*]—If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken *or summoned* before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same

or on whose premises such bird or the plumage thereof, or such beast or the skin thereof, or such animal or any part thereof, shall be so found, (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is the part of a stolen animal), shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section. (*See* s. 21.) [*This section was framed from* 7 & 8 G. 4, c. 20, s. 32, *and* 8 & 9 Vict. c. 47, s. 3. Smith *v.* Dear, 20 Cox, 458; 88 L. T. 664; 67 J. P. 244, *where it was held that a prosecution under s.* 23 *need not be by the owner of the pigeon stolen, seems equally applicable to ss.* 21, 22.]

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STATEMENT OF OFFENCE.

Dog-stealing, contrary to section 5 of the Larceny Act, 1916.

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A. B., on the —— day of ——, A.D. ——, in the county of ——, stole a dog the property of C. D.

A. B. has been previously convicted summarily of dog-stealing on the —— day of ——, A.D. ——, at the Marlborough Street Police Court, London.

Misdemeanor: imprisonment for not more than eighteen months, with or without hard labour. 6 & 7 Geo. 5, c. 50, s. 5. See also s. 37 (5) (ante, p. 501), *as to fine and sureties.*

Evidence.

Prove the subsequent offence, as directed, *ante*, pp. 510 *et seq.*; and if the defendant is found guilty, or pleads guilty, prove the former conviction in manner directed by 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 421), and the identity of the defendant. The mode of proceeding at the trial as to arraignment, etc., is regulated by 24 & 25 Vict. c. 96, s. 116 (*ante*, p. 167).

There cannot be a conviction for obtaining a dog by false pretences, under 6 & 7 Geo. 5, c. 50, s. 32: see *R.* v. *Robinson*, Bell, 34; 28 L. J. (M. C.) 58; 8 Cox, 115.

OFFENCES AKIN TO LARCENY OF ANIMALS.

Larceny of animals (other than horses, cattle, sheep and dogs) which are the property of any person, and the stealing of which was not on 1st January, 1917, punishable only on summary conviction, falls within s. 2 of the *Larceny Act*, 1916 (*ante*, p. 500). There are, however, several offences akin to larceny of animals which are punishable on indictment under other statutes, and these may conveniently be considered here.

(1) *Hunting, etc., deer.*

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 12.—*In uninclosed part of forest, etc.*]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever, having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 G. 4, c. 29, s. 26.]

Sect. 13.—*In inclosed ground.*]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 G. 4, c. 29, s. 26.]

Sect. 14.—*Suspected persons found in possession of venison, etc.*]—If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken *or summoned* before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same

shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned. [*This section re-enacts* 7 & 8 Geo. 4, c. 29, s. 27.]

Sect. 15.—*Setting engines for taking deer, etc.*]—Whosoever shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 28.]

Sect. 16.—*Powers of deer-keepers as to seizure, etc.*]—If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from any such offender any gun, firearms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act (*see R.* v. *Amey*, R. & R. 500), every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 29. *Holding a deer-keeper down to the ground whilst a confederate escaped was held not a beating within* 7 & 8 G. 4, c. 29, s. 29 : *R.* v. *Hale*, 2 C. & K. 326, Maule, J.]

Indictment for hunting deer in Inclosed Places. (24 & 25 *Vict. c.* 96, 1861. *s.* 13, *ante*, p. 551.)

Commencement as ante, p. 509.

Statement of Offence.

Hunting deer, contrary to section 13 of the Larceny Act, 1861.

Particulars of Offence.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, unlawfully hunted ("*course, hunt, snare, or carry away, or kill or wound, or attempt to*

kill or wound ") one fallow deer the property of J. N., kept or being in certain inclosed land (" *in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept* "), where deer were usually kept. *The enactment seems to apply to deer of all kinds, ages, and either sex.* R. *v.* Strange, Greaves, Crim. Cons. Acts (2nd ed.) 111. *It seems essential to state whether the land is inclosed or uninclosed.* See R. *v.* King, 13 L. J. (M. C.) 43. *Felony: imprisonment for not more than two years, with or without hard labour, and if a male under sixteen years of age, with or without whipping* (see *ante*, p. 247). 24 & 25 Vict. c. 96, s. 13. *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, Id. s. 117 (*ante*, p. 246, *post*, p. 562).

Evidence.

To support this indictment, you must prove the hunting, killing, or stealing of the deer, as stated in the indictment; that the act was unlawful, *i.e.*, done in a place in which it is not lawful for the accused to kill the deer (*Threlkeld* v. *Smith* [1901] 2 K. B. 531, 536; 70 L. J. (K. B.) 921; 20 Cox, 38); that the land in which the offence was committed was at the time inclosed, in the occupation of J. N., and that deer were usually kept there. In *R.* v. *Money*, Gloucester Summer Assizes, 1847, Erle, J., held that an inclosure in the Forest of Dean made under an Act of Charles II., and surrounded by a ditch and bank sufficient to keep out cattle, but over which deer could pass, was inclosed land within 7 & 8 G. 4, c. 29, s. 26 (*rep.*). *See* Greaves, Crim. Cons. Acts (2nd ed.) 112.

TAKING OR KILLING HARES OR RABBITS IN WARRENS, ETC., IN THE NIGHT-TIME.

Statute.

24 *& 25 Vict. c.* 96 (*Larceny Act*, 1861), *s.* 17.]—Whosoever shall unlawfully and wilfully, *between the expiration of the first hour after sunset and the beginning of the last hour before sunrise*, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully, *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*, take or kill any hare or rabbit, in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet.

Provided that nothing in this section contained shall affect any person taking or killing in the daytime any rabbits on any sea-bank or river-bank in the county of *Lincoln*, so far as the tide shall extend or within one furlong of such bank. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 30, *with the alterations italicized.*]

Indictment.

Commencement as ante, p. 509.

STATEMENT OF OFFENCE.

Taking hares by night, contrary to section 17 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, to wit, about the hour of eleven in the night of the same day, in a certain warren or ground (" *in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not* ") in the occupation of J. N., then being lawfully used for the breeding and keeping of hares ("*hares or rabbits*"), unlawfully took twenty hares ("*take or kill* ").

Misdemeanor: fine and (*or*) *imprisonment, without hard labour: (with sureties to keep the peace and be of good behaviour, if the Court thinks fit*, 24 & 25 Vict. c. 96, s. 117, ante, p. 247, post, p. 562). 24 & 25 Vict. c. 96, s. 17.

Evidence.

To support this indictment you must prove—1*st*. That the defendant took or killed the hares (or rabbits) in the place mentioned in the indictment. " A rick-yard " where a few rabbits were kept has been held not to be a " ground used for breeding or keeping." *R.* v. *Garratt*, 6 C. & P. 369, Patteson, J. " Taking," in the statute, means " catching," and not taking away. Where a defendant, who set several wires in a warren, in one of which a rabbit was caught, was seized as he was laying hold of the wire to take the rabbit, which was then alive, the judges held this to be a taking within the meaning of the statute. 7 & 8 G. 4, c. 29, s. 30 (*rep.*). *R.* v. *Glover*, R. & R. 269.—2*nd*. That the offence was committed between the expiration of the first hour after sunset and the beginning of the last hour before sunrise—3*rd*. That the place in which the defendant took the hares (or rabbits) was a warren or ground then used for the breeding or keeping of hares (or rabbits); that it was in the occupation of J. N., and was situate as described in the indictment. It has been held that ordinary agricultural land cannot be said to be used for the keeping or breeding of rabbits merely because rabbits are tolerated for the purpose of sport and probably breed in the hedgerows or adjoining plantation. *R.* v. *McLauchlan*, 75 J. P. 8.

As to when larceny can be committed of rabbits, *see R.* v. *Petch*, 14 Cox, 116 (C. C. R.) (*ante*, p. 544).

The *Ground Game Act*, 1880 (43 & 44 Vict. c. 47), which gives the occupiers of land the right to kill rabbits and hares, forbids them the use of firearms to kill them between the expiration of the first hour after sunset and the commencement of the last hour before sunrise, and prohibits the use of poison, or of rabbit traps, except in rabbit holes (s. 6). On this Act *see Anderson* v. *Vicary*

[1900] 2 Q. B. 287; 69 L. J. (Q. B.) 713: *May* v. *Waters* [1910] 1 K. B. 431; 79 L. J. (K. B.) 250; 26 T. L. R. 239: *Waters* v. *Phillips* [1910] 2 K. B. 465; 26 T. L. R. 564: *Leworthy* v. *Rees*, 23 Cox, 522; 109 L. T. 244; 77 J. P. 268; 29 T. L. R. 408. It would seem that if this enactment is disobeyed by an occupier he will be within the provisions of 24 & 25 Vict. c. 96, s. 17 (*ante*, p 553). The rights of the occupier are extended by 6 Edw. 7, c. 21, but not so as to extend his right to use firearms.

TAKING OR DESTROYING FISH IN WATER ADJOINING A DWELLING-HOUSE.

Statute.

24 *& 25 Vict.* c. 96 (*Larceny Act*, 1861), *s.* 24.]—Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house or any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; ["*Fish*" *includes freshwater crayfish.* Caygill *v.* Thwaites, 33 W. R. 581; 49 J. P. 614.]

And whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet:

Provided that nothing hereinbefore contained shall extend to any person angling *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset;*

But whosoever shall, by angling, *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem just.

And if the boundary of any parish, township or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township or vill adjoining thereto. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 34, *with addition of the words in italics. As to the rights of tenants to take fish*, see Jones *v.* Davies, 20 Cox, 184.]

Sect. 25.]—If any person shall at any time be found fishing against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant, or any person authorized by him, may

demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish which shall then be in his possession, and, in case such offender shall not immediately deliver up the same, may seize and take the same from him for the use of such owner :

Provided that any person angling against the provisions of this Act, *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*, from whom any implement used by anglers shall be taken, or by whom the same shall be so delivered up, shall by the taking or delivery thereof be exempted from the payment of any damages or penalty for such angling. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 34, *with addition of the words in italics.*]

The protection of the second half of the section only applies to "anglers" and not to persons "found fishing." The word "angling" is to be construed strictly. Fishing by night lines, consisting of two small pegs or stakes about 6 in. to 8in. long, which were pointed and driven into the bank of a stream with lines and hooks attached and with a stone weight attached to one of the lines to keep the line floating with the stream, has been held not to be "angling." *Barnard* v. *Roberts* [1907] 96 L. T. 648; 21 Cox, 425; 71 J. P. 277.

Indictment.

Commencement as ante, p. 509.

Statement of Offence.

Taking fish, contrary to section 24 of the Larceny Act, 1861.

Particulars of Offence.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, in a certain stream of water ("*any water*") running through or being in certain land ("*any land adjoining or belonging to the dwelling-house*") adjoining [*or* belonging] to the dwelling-house of J. N., the said J. N. then being the owner of the said water [*or*, the said J. N. then having a right of fishery in the said water], unlawfully took ["*take or destroy*"] thirty tench, and thirty trout. *Where the indictment alleged the fish to be the goods and chattels of the prosecutor, the judges held that these words might be rejected as surplusage.* R. *v.* Hundsdon, 2 East, P. C. 611.

Misdemeanor: fine and (or) imprisonment, without hard labour; with sureties, etc. See ante, pp. 246, 247, post, p. 562, 24 & 25 Vict. c. 96, ss. 24, 117.

Evidence.

Prove the taking or destruction of the fish mentioned, or some of them. The taking need not be such a taking as would be necessary to constitute a larceny. *See R.* v. *Glover*, R. & R. 269 (*ante*, p. 554). But a taking by angling in the daytime will not be sufficient. And taking fish with the consent of the tenant but not of the owner of the soil is not an offence unless the fishing is reserved to the owner by the lease. *Jones* v. *Davies*, 70 L. J. (K. B.) 38; 20 Cox, 184;

66 J. P. 439 (K. B. D.). If a destruction only be charged, it must be proved to have been wilful. Prove, also, that the fish were taken or destroyed in a stream [*or* water] running or being in land adjoining to (*see R.* v. *Hodges*, *post*, p. 575), or belonging to the dwelling-house of J. N., and which at the time belonged to J. N., or in which he had a right of fishery. Where a corporation had a right of several fishery in a part of a tidal river, and the accused, at a time of low water, collected winkles from small pools of water left by the ebbing tide on mud banks of the river within the limits of the fishery, it was held that the proviso in the section did not restrict the general words thereof to the offence of taking fish by angling, and that winkles were "fish" within the meaning of the section, and, further, that there was evidence upon which the justices could find that the pools from which the winkles were taken were "water" within the meaning of the section. *Leavett* v. *Clark* [1915] 3 K. B. 9; 84 L. J. (K. B.) 2157; 113 L. T. 424; 25 Cox, 44; 31 T. L. R. 424; 79 J. P. 396. The local situation of the dwelling-house and water must also be proved; but if the boundary of any parish, township or vill, happen to be in or by the side of the water, it will be sufficient to prove that the offence was committed either in the parish, etc., named in the indictment, or in the parish, etc., adjoining thereto. 24 & 25 Vict. c. 96, s. 24.

DREDGING FOR OYSTERS, ETC.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 26.]—[*Whosoever shall steal any oysters or oyster-brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and*] whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster-brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding three months, with or without hard labour. . . .

And it shall be sufficient in any indictment to describe, either by name or otherwise, the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill;

Provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only.

[*The words in italics have been repealed by the Larceny Act*, 1916, *the stealing of oysters or oyster-brood being simple larceny within s.* 2 *of that Act, ante*, p. 500. *As to property in oysters, etc.*, see ss. 51, 52 *of the Sea Fisheries Act*, 1865, *infra.*]

31 & 32 *Vict. c.* 45 (*Sea Fisheries Act*, 1868), *part iii., s.* 28.—*Interpretation of terms.*]—In this part of this Act the words "oysters" and "mussels" respectively include the brood, ware, half-ware, spat, and spawn of oysters and mussels respectively. In this part of the Act the expression "oyster and mussel fishery" includes a fishery for either oysters or mussels separately, and the term "oyster or mussel fishery" includes a fishery for both oysters and mussels; and the provisions of this part of this Act shall be construed to apply in the case of any fishery to oysters and oyster ground and beds alone, or to mussels and mussel ground and beds alone, or to both oysters and mussels, and oyster and mussel ground and beds, according as the right of fishery is for oysters alone, or for mussels alone, or for both oysters and mussels.

Sect. 42.—*Marking out of oyster, etc., fishery, how proved.*]—Whenever it is necessary in any legal proceeding to prove that in pursuance of any Act of parliament or of an order under this part of this Act, the limits of any oyster and mussel fishery have been duly buoyed or otherwise marked, or notices of such limits have been duly published, posted or distributed, or that notice of the provisions of the order or of such Act relating to the oyster and mussel fishery has been duly published, a certificate purporting to be under the hand of one of the secretaries or assistant secretaries of the Board of Trade, certifying that the Board of Trade are satisfied that the said limits were so buoyed or marked, or that the said notices were duly published, posted, or distributed, shall be received as evidence that the same have been so buoyed or marked, or that the said notices have been so published, posted, or distributed.

Sect. 43.—*Oyster fishery to be within county for purposes of jurisdiction.*]—The portion of the sea-shore to which an Order of the Board of Trade under this part of this Act relates (as far as it is not by law within the body of any county) shall for all purposes of jurisdiction be deemed to be within the body of the adjoining county, or to be within the body of each of the adjoining counties, if more than one (*see ante*, pp. 31, 37).

Sect. 51.—*Property in oysters, etc., within several fishery.*]—All oysters and mussels being in or on an oyster or mussel bed within the limits of a several oyster and mussel fishery granted by an order under this part of this Act, and all oysters being in or on any private oyster bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of the grantees or of such owner, as the case may be, and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of the grantees and such owner respectively.

Sect. 52.—*Property in oysters, etc., removed from several fishery.*]—All oysters and mussels removed by any person from an oyster or mussel bed within the limits of any such several fishery, and all oysters removed by any person from any such private oyster bed, and not either sold in market overt or disposed

of by or under the authority of the grantees or owner (as the case may be), shall be the absolute property of the grantees and owner respectively, and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, the absolute right to the possession thereof shall be deemed to be in the grantees and owner respectively.

Sect. 55.—*Statement and proof of ownership, etc., in case of contiguous fisheries.*]—When two or more oyster or mussel beds or fisheries belonging to different proprietors are contiguous to each other, and any proceeding by indictment or otherwise is taken against any person for stealing oysters or mussels from any bed formed under an order made in pursuance of this part of this Act, or for stealing oysters from any bed formed independently of this Act, it shall be sufficient, in alleging and proving the property and lawful possession of the oysters or mussels stolen, and the place from which they were stolen, to allege and prove that they were the property of and in the lawful possession of one or other of such proprietors, and were stolen from one or other of such contiguous beds or fisheries.

Sect. 65.—*Saving.*]—Nothing in this Act shall prevent any person being liable under any other Act or otherwise to any indictment, proceeding, punishment, or penalty, other than is provided for any offence by this Act, so that no person be punished twice for the same offence. [*Cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160.]

Indictment for using a Dredge, etc., in the Oyster Fishery of another.

Commencement as ante, p. 509.

STATEMENT OF OFFENCE.

Using a dredge in an oyster fishery, contrary to section 26 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, within the limits of a certain oyster-bed ("*any oyster-bed, laying, or fishery*") called ——, the property of J. N., unlawfully did use a certain dredge ("*any dredge, net, instrument, or engine whatsoever*") for the purpose of taking oysters ("*oysters or oyster-brood*").

Misdemeanor: punishable by imprisonment not exceeding three months, with or without hard labour. 24 & 25 Vict. c. 96, s. 26. *The offender may also, in addition to or in lieu of this punishment, be fined, and required to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour.* 24 & 25 Vict. c. 96, s. 117 (ante, p. 247, post, p. 562).

Evidence.

Prove that the defendant used a dredge, etc., within the limits of the oyster-bed, etc., of J. N., as stated in the indictment; and that such oyster-bed, etc., was at the time the property of J. N., and was sufficiently [marked out and] known as such. That it was so marked out may be proved as directed by 31 & 32 Vict. c. 45, s. 42 (*ante*, p. 558). The purpose is to be inferred from the act, and it is immaterial whether the defendant actually took any oysters or oyster-brood or not. The statute does not apply to persons catching or fishing for any floating fish within the limits of an oyster fishery with any net, instrument or engine adapted for taking floating fish only. 24 & 25 Vict. c. 96, s. 26.

STEALING WILLS, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 6.]—Every person who steals any will, codicil, or other testamentary instrument, either of a dead or of a living person, shall be guilty of felony, and on conviction thereof liable to penal servitude for life. [*This section is taken from* 24 & 25 Vict. c. 96, s. 29, *the unrepealed portions of which are set out below.*]

Sect. 43, *sub-ss.* 2, 3. *Limitations on prosecution.*]—*Ante*, p. 506.

Indictment.

THE KING *v.* A. B.

Central Criminal Court.

Presentment of the Grand Jury.

A. B. is charged with the following offence—

STATEMENT OF OFFENCE.

Larceny, contrary to section 6 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of London, stole the will of the late C. D. ("*either of a dead or of a living person*").

Felony: penal servitude for life or for not less than three years or imprisonment for not more than two years, with or without hard labour.—6 & 7 *Geo.* 5, c. 50, ss. 6, 37 (4); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace and being of good behaviour*, 6 & 7 Geo. 5, c. 50, s. 37 (5) (b), ante, p. 501.

This offence is not triable at quarter sessions.—5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove a larceny of the will, etc., as directed *ante*, pp. 510 *et seq.*

No person can be convicted of this offence upon any evidence whatever in respect of any act done by him if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been *bonâ fide* instituted by any person aggrieved; nor in any proceedings under this section is a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy admissible in evidence against that person. The former law under s. 29 of the *Larceny Act*, 1861 (*infra*), has been altered with regard to a first disclosure of the offence in the course of bankruptcy proceedings, the absolute immunity from prosecution being taken away by s. 43 (3) of the *Larceny Act*, 1916. A person accused of stealing a will who first disclosed the offence in his public examination in bankruptcy may be prosecuted, but his answers in his public examination are not admissible in evidence against him. The absolute protection still exists where the offence charged is not larceny, but destruction, cancellation, etc., of a will. *See infra.* The disclosure of the offence by a voluntary witness in a civil action on cross-examination and without objection to answer the questions being taken, has been held not to be a disclosure " in consequence of any compulsory process " of any court of law or equity within the meaning of s. 85 of the *Larceny Act*, 1861, which contains a similar provision. *R.* v. *Noel* [1914] 3 K. B. 848; 84 L. J. (K B..) 142; 112 L. T. 47; 24 Cox, 486; 10 Cr. App. R. 255.

DESTROYING, CONCEALING WILLS, ETC.

Statute.

24 *& 25 Vict. c.* 96 (*Larceny Act*, 1861), *s.* 29.]—Whosoever shall, either during the life of the testator, or after his death, . . . for any fraudulent purpose destroy, *cancel, obliterate*, or conceal, *the whole or any part of* any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

And it shall not in any indictment for such offence be necessary to allege, that such will, codicil, or other instrument, is the property of any person:

Provided that nothing in this or the last preceding section (*see post*, p. 665) mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him;

And no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned (*post*, p. 565) by any evidence whatever, in respect of any act done by him, if he shall, at any time previously to his being *charged with* such offence, have *first* disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved; or if he shall have first disclosed the same in any *compulsory* examination or deposition before any court *upon the hearing of any matter in bankruptcy or insolvency.* [*This section re-enacts* 7 & 8 G. 4, c. 29, ss. 23, 24, *with the alterations indicated in italics. The word "first" was inserted to get rid of the doubt expressed in* R. *v.* Skeen, 28 L. J. (N. S.) M. C. 91; Bell, 97.]

Sect. 115.—*Offences committed within jurisdiction of Admiralty.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence or for being an accessory to any such offence the venue in the margin shall be the same as if the offence itself shall be averred to have been committed "on the high seas"; Provided, that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces. [*This section was framed from* 7 & 8 G. 4, c. 29, s. 77. *As to Admiralty jurisdiction*, see ante, pp. 31 *et seq.*]

Sect. 117.—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour (*see ante*, p. 252);

And in case of any felony punishable under this Act the Court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized (*see ante*, p. 252):

Provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Indictment.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Destroying a will, contrary to section 29 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of London, destroyed the will of the late C. D. for a fraudulent purpose.

Felony: penal servitude for life, or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 96, s. 29; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace*, 24 & 25 Vict. c. 96, s. 117 (ante, pp. 252, 562).

This offence is not triable at quarter sessions.—5 & 6 Vict. c. 38, s. 1 (ante, p. 106.)

Evidence.

Prove the destruction or concealment of the will by the defendant as stated in the indictment, and also the fraudulent purpose for which he did it. The fraudulent purpose can, in most cases, be only matter of inference not capable of direct proof (*see R.* v. *Morris*, 9 C. & P. 89); but the mere destruction or concealment, unexplained by the defendant, is evidence from which fraud may fairly be presumed. It is immaterial whether the will, etc., is destroyed during the life or after the death of the testator, or whether it relates to real or personal estate, or to both.

No person can be convicted of this offence by any evidence whatever, in respect of any act done by him, if at any time previously to his being charged with the offence he shall "have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved: or if he shall have *first* disclosed the same in any examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." These words differ from those of s. 43 (3) of the *Larceny Act*, 1916, as explained above. As to the meaning of "compulsory process," *see R.* v. *Noel*, *ante*, p. 561. Evidence of A. that B. had told him that C. had committed an offence is inadmissible as against C. as evidence of the knowledge of B. as to the fact of C. having committed the offence: and it was therefore inadmissible as evidence that an offence, disclosed by C., a bankrupt, in his examination, had been disclosed previously to such examination, so as to disentitle C. to the protection of the proviso to 24 & 25 Vict. c. 96, s. 85 (*post*, p. 624); *R.* v. *Gunnell*, 16 Cox, 154 (C. C. R.), in which case the meaning of the words "first disclosure" was fully considered. The proviso discussed in *R.* v. *Gunnell*, which was in identical terms with that of 24 & 25 Vict. c. 96, s. 29, was repealed by 53 & 54 Vict. c. 71, s. 27: *see post*, p. 625; but the latter Act has not affected s. 29 of the *Larceny Act*, 1861, and *R.* v. *Gunnell* seems to be still a guide to the meaning of that section.

STEALING DOCUMENTS OF TITLE TO LANDS, RECORDS, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 7.]—Every person who steals the whole or any part of—(1) any document of title to lands; or (2) any record, writ, return, panel, petition, process, interrogatory, deposition, affidavit, rule, order,

warranty of attorney, or any original document of or belonging to any court of record, or relating to any cause or matter, civil or criminal, begun, depending, or terminated in any such court; or (3) any original document relating to the business of any office or employment under His Majesty, and being or remaining in any office appertaining to any court of justice, or in any of His Majesty's castles, palaces, or houses, or in any government or public office; shall be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding five years. [*This section is taken from* 24 *&* 25 *Vict. c.* 96, *ss.* 28, 30, *the unrepealed portions of which are set out below.*]

Sect. 43, sub-ss. 2, 3.—*Limitation on prosecution.*]—Ante, p. 506.

Indictment for Stealing a Document of Title to Lands.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Larceny, contrary to section 7 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, stole a deed, the property of J. N., being or containing evidence of the title [*or*, of part of the title] of the said J. N. to a real estate called Whiteacre.

Felony: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 6 *&* 7 *Geo.* 5, *c.* 50, *ss.* 7, 37 (4); 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (ante, pp. 238, 239). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 6 *&* 7 *Geo.* 5, *c.* 50, *s.* 37, (5) (b), ante, p. 506.

This offence is not triable at quarter sessions.—5 & 6 Vict. c. 38, s. 1 (ante, p. 106.)

Evidence.

Prove a larceny of the deed, as directed, *ante*, pp. 511, *et seq.* Prove also that it is or contains evidence of the title or part of the title of J. N. to the real estate mentioned in the indictment, or to part of it, which may be done by producing the instrument or giving secondary evidence of its contents (see *ante*, pp. 367, 368, 445), and by showing how J. N. claims the estate. For the definition of " document of title to lands " in the *Larceny Act*, 1916, see 6 & 7 Geo. 5, c. 50, s. 46 (1), *ante*, p. 508.

Under s. 43, sub-ss. 2, 3 of the *Larceny Act*, 1916, the same limitations apply to a prosecution of any person for this offence as have already been noticed in the case of stealing wills, *ante*, p. 506.

DESTROYING, ETC., DOCUMENTS OF TITLE TO REAL ESTATE

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 1. *Definition of Document of Title to Lands.*]—The term "document of title to lands" shall include any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title or any part of the title to any real estate, *or to any interest in or out of any real estate.* [*This definition re-enacts* 7 & 8 G. 4, c. 29, s. 23, *with the additions italicized. In the definition contained in s.* 46 (1) of the Larceny Act, 1916 (6 & 7 Geo. 5, *c.* 50), *ante*, p. 508, *the words "roll, register" are included.*]

Sect. 28.]—Whosoever *shall for any fraudulent purpose destroy, cancel, obliterate or conceal, the whole or any part of* any document of title to lands, shall be guilty of *felony*, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . :

[*This section re-enacts* 7 & 8 G. 4, c. 29, s. 23, *with the alterations indicated in italics.* See Greaves, Criminal Law Consolidation Acts (2nd ed.), p. 123. *The portions repealed by* 5 & 6 *Geo.* 5, *c.* 90, *and* 6 & 7 *Geo.* 5, *c.* 50, *are omitted.*]

Sect. 29.]—*Ante*, p. 561.

Indictment.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Destroying a document of title to lands, contrary to section 28 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of Essex, for a fraudulent purpose destroyed (*destroy, cancel, obliterate or conceal*) a certain deed, the property of J. N., being [*or*, containing] evidence of the title [*or*, of part of the title] of the said J. N. to a certain real estate [*or*, to part of a certain real estate] called *Whiteacre.*

Felony: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 96, s. 28; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 Vict. c. 96, s. 117 (ante, p. 562).

This offence is not triable at quarter sessions.—5 & 6 Vict. c. 38, s. 1 (*ante*, p. 106).

Evidence.

Prove that the defendant destroyed or concealed the deed. Prove, also, that it is, or contains, evidence of the title or part of the title of J. N. to the real

estate mentioned in the indictment, or to part of it, which may be done by producing the instrument, or giving secondary evidence of it (*see ante*, pp. 367, 368, 445), and by showing how J. N. claims the estate.

No person can be convicted of this offence by any evidence whatever in respect of any act done by him, if at any time previously to his being charged with the offence he shall "have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." 24 & 25 Vict. c. 96, s. 29 (*see ante*, p. 562).

REMOVING, OBLITERATING, ETC., RECORDS, ETC.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 30.]—Whosoever shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously *cancel*, obliterate, injure, or destroy *the whole or any part of* any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under [his] Majesty, and being or remaining in any office appertaining to any court of justice or in any of [his] Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 21, *with the additions italicized.*]

Indictment for taking a Record, etc., from its Place of Deposit.
(24 & 25 *Vict. c.* 96, *s.* 30.)

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Taking a record from its place of deposit, contrary to section 30 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, for a fraudulent purpose took a certain record of (*of or belonging to*) a certain Court of Record, to wit a (*describe record*) of the King's Bench Division of the High Court of Justice, from its place of deposit for the time being, to wit, from the Central Office of the said court [*or*, from one J. N. then having the lawful custody of the same.]

Felony: penal servitude for not more than five years nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 96, s. 30; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace*, 24 & 25 Vict. c. 96, s. 117 (ante, p. 562).

This offence is not triable at quarter sessions.—5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the record, etc., described in the indictment was deposited in the Central Office of the High Court, or in the record office, or other place mentioned in the indictment, and that such was its proper place of deposit for the time being; or, that the person from whose custody the record, etc., is charged in the indictment to have been taken was by law entitled to have, and in fact had, possession of it at the time. That the defendant took the record, etc., from the place or person mentioned in the indictment, which may be proved either by positive or by circumstantial evidence. (*See ante*, p. 396). And that he took it for a fraudulent purpose, which, in most cases, can only be matter of inference from circumstances, and is not capable of direct proof. The mere taking is evidence from which fraud may fairly be presumed, unless it is satisfactorily explained by the defendant. As to what facts will support a conviction for taking the process of a court for a fraudulent purpose from a person having the lawful custody thereof, *see R. v. Bailey*, L. R. 1 C. C. R. 347; 41 L. J. (M. C.) 61.

DESTROYING, ETC., VALUABLE SECURITIES. (*a*)

24 *& 25 Vict. c.* 96 (*Larceny Act*, 1861), *s.* 27.]—Whosoever . . . shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands (*see ante*, p. 508), shall be guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned or referred to in or by the security.

(*a*) The stealing of valuable securities, formerly punishable under 24 & 25 Vict. c. 96, s. 27, is now simple larceny within 6 & 7 Geo. 5, c. 50, s. 2. *See ante*, p. 500.

Definition of valuable security.]—Sect. 1—The term "valuable security" shall include any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, *whether within the United Kingdom or in any foreign state or country*, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, *and any document of title to land or goods as hereinbefore defined.* [*This definition re-enacts* 7 & 8 G. 4, c. 29, s. 5, *with the additions italicized. It should be carefully compared with the definition of valuable security in the* Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 46 (1), ante, p. 508. "*Valuable security*" *has been held to include a transfer of shares in a limited liability company.* R. *v.* Smith, 62 J. P. 231. *It includes currency notes.* 4 & 5 Geo. 5, c. 14, s. 1 (5). *As to money orders, see* 8 Edw. 7, c. 48, s. 59 (b), post, p. 582.]

Definition of document of title to lands.]—Sect. 1—The term "document of title to lands" shall include any *deed, map*, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, *or to any interest in or out of any real estate.* [*This definition re-enacts* 7 & 8 G. 4, c. 29, s. 23, *with the additions italicized.*]

Definition of document of title to goods.]—Sect. 1—The term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehousekeeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, *bought and sold note*, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possession of such document to transfer or receive any goods thereby represented *or therein mentioned or referred to.* [*This definition re-enacts* 7 & 8 G. 4, c. 29, s. 23, *with the additions italicized.*]

Indictment.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Destroying a valuable security, contrary to section 27 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, for a fraudulent purpose, destroyed a certain valuable security, to wit, one bill of exchange for the payment of ten pounds, the property of J. N. *As to the description of*

the bill or other security, see ante, p. 50. *As* 24 & 25 Vict. c. 96, s. 27, *limits the term "valuable security" to securities "other than a document of title to lands," it is material, in an indictment under it, to describe the security so as to show that it is within the section.* R. *v.* Lowrie, L. R. 1 C. C. R. 61; 36 L. J. (M. C.) 24. *If the instrument be for any reason void in law, the defendant may be convicted on a count charging him with stealing a piece of paper.* R. *v.* Perry, 1 Den. 69; 1 C. & K. 725.

Felony of the same nature, and in the same degree, and punishable in the same manner, as if the defendant had stolen any chattel of like value with the share, interest, or deposit to which the security stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security. 24 & 25 Vict. c. 96, s. 27 (supra).

Evidence.

Prove that the defendant destroyed the bill for a fraudulent purpose as directed, *ante*, pp. 563, 567.

The bill or other security must be of the description specified in the statute. *R.* v. *Lowrie* (*supra*). Where the defendant was indicted under 15 G. 2, c. 13, s. 12 (*rep.*) for stealing certain bills, commonly called Exchequer bills, and it appeared in evidence that the person who signed them on the part of the Government was not legally authorized to do so, it was held that they were not good Exchequer bills. *R.* v. *Aslett*, 2 Leach, 954. But on a subsequent trial of the same person, the documents were held to be "valuable effects or securities" within the same statute. *Id.* 958, 974.

In cases where the prosecutor had been compelled by duress or induced by fraud to sign a "valuable security," difficulties formerly arose in proving, in support of an indictment for larceny, that the property or possession of the instrument in question was in the prosecutor. These cases (*R.* v. *Phipoe*, 2 Leach, 673; 2 East, P. C. 599: *R.* v. *Edwards*, 6 C. & P. 515, 521: *R.* v. *Smith*, 2 Den. 449; 21 L. J. (M. C.) 111) are provided for by 6 & 7 Geo. 5, c. 50, ss. 29 (2) and 32 (2) (*b*), which make it a criminal offence for a person by threats (s. 29 (2), *post*, p. 681) or false pretences (s. 32 (2) (*b*), *post*, p. 691) to induce another to affix his name to any paper "in order that the same may be afterwards made or converted into or used or dealt with as a valuable security."

In consequence of an advertisement, A. applied to B. to raise money for him. B. promised to procure 5,000*l.*, and produced ten blank 6*s.* stamps, across which A. wrote an acceptance, and B. took them up without saying anything, and afterwards filled up the stamps for 500*l.* each, and put them into circulation. On these facts Littledale, J., Bolland, B., and Bosanquet, J., held that the stamps so filled up were not bills of exchange, orders for the payment of money, or securities for money, within the meaning of 7 & 8 G. 4, c. 29, s. 5 (*rep.*); and that, as the prosecutor never had any possession of the papers so as to enable him to maintain trespass for them, there was no taking of them such as to constitute larceny. *R.* v. *Minter Hart*, 6 C. & P. 106. But a document

which was a complete bill of exchange in all respects, except that it wanted the drawer's signature, was held to be, when it had reached the hands of the intended drawer, a "security for the payment of money," within 24 & 25 Vict. c. 96, s. 75 (*rep.*): *R.* v. *Bowerman* [1891] 1 Q. B. 112; 60 L. J. (M. C.) 13; and therefore would seem to be so within 24 & 25 Vict. c. 96, s. 1 (*ante*, p. 568). In the above case Hawkins, J., said: "Suppose a cheque to be drawn payable to order, and handed by the drawer to the payee, it could not possibly be said that the cheque was not a valuable security until the payee had indorsed it." Where country bank-notes, paid by the agent in London, were sent by him to the bankers in the country to be re-issued, and were stolen by the defendant, who was indicted for stealing the notes, and also for stealing the paper and stamps, this was held to be a larceny of the paper and stamps; but the judges seem to have been of opinion that the notes were not within 2 G. 2, c. 25, s. 3 (*rep.*), because it could not be said that the money secured thereby was due and unsatisfied. *R.* v. *Clark*, R. & R. 181; 2 Leach, 1036. *See R.* v. *Perry*, 1 Den. 69; 1 C. & K. 725 (*ante*, p. 569). So, where the defendant was indicted for receiving certain pieces of stamped paper, the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be re-issued, when they were stolen, it was held that they were properly described in the indictment as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of 7 & 8 G. 4, c. 29, s. 5 (*rep.*). *R.* v. *Vyse*, 1 Mood. 218. Documents which purported to be certificates entitling the holder to shares, and to receive dividends in a *foreign* railway company, and which passed by delivery like bank-notes, and were treated and dealt with on the London stock exchange as railway shares, were held to be valuable securities within that statute. *R.* v. *Smith*, Dears. 561; 25 L. J. (M. C.) 31. The halves of notes, if destroyed, may be described as goods and chattels. *R.* v *Mead*, 4 C. & P. 535. It would seem, however, that they may also be described as *parts* of a valuable security, *see* 24 & 25 Vict. c. 96, s. 27 (*ante*, p. 567). The notes themselves may be described as money: 14 & 15 Vict. c. 100, s. 18 (*ante*, p. 52). Where upon an indictment on 7 G. 3, c. 50, s. 1 (*rep.*), which made it felony for persons employed in the post office to secrete any letter, etc., containing any note, etc., it appeared that the note had been paid to the holder, and had not been re-issued, the judges were of opinion that such notes retained the character and fell within the description of promissory notes, and were, as promissory notes, valuable to the owners of them. *R.* v. *Ranson*, R. & R. 232; 2 Leach, 1090, 1093. A cheque on a banker, written on unstamped paper, payable to D. F. J., and not made payable to bearer, was held not to be a valuable security within the meaning of the statute. *R.* v. *Yates*, 1 Mood. 170. A cheque on a banker may be described as "a valuable security, to wit, a cheque of the value of," etc., without stating the drawee to be a banker. *R.* v. *Heath*, 2 Mood. 33. It is not necessary that a bill should be indorsed by the payee at the time it is destroyed, so as to be in a negotiable state. *Anon.*, 2 East, P. C. 598: *R.* v. *Bowerman*, *supra*. But in *R.* v. *Pooley*, R. & R. 12; 2 Leach, 887, an

unstamped draft was held to be of no value and not to be a bill or draft within 7 G. 3, c. 50, s. 1 (*rep.*).

A pawnbroker's duplicate was held to be a warrant for the delivery of goods, within 7 & 8 G. 4, c. 29, s. 5 (*rep.*). *R.* v. *Morrison*, Bell, 158; 28 L. J. (M. C.) 210. A written agreement to pay money for a sufficient consideration appearing on the face thereof is a valuable security within 24 & 25 Vict. c. 96, s. 1 (*ante*, p. 568). *R.* v. *John*, 13 Cox, 100, Brett, J.

By 16 & 17 Vict. c. 2, the Bank of England may impress upon their notes, etc., by machinery, the names of their cashiers, etc.; and notes so impressed are to be deemed and taken to be, and may be described in indictments, as bank-notes, etc., in the same manner as if they had been subscribed in the handwriting of the cashiers, etc.

Money orders—Postal orders.]—The *money orders* issued by the post office are "orders for the payment of money and valuable securities" within the statute, 8 Edw. 7, c. 48, s. 59 (1) (*post*, p. 582). It is no objection that they are unstamped, the practice of issuing them without a stamp having existed before, and been legalized by 3 & 4 Vict. c. 96. *R.* v. *Gilchrist*, 2 Mood. 233; C. & Mar. 224.

CONCEALMENT OF INSTRUMENT OF TITLE OR FALSIFICATION OF PEDIGREE BY VENDOR OR MORTGAGOR, OR HIS SOLICITOR OR AGENT.

Statute.

22 & 23 *Vict. c.* 35 (*Law of Property Amendment Act*, 1859), *s.* 24.]—Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser [*or* mortgagee; *see* 23 & 24 Vict. c. 38, s. 8 *infra*], or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act (Aug. 13, 1859), conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance from the purchaser [*or* mortgagee; *see* 23 & 24 Vict. c. 38, s. 8, *infra*], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the Court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them, or either or any of them, in consequence of the settlement, deed, will, or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or

mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land :

Fiat of attorney-general] but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of his Majesty's attorney-general, or in case that office be vacant, of his Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct.

Sect. 25.—*Interpretation.*]—In the construction of the previous provisions in this Act,

The term " land " shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term " mortgage " shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned, or released on satisfaction of the debt; and

The term " mortgagor " shall be taken to include every person by whom such conveyance, assignment, pledge, or charge as aforesaid shall be made; and

The term " mortgagee " shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred.

23 & 24 *Vict. c.* 38 (*Law of Property Amendment Act*, 1860), *s.* 8.]—The section 24 in the Act 22 & 23 Vict. c. 35 (*supra*) shall be read and construed as if the words " or mortgagee " had followed the word " purchaser " in every place where the latter word is introduced in the said section.

STEALING OR DAMAGING, WITH INTENT TO STEAL, FIXTURES, TREES, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 8.]—Every person who—(1) Steals, or, with intent to steal, rips, cuts, severs, or breaks—(*a*) any glass or woodwork belonging to any building; or (*b*) any metal or utensil or fixture, fixed in or to any building; or (*c*) anything made of metal fixed in any land being private property, or as a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground : [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 31.] (2) Steals or, with intent to steal, cuts, breaks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling, shrub, or underwood growing—(*a*) in any place whatsoever, the value of the article stolen or the injury done being to the amount of one shilling at the least, after two previous summary convic-

tions of any such offence; or (*b*) in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, the value of the article stolen or the injury done exceeding the amount of one pound; or (*c*) in any place whatsoever, the value of the article stolen or the injury done exceeding the amount of five pounds: [*This sub-section re-enacts* 24 & 25 Vict. c. 96, ss. 32, 33.] (3) Steals, or, with intent to steal, destroys or damages any plant, root, fruit, or vegetable production growing in any garden, orchard, pleasure ground, nursery-ground, hothouse, greenhouse or conservatory, after a previous summary conviction of any such offence; [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 36,] shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny.

Indictment for stealing or cutting with intent, etc., Lead, etc., affixed to Buildings, etc.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Larceny, contrary to section 8 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole (*a*) [*or* with intent to steal, ripped, cut, severed or broke] sixty pounds' weight of lead, the property of J. N., then being fixed to the dwelling-house ("*any building whatsoever*") of the said J. N.

Felony: *punishable as simple larceny.* (See ante, pp. 500, 572.)—6 & 7 Geo. 5, c. 50, s. 8.

Evidence.

Prove a larceny of the lead, etc., as directed *ante*, pp. 511 *et seq.*; or if the indictment charge that the defendant ripped, etc., the lead, with intent to steal it, prove the ripping, etc., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante*, pp. 397 *et seq.*) Prove also, that the house from which the lead was stolen or ripped was the dwelling-house of J. N., situate as described in the indictment. On an indictment for stealing lead from the dwelling-house of W., B. proved that he managed the property of W., who resided at Patras, that he received the rent for W. and let the house: it was held that W.'s ownership was sufficiently proved. *R.* v. *Brummitt*,

(*a*) In the 25th edition of this book, the square brackets enclosing the words "*or with intent to steal, ripped, cut, severed or broke*" were inadvertently omitted. An indictment was drawn, charging a prisoner *in one count* that he "stole, or with intent to steal, ripped and severed or broke one grate," etc. The prisoner was convicted, and he appealed. The Court of Criminal Appeal quashed the conviction upon the ground that two separate offences had been charged in one count, and that the indictment was therefore bad for duplicity. *R.* v. *Molloy* [1921] 2 K. B. 364.

27 Cox 38.

L. & C. 9; 8 Cox, 413. An unfinished building intended as a cart-shed, which is boarded up on all its sides, and has a door with a lock on it, and the frame of a roof with loose gorse thrown upon it, because it is not yet thatched, was held to be a building within the meaning of 24 & 25 Vict. c. 96, s. 31 (*rep.*). *R.* v. *Worrall*, 7 C. & P. 516.

An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B. was held not supported by proof of stealing a pipe fixed to two rooms of which A. and B. were *separate* tenants in the same house. *R.* v. *Finch*, 1 Mood. 418. Where a man (having given a false representation of himself) got into possession of a house under a treaty for a lease of it, and then stripped it of the lead, the jury, being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty; and he afterwards had judgment. *R.* v. *Munday*, 2 Leach, 850; 2 East, P. C. 594: followed in *R.* v. *Richards* [1911] 1 K. B. 260; 80 L. J. (K. B.) 174; 22 Cox, 372; 104 L. T. 48; 75 J. P. 144. An indictment for stealing lead fixed to "a certain *wharf*" was held to be sufficient, it being proved that the wharf was in fact a building. *R.* v. *Rice*, Bell, 87; 28 L. J. (M. C.) 64.

It has been held that upon an indictment on this section of the statute, the defendant cannot be convicted of simple larceny: *R.* v. *Gooch*, 8 C. & P. 293; *and see R.* v. *Millar*, 7 C. & P. 665: and that if the accused is charged with simple larceny, but the evidence proves a larceny under this section, he cannot be convicted. *R.* v. *Molloy*, 24 Cox, 226; 78 J. P. 216; 10 Cr. App. R. 75. As, however, simple larceny is now a statutory offence (*see ante*, p. 500), and wide powers of amending indictments exist (*see ante*, p. 54), it may be doubted whether these decisions will be followed in future.

Indictment for stealing or cutting, etc., with intent to steal, Trees, etc., in Parks, etc., Value above 1l.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Larceny, contrary to section 8 (2) (*b*) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole [*or* with intent to steal, cut, broke, rooted up, or otherwise destroyed or damaged] one oak-tree ("*the whole or any part of any tree, sapling, shrub, or underwood*"), of the value of two pounds,* the property of J. N., then growing in a certain park ("*park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house*") of the said J. N. [thereby doing injury exceeding the amount of one pound].

**If the indictment is for cutting, etc., with intent to steal, omit this allegation of value.*

Felony: punishment same as in simple larceny. 6 & 7 Geo. 5, c. 50, s. 8. (See ante, pp. 500, 574).

Evidence.

Prove a larceny of the tree, as directed, *ante*, pp. 511 *et seq.*; or, if the indictment allege that the defendant cut, etc., the tree with intent to steal it, prove the cutting, etc., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante*, pp. 397 *et seq.*) In the former case, the value of the tree, and in the latter, the amount of the injury done, must be proved to exceed the sum of 1*l.* But if several trees be stolen or cut at the same time, or so continuously as to form one transaction, and the value or injury done exceed that amount in the aggregate, it will be sufficient. *R.* v. *Shepherd*, L. R. 1 C. C. R. 118; 37 L. J. (M. C.) 45; 11 Cox, 119. The injury mentioned in the statute means the actual injury to the tree itself, not *consequential* injury resulting from the defendant's act; and where the evidence showed that the actual injury done to certain trees damaged by the defendant was less than the statutable amount, but that it would, in consequence of the damage done, be necessary to stub up and replace part of an old hedge, at an expense greater than the statutable amount, this was held insufficient. *R.* v. *Whiteman*, Dears. 353; 23 L. J. (M. C.) 120. Prove that the tree, etc., stolen or cut, etc., was at the time growing in a park, etc., belonging to or in the occupation of J. N., and situate as described in the indictment. The words "adjoining any dwelling-house" import *actual contact;* and therefore ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. *R.* v. *Hodges*, M. & M. 341.

Indictment for stealing, or cutting, etc., with intent to steal, Trees, etc., growing in any place whatsoever, value above 5l.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE

Larceny, contrary to section 8 (2) (*c*) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole [*or* with intent to steal, cut, broke, rooted up, or otherwise destroyed or damaged] one ash-tree ("*the whole or any part of any tree, sapling, shrub, or underwood*") of the value of six pounds,* the property of J. N., then growing in a certain close of the said J. N. [thereby doing injury exceeding the amount of five pounds].

**If the indictment is for cutting, etc., with intent to steal, etc., omit this allegation of value.*

Felony: see *the last precedent.* 6 & 7 Geo. 5, c. 50, s. 8 (*ante*, p. 574).

Evidence.

Prove a larceny of the tree, as directed, *ante*, pp. 511 *et seq.*; or if the indictment alleges that the defendant cut, etc., the tree with intent to steal it, prove the cutting, as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante*, pp. 397 *et seq.*) In the former case, the value of the tree, and in the latter the amount of injury done (*see supra*), must be proved to exceed the value of 5*l.*, but it is sufficient to prove that several trees were stolen or cut at the same time, or so continuously as to form one transaction, and the value or injury done in the aggregate exceeds that amount. *R.* v. *Shepherd*, L. R. 1 C. C. R. 118; 37 L. J. (M. C.) 45. Prove that the close in which the tree was stolen or cut belonged to or was in the occupation of J. N., and was situate as described in the indictment. It is not necessary to prove that the close was not a park, etc.

STEALING SILK, ETC., IN THE PROCESS OF MANUFACTURE.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 9.]—Every person who steals, to the value of ten shillings, any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed or exposed, during any stage, process or progress of manufacture in any building, field or other place, shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years. [*This section re-enacts* 24 & 25 Vict. c. 96, s. 62.]

Indictment.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Larceny, contrary to section 9 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole thirty yards of linen cloth, of the value of twenty shillings ("*to the value of ten shillings*"), the property of J. N., whilst the same were laid, placed or exposed in a building, during a stage, process or progress of manufacture.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour: 6 & 7 Geo. 5, c. 50, s. 9; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace, see* 6 & 7 Geo. 5, c. 50, s. 37 (5) (b) (ante, p. 507).

As to summary proceedings for the embezzlement of materials or tools by persons employed in such manufacture, see 6 & 7 Vict. c. 40, ss. 2, 3, 11.

Evidence.

Prove the larceny as directed, *ante*, p. 511 *et seq.*; prove the value of the goods taken to be ten shillings at the least; then prove that they were stolen from the building, field, or other place mentioned in the indictment; and, lastly, prove that when stolen the goods were placed, laid, or exposed in the building, etc., described, in a certain stage, process, or progress of manufacture.

Where, upon an indictment on 18 G. 2, c. 27 (*rep.*), for stealing yarn from a bleaching-ground, it appeared in evidence that the yarn, at the time it was stolen, was in heaps, for the purpose of being carried into the house, and not spread out for bleaching, Thompson, B., held that the case was not within the statute. *R.* v. *Hugill*, 2 Russ. Cr. (7th ed.) 1447. So, where the indictment was for stealing calico, placed to be printed and dried in a certain building, it was held that, in order to support a capital charge, it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico: *R.* v. *Dixon*, R. & R. 53; but it should be observed, that 18 G. 2, c. 27 (*rep.*), mentioned particularly a building, etc., made use of by any calico printer, etc., "for printing, whitening, bowking, bleaching, or dyeing." Goods remain in a "stage, process, or progress of manufacture," within the meaning of 7 & 8 G. 4, c. 30, s. 3 (*rep.*), and therefore also within this statute, though the texture is complete, if they are not yet brought into a condition for sale. *R.* v. *Woodhead*, 1 M. & Rob. 549.

If you prove the larceny, but fail to prove the other circumstances, so as to bring the case within the statute, the defendant may be found guilty of simple larceny.

ABSTRACTION OF ELECTRICITY.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 10.]—Every person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity shall be guilty of felony, and on conviction thereof liable to be punished as in the case of simple larceny. [*This section re-enacts* 45 & 46 Vict. c. 56, s. 23.]

Indictment.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Abstracting electricity, contrary to section 10 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, maliciously or fraudulently abstracted a quantity of electricity, the property of the —— Electric Lighting Company, Limited.

Felony: punishable as simple larceny. 6 & 7 Geo. 5, c. 50, s. 10. See ante, p. 577.

Evidence.

Prove that the defendant abstracted, etc., a quantity of electricity, and that he did so maliciously or fraudulently. "Maliciously" means intentionally and without lawful excuse: see *post*, pp. 741, 800. Prove also that the electricity was the property of the person named in the indictment. *See R.* v. *Armanni*, 130 Cent. Crim. Ct. Sess. Pap. 707.

STEALING, OR SEVERING WITH INTENT TO STEAL, ORE, ETC., FROM A MINE.

Statute.

6 & 7 *Geo. 5, c. 50* (*Larceny Act*, 1916), *s.* 11.]—Every person who steals, or severs with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, mundick, wad, black cawke, black lead, coal, or cannel coal from any mine bed or vein thereof, shall be guilty of felony and on conviction thereof liable to imprisonment for any term not exceeding two years with or without hard labour. [*This section re-enacts* 24 & 25 Vict. c. 96, s. 38.]

Indictment.

Commencement as ante, p. 560.

STATEMENT OF OFFENCE.

Larceny, contrary to section 11 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole [*or* severed with intent to steal] twenty pounds' weight of copper ore ("*the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal*"), the property of J. N., from a certain mine of copper ore ("*mine bed or vein thereof respectively*") of the said J. N.

Felony: imprisonment for not more than two years, with or without hard labour. 6 & 7 Geo. 5, c. 50, s. 11. *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

Prove a larceny of the ore, etc., as directed, *ante*, pp. 511 *et seq.*, or if a severance with intent to steal is alleged in the indictment, prove the severance, and circumstances from which the jury may infer the intent. (*See R.* v. *Bleasdale*, 2 C. & K. 765, *and ante*, pp. 352, 356, 364). Prove, also, that the mine was at the time in the possession or occupation of J. N.

REMOVING, CONCEALING, ETC., ORE, ETC., WITH INTENT TO DEFRAUD.

Statute.

24 *& 25 Vict. c.* 96 (*Larceny Act*, 1861), *s.* 39.]—Whosoever being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . . [*This section was taken from* 2 & 3 Vict. c. 58, s. 10, *and meets the difficulty created by* R. *v.* Webb, 1 Mood. 431, *where it was held not to be larceny for miners, employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner.*]

STEALING, ETC. POSTAL PACKETS, ETC.

Statutes.

6 *& 7 Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 12.—*Larceny of postal packets, etc.*]—Every person who—

(1) steals a mail bag;

(2) steals from a mail bag, post office, officer of the Post Office, or mail, any postal packet in course of transmission by post; or

(3) steals any chattel, money or valuable security out of a postal packet in course of transmission by post; or

(4) stops a mail with intent to rob the mail;

shall be guilty of felony and on conviction thereof liable to penal servitude for life.

Sect. 18.—*Embezzlement by officer of the Post Office.*]—Every person who, being an officer of the Post Office, steals or embezzles a postal packet in course of transmission by post shall be guilty of felony and on conviction thereof liable—

(a) if the postal packet contains any chattel, money or valuable security, to penal servitude for life :

(b) in all other cases to penal servitude for any term not exceeding seven years.

Sect. 33 (2).—*Receiving.*]—Every person who receives any mail bag, or any postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof amounts to a felony under the Post Office Act, 1908, or this Act, knowing the same to have been so feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by post, shall be guilty of felony and on conviction thereof liable to the same punishment as if he had stolen, taken, embezzled, or secreted the same.

Sect. 46.—*Interpretation.*]—Expressions "mail," etc., to have the same meaning as in Post Office Act, 1908. See *ante*, p. 508, and *post*, p. 585.

The above sections of the *Larceny Act*, 1916, reproduce the portions of ss. 50, 55, and 52 of the *Post Office Act*, 1908, relating to larceny, embezzlement and receiving, in order that the *Larceny Act*, 1916, may serve the purpose of a consolidating statute by presenting a complete code of indictable offences of the nature of larceny. As, however, the *Post Office Act*, 1908, is itself a code of Post Office offences, ss. 50, 52, and 55 have been left standing in their entirety, and in practice it will no doubt be found more convenient to proceed under the *Post Office Act*, 1908, the principal provisions of which are set out below.

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 50.—*Stealing mail bag or postal packet.*]—If any person—

(*a*) steals a mail bag; or

(*b*) steals from a mail bag, or from a post office, or from an officer of the Post Office, or from a mail, any postal packet in course of transmission by post (*see* s. 90); or

(*c*) steals any chattel or money or valuable security out of a postal packet in course of transmission by post; or

(*d*) stops a mail with intent to rob or search the mail;

he shall be guilty of felony, and on conviction shall be liable, at the discretion of the Court, to penal servitude for life or any term not less than three years, or to imprisonment, with or without hard labour, for any term not exceeding two years. [*This section is framed from* 7 W. 4 & 1 Vict. c. 36, ss. 6, 27, 28, 29, 42, *and* 47 & 48 Vict. c. 76, s. 13. *For definitions*, see s. 89, post, p. 585.]

Sect. 51.—*Unlawfully taking away or opening mail bag sent by vessel employed under Post Office.*]—If any person unlawfully takes away or opens a mail bag sent by any vessel employed by or under the Post Office for the transmission of postal packets under contract, or wilfully takes a postal packet in course of transmission by post out of a mail bag so sent, he shall be guilty of felony, and on conviction shall be liable, at the discretion of the Court, to penal servitude for any term not exceeding fourteen years or not less than three years,

or to imprisonment, with or without hard labour, for any term not exceeding two years. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 36, s. 26.]

Sect. 52.—*Receiving stolen, etc., mail bag or postal packet.*]—If any person receives any mail bag, or any postal packet or any chattel or money or valuable security, the stealing or taking, or embezzling, or secreting whereof amounts to a felony under this Act, knowing the same to have been so feloniously stolen, taken, embezzled, or secreted, and to have been sent, or to have been intended to be sent by post, he shall be guilty of felony, and shall on conviction be liable to the same punishment as if he had stolen, taken, embezzled, or secreted the same, and may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice. [*For indictment, see post*, p. 594.]

Sect. 53.—*Fraudulent retention of mail bag or postal packet.*]—If any person fraudulently retains, or wilfully secretes or keeps, or detains, or, when required by an officer of the Post Office, neglects or refuses to deliver up—

(*a*) any postal packet which is in course of transmission by post and which ought to have been delivered to any other person; or

(*b*) any postal packet in course of transmission by post or any mail bag which shall have been found by him or by any other person,

he shall be guilty of a misdemeanor, and be liable on conviction on indictment to a fine and to imprisonment with or without hard labour. [*This section is framed from* 7 W. 4 & 1 Vict. c. 36, ss. 31, 42. *As to former law*, see R. v. Mucklow, 1 Mood. 160.]

Sect. 54.—*Criminal diversion of letters from addressee.*]—(1) If any person not in the employment of the Postmaster-General wilfully and maliciously, with intent to injure any other person, either opens or causes to be opened any letter which ought to have been delivered to that other person, or does any act or thing whereby the due delivery of the letter to that other person is prevented or impeded, he shall be guilty of a misdemeanor, and be liable to a fine not exceeding fifty pounds, or to imprisonment, with or without hard labour, for any term not exceeding six months.

(2) Nothing in this section shall apply to a person who does any act to which this section applies where he is parent, or in the position of parent or guardian, of the person to whom the letter is addressed.

(3) A prosecution shall not be instituted in pursuance of this section except by the direction or with the consent of the Postmaster-General.

(4) A letter in this section means a postal packet in course of transmission by post and any other letter which has been delivered by post. [*This section re-enacts* 53 & 54 Vict. c. 46, s. 10.]

Sect. 55.—*Stealing, embezzlement, destruction, etc., by officer of Post Office of postal packet.*]—If any officer of the Post Office steals, or for any purposes whatever embezzles, secretes, or destroys, a postal packet in course of transmission by post, he shall be guilty of felony, and shall on conviction be liable, at the discretion of the Court, to imprisonment for any term not exceeding two years, with or without hard labour, or to penal servitude for a term not less than three years and not exceeding seven years, or, if the postal packet contains any chattel or money, or valuable security, to imprisonment for any term not

exceeding two years with or without hard labour, or to penal servitude for life or any term not less than three years. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 36, s. 26.]

Sect. 56.—*Opening or delaying postal packets.*]—(1) If any officer of the Post Office, contrary to his duty, opens or procures or suffers to be opened any postal packet in course of transmission by post, or wilfully detains or delays, or procures or suffers to be detained or delayed, any such postal packet, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to imprisonment with or without hard labour, or to a fine, or to both such imprisonment and fine. [*This section re-enacts* 7 W. 4 and 1 Vict. c. 36, s. 25. *As to detaining postal packets containing obscene matter or contraband goods, see* 8 Edw. 7, c. 48, ss. 16, 18.]

(2) Provided that nothing in this section shall extend to the opening, detaining, or delaying of a postal packet returned for want of a true direction, or returned by reason that the person to whom the same is directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof, or to the opening or detaining or delaying of a postal packet under the authority of this Act or in obedience to an express warrant in writing under the hand of a Secretary of State : Provided that the warrant in Scotland may be either under the hand of a Secretary of State or of the Secretary for Scotland, in Ireland shall be under the hand and seal of the Lord Lieutenant, and in the Isle of Man shall be under the hand of the Governor issued with the sanction of a Secretary of State.

Sect. 57.—*Carelessness, negligence, or misconduct of persons employed in carrying or delivering mail bags, postal packets, etc., punishable on summary conviction by fine not exceeding* 20*l.*]

Sect. 58.—*Issuing money orders with fraudulent intent.*]—(1) If any officer of the Post Office grants or issues any money order with a fraudulent intent, he shall be guilty of felony, and be liable, at the discretion of the Court, to penal servitude for a term not exceeding seven and not less than three years, or to imprisonment, with or without hard labour, for any term not exceeding two years.

(2) If any officer of the Post Office re-issues a money order previously paid, he shall be deemed to have issued the order with a fraudulent intent under this section. 11 & 12 Vict. c. 88, s. 4; 43 & 44 Vict. c. 33, s. 4 (3); *and* 47 & 48 Vict. c. 76, s. 13. *The form and issue of money orders, including postal orders, are governed by* ss. 23, 24.]

Sect. 59.—*Forgery and stealing of money order.*]—(1) A money order shall be deemed to be an order for the payment of money and a valuable security within the meaning of this Act and of the *Forgery Act*, 1861 [24 & 25 Vict. c. 98], and of the *Larceny Act*, 1861 [24 & 25 Vict. c. 96], and of any other law relating to forgery or stealing which is for the time being in force in any part of the British Islands. [*The expression "valuable security" does not occur in the* Forgery Act, 1861, *but "money order" is included in the definition of "valuable security" in the* Forgery Act, 1913. See post, p. 808.]

(2) If any person, with intent to defraud, obliterates, adds to, or alters any such lines or words on a money order as would, in the case of a cheque, be a

crossing of that cheque, or knowingly offers, utters, or disposes of any money order with such fraudulent obliteration, addition, or alteration, he shall be guilty of felony, and be liable to the like punishment as if the order were a cheque. [*This section re-enacts* 43 & 44 Vict. c. 33, ss. 3, 4.]

Sect. 60.—*Punishment of offences in relation to postal orders, and the poundage thereon.*]—The provisions of law respecting the punishment of offences connected with stamp duties (including the provisions relating to paper and implements used in the manufacture of that paper, and to the punishing of fraud) shall apply in like manner as if any poundage or commission chargeable for a postal order were stamp duty, and as if the paper used for postal orders were paper provided by the Commissioners of Inland Revenue for receiving the impression of a die, and in the Isle of Man and Channel Islands as if those provisions extended to those islands. [*Framed from* 43 & 44 Vict. c. 33, s. 4. (See post, *tit. Forgery*, p. 802.) *As to the issue of postal orders*, see s. 24.]

Sect. 61.—*Prohibition of placing injurious substances in or against post office letter boxes.*]—Post, p. 801.

Sect. 62.—*Penalties for affixing placards, notices, etc., on post office letter boxes, etc., recoverable on summary conviction.*]

Sect. 63.—*Prohibition of sending by post explosive, inflammable, or deleterious substances, or indecent prints, words, etc.*]—(1) A person shall not send or attempt to send a postal packet which either—

(*a*) encloses any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, any sharp instrument not properly protected, any living creature which is either noxious or likely to injure other postal packets in course of conveyance or an officer of the Post Office, or any article or thing whatsoever which is likely to injure either other postal packets in course of conveyance or an officer of the Post Office; or

(*b*) *and* (*c*)—*See post, tit.* Obscene Libels, etc.

(2) If any person acts in contravention of this section, he shall be guilty of a misdemeanor, and shall be liable on summary conviction to a fine not exceeding ten pounds, and on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding twelve months.

(3) The detention in the Post Office of any postal packet on the ground of its being in contravention of this section [*see* s. 16] shall not exempt the sender thereof from any proceedings which might have been taken if the packet had been delivered in due course of post. [*This section re-enacts* 47 & 48 Vict. c. 76, s. 4.]

Sect. 64.—*Penalties for imitation of Post Office stamps, envelopes, forms, and marks recoverable on summary conviction only.*]

Sect. 65.—*Penalties and forfeitures in respect of making, possessing, etc., fictitious stamps, etc., recoverable as under Acts relating to excise.*]

Sect. 66.—*Penalties for false notices as to reception of letters recoverable on summary conviction.*]

Sect. 67.—*Penalties for obstruction of officers of Post Office recoverable on summary conviction.*]

Sect. 69.—*Endeavouring to procure the commission of any felony or mis-*

demeanor.]—If any person solicits or endeavours to procure any other person to commit an offence punishable on indictment under this Act, he shall be guilty of a misdemeanor, and shall on conviction be liable at the discretion of the Court to imprisonment, with or without hard labour, for any term not exceeding two years. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 36, ss. 36, 42.]

Sect. 70.—*Recovery of fines and forfeitures summarily or in the High Court.*]

Sect. 71.—*Summary procedure.*]

Sect. 72.—*Venue.*]—(1) An offence against this Act may be tried either in the county or place in which it was actually committed, or in any county or place in which the alleged offender is apprehended or is in custody, or (where the offence is in respect of a mail, mail bag, postal packet, or money order, or any chattel, money, or valuable security sent by post) in any county or place through which or any part thereof the mail, mail bag, postal packet, money order, chattel, money or security passed in due course of conveyance by post, and an offence, if committed in Scotland, may also be tried at any sitting of the High Court of Justiciary.

(2) Where the offence is committed on any highway, harbour, canal, river, arm of the sea, or other water, constituting the boundary of two or more counties or places, it may be tried in any of the said counties or places.

(3) The offence of being accessory to or of aiding or abetting an offence against this Act may be tried in any county or place in which the last-mentioned offence may be tried. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 36, s. 37.]

Sect. 73.—*Provisions as to form of proceedings.*]—(1) In any indictment or legal proceeding for any offence committed or attempted to be committed, or any malicious, injurious, or fraudulent act or thing done in, upon, or with respect to, the Post Office or the Post Office revenue, or any mail bag, postal packet, money order, or any chattel, money, or valuable security, sent by post, or in anywise concerning any property under the management or control of the Postmaster-General, it shall be sufficient to allege the property to belong to His Majesty's Postmaster-General, and to allege any such act or thing to have been done with intent to injure or defraud His Majesty's Postmaster-General, without in either case naming the person who is Postmaster-General, and it shall not be necessary to allege or to prove upon the trial or otherwise that the mail bag, postal packet, money order, chattel, money, security, or property was of any value.

(2) In any indictment or legal proceeding against any officer of the Post Office for any offence committed against this Act, it shall be sufficient to allege that the alleged offender was an officer of the Post Office at the time of the committing of the offence, without stating further the nature or particulars of his employment. [*This section is framed from* 7 W. 4 & 1 Vict. c. 36, s. 40, *and is repealed* "*so far as respects indictments*" *by the Indictments Act*, 1915.]

Sect. 74.—*Evidence of thing being postal packet.*]—On the prosecution of any offence under this Act, whether on summary conviction or on indictment, evidence that any article is in the course of transmission by post, or has been accepted on behalf of the Postmaster-General for transmission by post, shall be

sufficient evidence that the article is a postal packet. [*And see s.* 90, *post*, p. 586.]

Sect. 75.—*Application of fines.*]—All fines, forfeitures, and other sums recovered in respect of an offence under this Act shall, notwithstanding anything in any other Act, be paid into the Exchequer unless applied as an appropriation in aid under section two of the *Public Accounts and Charges Act*, 1891 (54 & 55 Vict. c. 24).

Sect. 77.—*Saving clause as to liability.*]—When proceedings are taken before any court against a person in respect of an offence under this Act, which is also an offence punishable at common law, or under some Act other than this Act, the Court may direct that instead of those proceedings being continued, proceedings shall be taken for punishing that person at common law, or under some Act other than this Act.

Sect. 84.—*Application of Act to British possessions.*]—Where there is in any British possession a post established by the Postmaster-General this Act shall apply to that possession in like manner as it applies to the United Kingdom, subject to such modification, if any, as may be made by His Majesty by Order in Council, or as may be made by any enactment of the legislature of the possession. [*The Act does not affect colonial Acts or ordinances in force on May 1st*, 1909. (See s. 92 (c).)]

Sects. 85, 86, *deal with power of colonial legislatures to set up post offices and cesser of Postmaster-General's powers.*]

Sect. 88.—*Channel Islands and Isle of Man.*]—This Act shall extend to the Isle of Man and to the Channel Islands, and the Royal Courts of the Channel Islands shall register this Act accordingly. [*The repeals effected by the Act do not affect legislation of the Channel Islands or Isle of Man in force on May 1st*, 1909. (See s. 92 (c).)]

Definitions.

Sect. 89.—*Definitions.*]—In this Act, unless the context otherwise requires,—

The expression " British possession " does not include the Channel Islands or the Isle of Man :

The expression " postage " means the duty chargeable for the transmission of postal packets :

* * * * *

The expression " mail " includes every conveyance by which postal packets are carried, whether it be a carriage, coach, cart, horse, or any other conveyance, and also a person employed in conveying or delivering postal packets, and also any vessel employed by or under the Post Office for the transmission of postal packets by contract or otherwise in respect of postal packets transmitted by the vessel :

The expression " mail bag " includes a bag, box, parcel, or any other envelope or covering in which postal packets in course of transmission by post are conveyed, whether it does or does not contain any such packets :

The expression " postal packet " means a letter, post card, reply post card, newspaper, book packet, pattern or sample packet, or parcel, and every

packet or article transmissible by post, and includes a telegram [*see* 8 Edw. 7, c. 48, s. 19] :

The expression " officer of the Post Office " includes the Postmaster-General, and any person employed in any business of the Post Office, whether employed by the Postmaster-General, or by any person under him or on behalf of the Post Office [*for decisions under former Acts*, see R. *v.* Salisbury, 5 C. & P. 155 : R. *v.* Pearson, 4 C. & P. 572] :

The expression " post office " includes any house, building, room, carriage, or place used for the purpose of the Post Office, and any post office letter box :

The expression " post office letter box " includes any pillar box, wall box, or other box or receptacle provided by the permission or under the authority of the Postmaster-General for the purpose of receiving postal packets, or any of them, for transmission by or under the authority of the Postmaster-General :

* * * * *

The expression " indictment " includes an information :

The expression " misdemeanor " means as regards the Channel Islands a crime and offence :

The expression "valuable security " has the same meaning as in the *Larceny Act*, 1861 [24 & 25 Vict. c. 96, s. 1, ante, p. 568], and includes anything which is a valuable security within the meaning of that Act, and any part of such thing :

The expression " the purpose of the Post Office " means any purpose of any of the Post Office Acts or of any Acts for the time being in force relating to Post Office money orders, Post Office telegraphs, or Post Office savings banks, and includes any purpose relating to or in connection with the execution of the duties for the time being undertaken by the Postmaster-General or any of his officers :

The expression " Post Office regulations " means regulations for the time being in force made under this Act by warrant of the Treasury, whether made upon the recommendation of the Postmaster-General or otherwise. [*See* 8 Edw. 7, c. 48, ss. 12, 19.]

Sect. 90.—*Meaning of " in course of transmission by post " and " delivery to or from a post office."*]—For the purposes of this Act—

(*a*) A postal packet shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed [*as to decoy letters put into the post box from the inside*, see R. *v.* Ryan [1905] 9 Canada Cr. Cas. 347] and

(*b*) The delivery of a postal packet of any description to a letter carrier or other person authorized to receive postal packets of that description for the post shall be a delivery to a post office; and

(*c*) The delivery of a postal packet at the house or office of the person to whom the packet is addressed, or to him or to his servant or agent or other person considered to be authorized to receive the packet, according

to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed.

Sect. 91.—*Construction of reference to Post Office Acts.*]—(1) Any reference contained in any enactment, warrant, deed, or document referring to the Post Office Acts, or any of them, or to the Post Office laws, shall be construed, so far as the context permits, as a reference to this Act, and any fines, penalties, and other sums directed to be recovered under the Post Office Acts, or any of them, or the Post Office laws may be recovered in like manner as fines and forfeitures under this Act may be recovered; and any reference in any enactment to an indictable offence under the Post Office laws shall be construed, so far as the context permits, as a reference to any offence punishable on indictment under this Act, whether it is or is not also punishable on summary conviction.

(2) Where by reason of any Act being declared to be a Post Office Act or its provisions to be Post Office laws any enactment repealed by this Act is applied for any purpose, the corresponding provisions of this Act shall apply in like manner.

(3) A reference in any enactment other than this Act to a post letter shall be construed to refer to a postal packet within the meaning of this Act.

31 & 32 *Vict. c.* 110 (*Telegraph Act*, 1868), *s.* 20.]—*Officials of post office disclosing or intercepting telegraph messages.*]—Any person having official duties connected with the post office, or acting on behalf of the postmaster-general, who shall, contrary to his duty, disclose or in any way make known or intercept the contents, or any part of the contents, of any telegraphic messages, or any message intrusted to the postmaster-general for the purpose of transmission, shall, in England and in Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and shall upon conviction be subject to imprisonment for a term not exceeding twelve calendar months; and the postmaster-general shall make regulations to carry out the intentions of this section, and to prevent the improper use by any person in his employment or acting on his behalf of any knowledge he may acquire of the contents of any telegraphic message.

Sect. 21.—*Property in telegraphic messages, how laid—Form of indictment.*]—In every case where an offence shall be committed in respect of a telegraphic message sent by or intrusted to the postmaster-general, it shall be lawful and sufficient, in the indictment or criminal letters to be preferred against the offender, to lay the property of such telegraphic message in His Majesty's postmaster-general, without specifying any further or other name, addition, or description whatsoever, and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the telegraphic message was of any value; and in any indictment to be preferred against any person employed under the post office, for any offence committed under this Act, it shall be lawful and sufficient to state and allege that such offender was employed under the post office at the time of the committing of such offence, without stating further the nature or particulars of his employment.

32 & 33 *Vict. c.* 73 (*Telegraph Act*, 1869), *s.* 23.]—*Telegraphic messages to be deemed postal packets.*]— . . . Provided always, that nothing in this Act con-

tained shall have the effect of relieving any officer of the post office from any liability which would, but for the passing of this Act, have attached to a telegraph company, or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication. [*The part omitted is repealed by* 8 Edw. 7, c. 48, s. 92, *and is replaced by definition of postal packet in s.* 89 *of that Act*, ante, p. 585.]

Sect. 24.—*Telegraph Acts to be Post Office Acts.*]—The *Telegraph Act*, 1868, and this Act shall be "Post Office Acts," and the provisions contained therein respectively shall be "post office laws," within the meaning of the "*Post Office Act*, 1908." [*See* 8 Edw. 7, c. 48, s. 91, ante, p. 587.]

47 & 48 *Vict. c.* 76 (*Post Office* (*Protection*) *Act*, 1884), *s.* 1.]—. . . "This Act shall be deemed to be a Post Office Act within the meaning of the *Post Office* (*Offices*) *Act*, 1837." [*Rest of section repealed*, 8 Edw. 7, c. 48, s. 92. (*See now s.* 91 *of that Act*, ante, p. 587.)]

Sect. 11.—*Improper disclosures of telegrams—Forgery of telegrams*, post, p. 851.]— . . . If any person being in the employment of a telegraph company as defined by this section improperly divulges to any person the purport of any telegram, such person shall be guilty of a misdemeanour and be liable on summary conviction to a fine not exceeding 20*l.*, and on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine not exceeding 200*l.*

For the purposes of this section the expression "*telegram*" means a written or printed message or communication sent to or delivered at a post office, or the office of a telegraph company, for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph.

The expression "*telegraph company*" means any company, corporation, or persons carrying on the business of sending telegrams for the public under whatever authority or in whatever manner such company, corporation, or persons may act or be constituted. The expression "*telegraph*" has the same meaning as in the *Telegraph Act*, 1869, and the Acts amending the same.

Indictment against an Officer of the Post Office for opening or delaying Letters (8 *Edw.* 7, *c.* 48, *s.* 56 (ante, p. 582)).

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Opening a letter, contrary to section 56 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of London, being an officer of the Post Office, did contrary to his duty open or procure or suffer to be opened [or wilfully detain or delay, or procure or suffer to be detained or delayed] a postal packet in course of transmission by post, the property of the Postmaster-General. *As to the venue*, see 8 Edw. 7, c. 48, s. 72, ante, p. 584.)

Misdemeanor: fine, or imprisonment, with or without hard labour (8 Edw. 7, c. 48, s. 56). (See ante, p. 582.)

Evidence.

Prove that the defendant was at the time of the commission of the offence an officer of the Post Office as defined in s. 89. For this purpose evidence of his acting as such is sufficient, without proving his appointment. *R.* v. *Rees*, 6 C. & P. 606. *See R.* v. *Borrett*, 6 C. & P. 124 : *R.* v. *Townsend*, C. & Mar. 178 : *R.* v. *Goodwin*, 1 Lew. 100. The defendant, a letter carrier from C. to T., had brought the C. letter bag, and safely delivered it to the postmaster at T., whose duty it was to sort the letters in time to make up the bags for the mails. The defendant's duty as a letter carrier was complete on the delivery of the letters to the postmaster; but the defendant was afterwards requested by the postmaster to assist him in the sorting, and consented to do so, and in the course of doing so stole a letter. It was held that, while so engaged in sorting the letters he was a person employed under the post office, within the statute. *R.* v. *Reason*, Dears. 226; 23 L. J. (M. C.) 11. *See R.* v. *Glass*, 2 C. & K. 395.

Then prove that the defendant opened the letter, or delayed it, according to the allegation in the indictment. The defendant may prove, in answer to the charge, any of the circumstances specified in the proviso, and which would authorize him to open or detain the letter.

Indictment against an Officer of the Post Office for stealing or embezzling Letters (8 *Edw.* 7, *c.* 48, *s.* 55 (ante, p. 581)).

Commencement as in the last precedent.

STATEMENT OF OFFENCE.

Larceny, contrary to section 55 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, being an officer of the Post Office, stole ("*steals or embezzles, secretes or destroys*") one postal packet in the course of transmission by post, the property of the

Postmaster-General, containing a cheque ("*any chattel, money, or valuable security*") for the payment of ten pounds.*

**This allegation may be omitted, if the packet did not contain any chattel, money, or valuable security. As to the venue*, see 8 Edw. 7, c. 48, s. 72 (ante, p. 584). [*As to form of indictment for embezzlement*, see post, p. 605.]

Felony: if the packet contains any chattel, money, or valuable security, penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 8 Edw. 7, c. 48, s. 55 (*ante*, p. 581).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

If the packet does not contain any chattel, money, or valuable security, felony, penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour. 8 Edw. 7, c. 48, s. 55 (ante, p. 581).

This offence is triable at quarter sessions.

Evidence.

Prove that the defendant was at the time he committed the offence an officer of the post office as defined in s. 89. *See R.* v. *Rees*, 6 C. & P. 606 (*ante*, p. 589) : *R.* v. *Reason*, Dears. 226; 23 L. J. (M. C.) 11 (*supra*) : *R.* v. *Milner*, 4 Cox, 275 : *R.* v. *Simpson*, 4 Cox, 276. It seems not to be necessary to prove his appointment if it can be proved that he acted as an officer or employee of the post office. *R.* v. *Borrett* [1833] 6 C. & P. 124; 1 Taylor, Evid. (11th ed.), s. 171 (*and see ante*, p. 401). Then prove that he stole the packet, with its contents (*see ante*, pp. 511 *et seq.*); or that he embezzled, secreted, or destroyed it. It is not necessary to prove that the letter or valuable security was of any value. 8 Edw. 7, c. 48, s. 73 (*ante*, p. 584). Prove that the packet was in course of transmission by post, by calling the person who posted it, and producing the receipt or certificate, if any, given under the Postal Regulations of posting, or registration, or delivery (8 Edw. 7, c. 48, s. 12), or by producing the letter bearing a post-mark; which *semble* is *primâ facie* evidence of posting. *R.* v. *Plumer*, R. & R. 264 : *Woodcock* v. *Houldsworth*, 16 L. J. (N. S.) Ex. 49; 16 M. & W. 124 : Roscoe, Nisi Prius Evid. (18th ed.) 123 : Taylor, Evid. (11th ed.), s. 179. *R.* v. *Johnson*, 7 East, 65. Any letter *posted* in the ordinary way, whatever be its address or object, is a *postal packet* within the statute. *Young* v. *R.*, 1 Den. 194; 2 C. & K. 466. Therefore, where a fictitious letter is posted, with money in it, to try the honesty of the defendant, the stealing of it is within the statute. *Id.* (overruling *R.* v. *Gardner*, 1 C. & K. 628. *See R.* v. *Ryan* [1905] 9 Canada Cr. Cas. 347.) But the secreting, by a letter carrier, of a letter written by an inspector of the post office, for the purpose of trying the defendant's honesty, was held not to be a stealing of a post letter within the statute; it was held, however, that he might be convicted of simple larceny, in stealing a sovereign enclosed by the inspector in such a letter, the sovereign being one of those which are occasionally found on the floor of the post office, having dropped out of letters, and which are carried to a fund which is under the direction of the postmaster-general; and that such sovereign might be described as the property of the postmaster-general. *R.* v.

Rathbone, 2 Mood. 242; C. & Mar. 220. So where, suspicions being entertained against the defendant, who was a sub-sorter in the General Post Office, the authorities there made up a letter, and enclosed coin in it, and put upon it the usual postage stamp; and an inspector delivered it in, at the window in the outer hall, to another inspector, who handed it to a third, who, after locking it up for the night, handed it to a sorter, who placed it amongst the letters which it was the prisoner's duty to sort, and the prisoner stole the letter and the money;— the ordinary course of posting a letter at the outer hall of the General Post Office being by placing it in the receiving-box; it was held that the prisoner was not rightly convicted of stealing a post letter containing money, and that the conviction must be confined to the count for simple larceny. *R.* v. *Shepherd*, *Dears.* 606; 25 L. J. (M. C.) 52. Where a servant who was sent with a letter and a penny to pay the postage, finding the door of the receiving-house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter in the unpaid letter-box: it was held that a messenger in the post office, who stole this letter with the penny in it, might be convicted of stealing a post letter containing money, though the money was not put in for the purpose of being conveyed by post to the person to whom the letter was addressed. *R.* v. *Mence*, C. & Mar. 234. Where a letter containing a bank-note was received by the postmistress for registration and not registered (though the fee had been paid), but placed by her under a glass case to which the prisoner (an officer of the post office) had access, the letter was held to be a post letter within 7 W. 4 & 1 Vict. c. 36, s. 47 (*rep.*). *R.* v. *Rogers*, 5 Cox, 293, Cresswell, J. But where, the post office being at an inn, the person sent to put a letter, containing bank-notes, into the post, took it to the inn, with money to prepay the postage, and laid the letter, and the money on it, upon a table in the lobby of the inn, in which the letter-box was, and pointed out the letter to the female servant at the inn (not authorized to receive letters), who said "she would give it to them"; and she stole the letter and its contents: it was held that this was not a post letter within 7 W. 1 & 1 Vict. c. 36, ss. 26, 27 (*rep.*), and the defendant could be convicted only of larceny. *R.* v. *Harley*, 1 C. & K. 89. An unsealed letter, delivered by the postmistress at G. to the defendant, the letter-carrier between that place and L., with the directions to obtain at the post office at L. a money order for one pound, and after enclosing it in the letter, to post the letter at L., was held to be, while in the defendant's hands, a post letter, and the defendant to be a person employed under the post office, so that he might be convicted under this section. *R.* v. *Bickerstaff*, 2 C. & K. 761. Where the defendant, a person employed in the post office, having committed a mistake in the sorting of the letters, put some post letters down a water-closet, in order to avoid the supposed penalty attached to such a mistake, this was held to be not only a *secreting* but a *larceny* of the letters. R. v. *Wynn*, 1 Den. 365; 2 C. & K. 859; 18 L. J. (M. C.) 51. It was the duty of a letter-carrier, on returning from his round, to bring back to the post office any letters which he had failed to deliver. A letter containing money having been given to him with other letters to deliver; on his return from his round, he brought back to the office the pouch, containing some letters which he had failed to deliver, but said nothing about the money-letter. Subsequently

on enquiry being made of him, he produced the money-letter from his pocket; upon these facts it was held that he was rightly convicted of stealing the letter. *R.* v. *Poynton*, L. & C. 247; 32 L. J. (M. C.) 29.

Indictment for stealing Money, etc., out of Postal Packets.
8 *Edw.* 7, *c.* 48, *s.* 50 (ante, p. 580).)

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Larceny, contrary to section 50 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole a valuable security, to wit, one bill of exchange for the payment of ten pounds ("*any chattel, money, or valuable security*") the property of the Postmaster-General, from and out of a postal packet in course of transmission by post. *As to the venue, see* 8 Edw. 7, c. 48, s. 72 (ante, p. 584).

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 8 Edw. 7, c. 48, s. 50 (ante, p. 580).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p 106).

Evidence.

Prove a larceny of the chattel, money, or valuable security out of the postal packet, either directly or by circumstances from which it may be inferred. Prove, also, that the packet was in course of transmission by post and delivered to the post office and not yet delivered to the addressee, which is an essential part of the offence. (*See* ss. 50, 74, 90: *R.* v. *Rathbone* (*ante*, p. 590), and *Young* v. *R.* (*ante*, p. 590).) A delivery to a letter-carrier, or other person authorized to receive postal packets of the description in question, is a delivery to the post office; and a delivery at the house or office of the person to whom the packet is addressed or to him, or his servant or agent, or other person considered to be authorized to receive the letter according to the usual manner of delivering that person's postal packets, is a delivery to the person addressed. 8 Edw. 7, c. 48, s. 90 (*ante*, p. 586).) It was held on 7 W. & 1 Vict. c. 36, s. 27, that the words "every person" include those employed by the post office as well as others. *See R.* v. *Brown*, R. & R. 32 n.; overruling *R.* v. *Skutt*. 1 Leach, 106; 2 Leach, 904; and *R.* v. *Pooley*, R. & R. 31; *and see R.* v *Salisbury*, 5 C. & P. 155.

Indictment for stealing, etc., postal packets, etc. (8 *Edw.* 7, *c.* 48, *s.* 50 (ante, p. 580).)

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Larceny, contrary to section 50 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole one postal packet in the course of transmission by post, the property of the Postmaster-General, from a mail bag ("*from a mail bag, or from a post office, or from an officer of the post office, or from a mail*"). *As to venue*, see ante, p. 584.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 8 Edw. 7, c. 48, s. 50 (ante, p. 580).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the larceny of the packet as directed, *ante*, p. 511 *et seq.* The taking away and destroying of a post letter in order to suppress inquiries supposed by the defendant to be made in it about her character, was held to be a larceny of the letter. *R.* v. *Jones*, 1 Den. 188; 2 C. & K. 236. A person who with intent to deprive another to whom a letter is addressed of such letter and to commit a fraud, induces a servant of the post office to intercept and hand over such letter, which is in course of transmission by post, is either guilty of larceny as a principal felon, or is accessory before the fact of the larceny committed by the servant of the post office, and in either view can be convicted on an indictment charging him with larceny of the letter. *R.* v. *James*, 24 Q. B. D. 439; 59 L. J. (M. C.) 96. Where the defendant obtained the mail bags from the post office, pretending that he was the mail guard, and then ran away with them; the jury being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges held the conviction to be right. *R* v. *Pearce*, 2 East, P. C. 603, 673. Taking the mail bags off the post horse during the momentary absence of the person employed to carry them, was held to be a taking from his possession, within the meaning of 52 G. 3, c. 14, s. 3 (*rep.*). *R.* v. *Robinson*, 2 Stark. (N. P.) 485.

Where a letter intended to be delivered in Brighton and addressed to Mrs. Fisher, 29 Gloucester St., was delivered at 29 Gloucester St., Lambeth, where the prisoner lodged, and the prisoner, who was known to some persons as Fisher, opened the letter and cashed a cheque contained in it, it was held that he could not be convicted of larceny of the cheque on the ground that there was no evidence of *animus furandi* when the prisoner received the cheque. *R.* v. *Fish* [1900] 64 J. P. 137, Bosanquet, Common Serjeant: where *R.* v. *Mucklow*.

1 Mood. 160, and *R.* v. *Davies*, Dears. 640; 25 L. J. (M. C.) 91, were cited and followed. In such a case the indictment should be framed under 8 Edw. 7, c. 48, s. 54 (*ante*, p. 581).

Indictment for receiving a stolen postal packet, etc. (8 *Edw.* 7, *c.* 48, *s.* 52 (ante, p. 581).)

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Receiving stolen property, contrary to section 52 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, received one postal packet ("*any mail bag or any postal packet, or any chattel or money, or valuable security*," *etc.*) the property of the Postmaster-General, knowing the same to have been stolen [*as the case may be*] ("*stolen, taken, embezzled, or secreted*," ante, p. 581), from and out of a mail bag, and to have been sent ("*sent or intended to be sent*") by post. *As to the venue*, see ante, p. 584.

Felony : 8 Edw. 7, c. 48, s. 52 (ante, p. 581). *The punishment varies according as the principal offence is larceny* (s. 50), *taking* (s. 51), *or embezzling or secreting* (s. 55). *Where the maximum punishment is penal servitude for life under s.* 51, *or in cases of embezzlement of postal packets containing money, etc., under s.* 55, *the receiving is not triable at quarter sessions.* See 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

This precedent will serve in most cases as a second count for receiving to an indictment for larceny. See the precedents, ante, pp. 509 *et seq.*

Evidence.

Prove the felony as directed (*ante*, p. 590); then prove the receipt and guilty knowledge, as directed (*post*, p. 730); and also prove that the defendant at the time he received the packet, etc., knew that it had been sent, or that it was intended to have been sent, by post. This may be shown by the post-mark on the letter, or by the contents of the packet, if brought to the defendant's knowledge, or by other circumstances from which it may be inferred. (*See ante*, pp. 397, 398.)

For definition of the terms "mail," "mail bag," "officer of the post office," "post office postal packet," "transmission by post," *see* 8 Edw. 7, c. 48, ss. 89, 90 (*ante*, pp. 585, 586).

Indictment for stopping Mails, with intent to rob, etc.
(8 *Edw.* 7, *c.* 48, *s.* 50 (*d*) (*ante*, p. 580.)

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Stopping a mail, contrary to section 50 (d) of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stopped a mail with intent to rob or search the mail. *As to the venue*, see 8 Edw. 7, c. 48, s 72 (ante, p. 584).

Felony: see *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the mail is such within the definition in s. 89 (*ante*, p. 584).

Prove that the defendant stopped the mail, and prove the intent by circumstances from which it may be inferred. If the defendant actually robbed or searched the mail, his original intent so to do will be put beyond doubt. The words " or search " are omitted from s. 12 of the Larceny Act, 1916 (*ante*, p 579), as going beyond larceny.

Indictment for fraudulently retaining Postal Packet.
(8 *Edw.* 7, *c.* 48, *s.* 53 (ante, p. 581).)

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Fraudulently retaining a postal packet, contrary to section 53 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, fraudulently did retain ("*fraudulently retains or wilfully secretes or keeps or detains or when required by any officer of the post office, neglects or refuses to deliver up*") a postal packet in course of transmission by post, the property of the Postmaster-General, which ought to have been delivered to a certain other person, to wit, one J. N. *As to the venue*, see 8 Edw. 7, c. 48, s. 72 (ante, p. 584).

Misdemeanor: fine and imprisonment, with or without hard labour. 8 Edw. 7, c 48, s. 53 (ante, p. 581).

Evidence.

Prove that the letter ought to have been delivered to J. N.; that it was delivered to the defendant, and was retained by him, as stated in the indictment. *See R.* v. *Fish*, 64 J. P. 137 (*ante*, p. 593). If the defendant secretes, or keeps, or detains the letter after a request to deliver it up made by an officer of the post office, it may be presumed that he does so wilfully, unless at the time of the refusal to deliver it up, he gives some *bonâ fide* excuse for so doing. To make out a fraudulent retainer, however, it must be shown, from the contents of the letter or other circumstances, that the defendant well knew the letter was not intended for him. The fact that the defendant found the packet is no defence. *See s.* 53 (*b*), *ante*, p. 581.

Indictment for endeavouring to procure the commission of offences punishable on indictment against the Post Office Act, 1908. (8 *Edw.* 7, *c.* 48, *s.* 69 (ante, p. 583).

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Endeavouring to procure the commission of an offence, contrary to section 69 of the Post Office Act, 1908.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, endeavoured to procure ("*solicit or endeavour to procure*") one J. S., an officer of the post office, unlawfully and contrary to his duty to open a postal packet then in course of transmission by post (*see* Edw. 7, c. 48, ss. 56, 74 (*ante*, pp. 582, 584), the property of the Postmaster-General. *From this and the foregoing precedents an indictment may easily be framed for procuring the commission of any offence punishable on indictment under the* Post Office Act, 1908. *As to venue*, see 8 Edw. 7, c. 48, s. 72 (*ante*, p. 584).

Misdemeanor: imprisonment not exceeding two years, with or without hard labour. (8 Edw. 7, c. 48, s. 69).

Evidence.

Prove that the defendant solicited or endeavoured to procure the commission of the offence stated. It is immaterial whether the offence was completed or not.

LARCENY IN DWELLING HOUSES.

(*See post*, pp. 653 *et seq.*)

LARCENY FROM THE PERSON.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 14.]—Every person who steals any chattel, money, or valuable security from the person of another shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years. [*This section partly re-enacts* 24 & 25 Vict. c. 96, s. 40.]

Indictment for Stealing from the Person.

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Larceny from the person, contrary to section 14 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole one watch, one pocket-book, and one pocket-handkerchief ("*any chattel, money, or valuable security*") of the goods and chattels of J. N., from the person of the said J. N.

Felony: see *precedent*, *post*, p. 638.

Evidence.

Prove a larceny as directed *ante*, p. 511 *et seq.*, except that an actual and not merely a constructive taking must be proved; and prove the goods to have been actually severed from the person of J. N. Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket; this was held, by a majority of the judges, not to be a sufficient asportation to warrant a conviction for stealing from the person, because from the first to the last the book remained about the person of the prosecutor; although it was sufficient to constitute a simple larceny. *R.* v. *Thompson*, 1 Mood. 78. But where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waistcoat, and kept there by a watch-key at the other end of the chain; and the defendant took the watch out of the pocket, and forcibly drew the chain and key out of the button-hole, but the point of the key caught upon another button, and the defendant's hand being seized, the watch remained there suspended, this was held a sufficient severance. *R.* v. *Simpson*, Dears. 421; 24 L. J. (M. C.) 7. *See R.* v. *Lapier*, 1 Leach, 320, *ante*, p. 533. Where the prisoner put his hand into the prosecutor's pocket, seized his purse, and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its being caught in the prosecutor's belt,

this was held to be sufficient evidence of asportation to support a charge of simple larceny, but not of larceny from the person. *R.* v. *Taylor* [1911] 1 K. B. 674; 80 L. J. (K. B.) 311; 75 J. P. 126; 27 T. L. R. 108. Where a man went to bed with a prostitute, having left his watch in his hat on the table, and while he was asleep she stole the watch, this was held to be a stealing in the dwelling-house, and not a stealing from the person. *R.* v. *Hamilton*, 8 C. & P. 49.

STEALING FROM SHIPS, DOCKS, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 15.]—Every person who steals—(1) any goods in any vessel, barge or boat of any description in any haven or any port of entry or discharge or upon any navigable river or canal or in any creek or basin belonging to or communicating with any such haven, port, river, or canal; or (2) any goods from any dock, wharf or quay adjacent to any such haven, port, river, canal, creek, or basin; or (3) any part of any vessel in distress, wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such vessel; shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years. [*This section is framed from* 24 & 25 Vict. c. 96, ss. 63, 64.]

Indictment for stealing from a Vessel on a navigable River.

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Larceny, contrary to section 15 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

J. S., on the first day of June, A.D. ——, in the county of London, stole twenty pounds' weight of indigo ("*any goods or merchandise*"), the property of J. N., in a ship called the Rattler ("*vessel, barge, or boat, of any description whatsoever*"), upon the navigable river Thames ("*in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal*").

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour. 6 & 7 Geo. 5, c. 50, s. 15; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2, *ante*, pp. 237-238. *As to recognizances and sureties for keeping the peace*, see 6 & 7 Geo. 5, c. 50, s. 37 (5) (*b*), ante, p. 501.

Evidence.

[Prove a larceny as directed, *ante*, pp. 511 *et seq.*, except that you must prove an actual and not merely a constructive taking. The words "goods, wares, and merchandise," in 24 G. 2, c. 45 (*rep.*), were held to extend to such goods, etc., only as are usually lodged in vessels, or on wharves and quays, *R.* v. *Grimes*, Fost. 79 n.; 2 East, P. C. 647; *R.* v. *Leigh*, 1 Leach, 52. The same may be said of the present statute, by reason of the substitution of the words "goods and merchandise" for the words "chattel, money, or valuable security," which are used in other parts of the Act. The luggage of a passenger going by a steam-boat was held within 7 & 8 G. 4, c. 29, s. 17 (*rep.*). *R.* v. *Wright*, 7 C. & P. 159. Prove that the goods, etc., were at the time *in* the ship described in the indictment. The words of the statute are "*in* any vessel," etc.; and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny. A man cannot be guilty of this offence in his own ship. *R.* v. *Madox*, R. & R. 92. Lastly, prove that the ship was at the time upon the river, etc., mentioned in the indictment. Where it was laid to be committed in a barge on the river Thames, and proved to have been committed in a barge lying aground on the bank of one of the creeks of the river, namely, Limehouse-dock, it was held to be a fatal variance. *R.* v. *Pike*, 1 Leach, 317; 2 East, P. C. 647. But see now 5 & 6 Geo. 5, c. 90, s. 5 (*ante*, p. 54).

If you prove a larceny, but fail in proving the other circumstances requisite to bring the case within the statute, the defendant may be convicted of simple larceny.

Indictment for stealing from a Dock, etc.

Commence as in the last precedent]—twenty pounds' weight of indigo ("*any goods or merchandise*"), the property of J. N., in a dock ("*dock, wharf, or quay*") adjacent to the navigable river Thames ("*adjacent to any haven, port,*" *etc.*: see *the last precedent*).

Felony. 6 & 7 Geo. 5, c. 50, s. 15. See *the last precedent.*

Evidence.

Prove the larceny as directed, *ante*, pp. 511 *et seq.*, except that there must be an actual and not merely a constructive taking. The goods must be such as are usually deposited upon a dock, etc., for shipment, safe custody, or the like. Prove that the goods were taken *from* the dock, etc.; for which purpose a mere removal, such as would be sufficient to constitute simple larceny, will not suffice, for the words of the statute are, "*from* any dock." etc., to satisfy which there must be an actual removal from the dock, etc., in the same manner as upon an indictment for stealing from the person (*infra*). Lastly, prove that the dock, etc., from which the goods were taken, is adjacent to the navigable river, etc. This, as we have seen in the last case, is a matter of local description, and must be proved strictly as laid.

If you prove the larceny, but fail in proving any of the other circumstances necessary to bring the case within the statute, the defendant may be convicted of simple larceny.

LARCENY BY TENANTS OR LODGERS.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 16.]—Every person who, being a tenant or lodger, or the husband or wife of any tenant or lodger, steals any chattel or fixture let to be used by such person in or with any house or lodging shall be guilty of felony and on conviction thereof liable—(*a*) if the value of such chattel or fixture exceeds the sum of five pounds, to penal servitude for any term not exceeding seven years; (*b*) in all other cases, to imprisonment for any term not exceeding two years, with or without hard labour; (*c*) in any case, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable. [*This section re-enacts* 24 & 25 *Vict. c.* 96, *s.* 74.]

Indictment.

The indictment for stealing a chattel will be in the form ante, p. 509, *and for stealing a fixture, in the form* ante, p. 573. *The article stolen must be described as the property of the landlord; and in the latter case the dwelling-house or lodging must, according to the circumstances, be described as the dwelling-house of the defendant, or of the landlord, as in burglary.*

Felony: imprisonment for not more than two years, with or without hard labour,and, if a male under sixteen, with or without whipping (Id.)—or if the value of the chattel or fixture exceed 5l., penal servitude for not more than seven nor less than three years, or imprisonment, etc., as above.—6 & 7 Geo. 5, c. 50, s. 16; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 6 & 7 Geo. 5, c. 50, s. 37 (5) (*b*) (ante, p. 581).

Evidence.

Prove a larceny of the chattel mentioned in the indictment, as directed *ante*, pp. 511 *et seq.*; or, if the indictment alleged that the defendant stole a fixture, prove the allegations of that indictment, as directed *ante*, p. 573. Independently of the statute, the contract of letting, and that the goods were in his possession under that contract, would be matter of defence for the defendant; but as that circumstance would now be no defence, it is immaterial whether the contract of letting be proved or not.

LARCENY AND EMBEZZLEMENT BY CLERKS, SERVANTS, ETC.

Statutes.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 17—*Larceny and embezzlement by clerks or servants.*]—Every person who—(1) being a clerk or servant or person employed in the capacity of a clerk or servant—(*a*) steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer; or (*b*) fraudulently embezzles the whole or any part of any chattel, money or valuable security delivered to or received or taken into possession by him for or in the name or on the account of his master or employer: [*This sub-section re-enacts* 24 & 25 Vict. c. 96, ss. 67, 68.]

(2) being employed in the public service of His Majesty or in the police of any place whatsoever—(*a*) steals any chattel, money, or valuable security belonging to or in the possession of His Majesty or entrusted to or received or taken into possession by such person by virtue of his employment; or (*b*) embezzles or in any manner fraudulently applies or disposes of for any purpose whatsoever except for the public service any chattel, money or valuable security entrusted to or received or taken into possession by him by virtue of his employment: [*This sub-section re-enacts* 24 & 25 Vict. c. 96, ss. 69, 70.] *In* R. v. *Parsons*, 16 Cox, 498, *a county court bailiff appointed by the high bailiff was held by* Cave, J., *not to be in the public service of the Queen*; and see post, p. 610. *In* R. v. Graham, 13 Cox, 57 (C. C. R.), *a man employed under an inspector of prisons to collect and pay in to the Bank of England, to the credit of the Paymaster-General, contributions by parents, under* 29 & 30 Vict. cc. 117, 118 (rep.), *towards the maintenance of their children in reformatory and industrial schools, was held to be employed in such public service.*]

(3) being appointed to any office or service by or under a local marine board—(*a*) fraudulently applies or disposes of any chattel, money or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board or for or on account of any other public board or department, for his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him; or (*b*) fraudulently withholds, retains, or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid; [*This sub-section reproduces* 57 & 58 Vict. c. 60, s. 248, *which is left unrepealed.*] shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years, and in the case of a clerk or servant or person employed for the purpose or in the capacity of a clerk or servant, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable.

Sect. 18.—*Embezzlement by officer of the Post Office.*]—See ante, p. 580.

Sect. 19.—*Embezzlement, etc., by officers of the Bank of England or Ireland.*]—Every person who, being an officer or servant of the Bank of England or of the Bank of Ireland, secretes, embezzles, or runs away with any bond, deed,

note, bill, dividend warrant, warrant for the payment of any annuity, interest or money, security, money or other effects of or belonging to the Bank of England or Bank of Ireland and entrusted to him or lodged or deposited with the Bank of England or Bank of Ireland, or with him as such officer or servant, shall be guilty of felony and on conviction thereof liable to penal servitude for life. [*This section re-enacts* 24 & 25 Vict. c. 96, s. 73.]

Sect. 39.—*Venue.*]—See ante, p. 502.

Sect. 40, sub-s. 2.—*Embezzlement of money or bank-note. Description of property.*]—See ante, p. 502.

Sub-s. 4.—*Embezzlement by joint owner.*]—See ante, p. 503.

Sect. 44 (2).—*Power to convict of larceny on indictment for embezzlement, and vice versâ.*]—See ante, p. 506.

26 & 27 *Vict. c.* 103 (*Misappropriation by Servants Act*, 1863), *s.* 1.—*Punishment of servants taking their master's corn, etc., without authority.*]—"If any servant shall, contrary to the orders of his master, take from his possession any corn, pulse, roots, or other food, for the purpose of giving the same or of having the same given to any horse or other animal belonging to or in possession of his master, the servant so offending shall not by reason thereof be deemed guilty of or be proceeded against for felony, but shall, on conviction of such offence before two justices of the peace, at their discretion, either be imprisoned, with or without hard labour, for any term not exceeding three months, or else shall forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of 5*l.*; and if such penalty shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour. . . .

"Provided always, that if upon the hearing of the charge the said justices shall be of opinion that the same is too trifling, or that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the charge without proceeding to a conviction.

"Provided also, that if upon the trial of any servant for feloniously taking from his master any corn, pulse, roots, or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under this Act, and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the Court before which such trial shall take place, shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any person under the provisions of this Act.

"Provided also, that in case of non-payment of any penalty to be imposed by the Court on such servant, he shall be imprisoned, with or without hard labour, for any term not exceeding three months, as the Court shall order, unless such penalty be sooner paid."

29 & 30 *Vict. c.* 109, *s.* 33.—*Embezzlement of naval stores by persons subject to naval discipline.*]

38 & 39 *Vict. c.* 25.—*Embezzlement of public stores.*]

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876), *s.* 29.—*Embezzlement y officers of customs.*]—Any moneys, chattels, or other valuable securities hich shall or may be received by any officer, clerk, or other person in the ervice of the customs, either as duties of customs, or under or by virtue of ny statute, or by the order or direction of the Commissioners of Customs, or in irtue of his office or employment, or otherwise for the use and service of his Iajesty, or of any public department, shall be deemed to be money, chattels, r valuable securities for the public service, and shall be considered as such ithin the meaning of the *Larceny Act*, 1861 (24 & 25 Vict. c. 96). See *ante*, . 568.

Sect. 85.]—. . . Every person who shall destroy or embezzle any goods duly arehoused [*i.e., in a bonded customs warehouse*] shall be deemed guilty of a isdemeanor, and shall upon conviction suffer the punishment by law inflicted in ises of misdemeanor (*ante*, pp. 239, 240); but if such person shall be an officer of ustoms or excise, not acting in the due execution of his duty, and shall be rosecuted to conviction by the importer consignee or proprietor of such goods o duty shall be payable for or in respect of such goods, and the damage occaioned by such destruction or embezzlement shall with the sanction of the reasury be repaid or made good to such importer consignee or proprietor by he commissioners of customs.

44 & 45 *Vict. c.* 58, *ss.* 17, 18 (4).—*Embezzlement by persons subject to ilitary law of public or regimental money or goods.*]

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 55.—*Embezzlement, etc., by officer f Post Office.*]—See ante, p. 580.

Indictment for larceny by clerk or servant.

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Larceny, contrary to section 17 (1) (a) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, being clerk r servant to M. N., stole from the said M. N. ten yards of cloth.

A count for larceny at common law may be added, but is unnecessary, as the ury can negative the relation of master and servant and convict of simple rceny. R. *v.* Jennings, Dears. & B. 447; 7 Cox. 397. *If it appears that the oney, etc., was received by the clerk, etc., for and on account of his aster and was not received into the possession of the master otherwise an by the actual possession of the clerk, etc., so as not to amount to*

larceny but to embezzlement, the defendant is nevertheless not entitled to be acquitted, but the jury may return as their verdict that the defendant was not guilty of larceny, but was guilty of embezzlement, and thereupon he shall be liable to be punished in the same manner as if he had been convicted on an indictment for embezzlement. 6 & 7 Geo. 5, c. 50, s. 44 (2), ante, p. 506.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment with or without hard labour, for not more than two years; and, if a male under sixteen years, with or without whipping.—6 & 7 Geo. 5, c. 50, s. 17 (ante, p. 601); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, see 6 & 7 Geo. 5, c. 50, s. 37 (5) (b) (ante, p. 501).

Evidence.

Prove that the defendant, at the time he committed the offence, was " clerk " or " servant " to M. N., or was employed by M. N. for that purpose or in that capacity, as alleged in the indictment. (*See post*, p. 607). The driver of a glass-coach hired for the day is not the servant of the hirer, so as to come within the statute. *R.* v. *Haydon*, 7 C. & P. 445; *and see Quarman* v. *Burnett*, 9 L. J. (N. S.) Ex. 308; 6 M. & W. 499 : *Milligan* v. *Wedge*, 10 L. J. (N. S.) Q. B. 19; 12 A. & E. 737 : *Jones* v. *Scullard* [1898] 2 Q. B. 565; 67 L. J. (Q. B.) 895 : *R.* v. *Hey*, 1 Den. 602; 2 C. & K. 983 : *R.* v. *Gibbs*, Dears. 445; 24 L. J. (M. C.) 62. In *R.* v. *Warren*, 10 Cox, 359, a woman living with a man as his wife was convicted of larceny as his servant.

Then prove the larceny as directed, *ante*, pp. 511 *et seq.; see particularly* p. 531. Where, upon an indictment for larceny, it appeared that the defendant, being sent by his master to get change for a *5l.* note, got silver for it and absconded, it was held that it was not larceny, because the silver had never been in the possession of the master, except by the hands of the defendant; *R.* v. *Sullens*, 1 Mood. 129; but it is now embezzlement within 6 & 7 Geo. 5, c. 50, s. 17 (1) (b), *and see* s. 44 (2) (*ante*, p. 506). But if the property is in the possession of the master, even by the hands of another clerk or servant, or by delivery into the master's house or barn, or into his cart or barge, appropriation by a servant is larceny. *R.* v. *Murray*, 1 Mood. 276; 5 C. & P. 145 : *R.* v. *Watts*, 2 Den. 14; 19 L. J. (M. C.) 192 : *R.* v. *Spears*, 2 Leach, 825; 2 East, P. C. 568 : *R.* v. *Reed*, Dears. 168, 257; 23 L. J. (M. C.) 25. If a servant receives from his master goods for the purpose of selling them and appropriates them to his own use, it is larceny, not embezzlement. *R.* v. *Howkins*, 4 Cox, 224 (C. C. R.). It was the duty of the prisoner, a servant of the prosecutors, to give out materials to be wrought up, and pay the workmen when the work was finished, and for this purpose he received cash from his masters, and at the end of each week he accounted with them for sums so received and paid. The cash was kept by him, but he was not authorized to apply it in any other manner. He paid one of the workmen 13*s.* and fraudulently charged his masters as having paid him 14*s.* 8*d.*, and appropriated the 1*s.* 8*d.* to his own use. On these facts it was held that he was rightly convicted of larceny, as a servant, of the 1*s.* 8*d.* *R.* v. *Low*, 10 Cox, 168 (C. C. R.);

ut see R. v. *Dartnell*, 20 L. T. (N. S.) 1020, Byles, J. It is not required by he statute that the goods, etc., stolen should be the property of the master; he words of the statute are, "belonging to or in the possession or power of the aster." If the defendant is not shown to be the clerk or servant of J. N., ut a larceny is proved, he may be convicted of the larceny merely. *R.* v. *ennings*, 7 Cox, 397, *supra*.

As to taking from the possession of the master by the servant, contrary to he master's orders, of any corn, etc., for the purpose of giving the same to any orse, etc., *see* 26 & 27 Vict. c. 103, s. 1, *ante*, p. 602.

Many of the difficulties formerly found in prosecuting servants for defrauding heir masters have been removed by the *Falsification of Accounts Act*, 1875 38 & 39 Vict. c. 24), *post*, p. 734, and the *Larceny Act*, 1901 (1 Edw. 7, c. 10), ow repealed and re-enacted by 6 & 7 Geo. 5, c. 50, s. 20 (1) (iv), *post*, p. 621.

Indictment for embezzlement by clerk or servant.

Commencement as ante, p. 588.

STATEMENT OF OFFENCE.

Embezzlement, contrary to section 17 (1) (*b*) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, being clerk or ervant to J. N., fraudulently embezzled ten pounds in money ("*any chattel, noney or valuable security*") received by him for or in the name or on the ccount of the said J. N., his master ("*master or employer*").

Felony: see the last precedent.

Venue.]—*Where the money was received or the accused denied its receipt, r was called on to account for it.* R. *v.* Hobson, R. & R. 56; 2 Leach, 975: . *v.* Taylor, R. & R. 63; 3 B. & P. 596: R. *v.* Murdock, 2 Den. 298; 21 L. J. M. C.) 22; 5 Cox, 360: R. *v.* Rogers, 3 Q. B. D. 28; 47 L. J. (M. C.) 11; 4 Cox, 22: R. *v.* Treadgold, 48 L. J. (M. C.) 102; 14 Cox, 220 (post, p. 618). *s to venue generally*, see ante, pp. 42, 502).

Description of property.]—*Under* 6 *&* 7 *Geo.* 5, *c.* 50, *s.* 40 (2) (ante, p. 502), *n allegation in an indictment that money or banknotes have been embezzled n, so far as regards the description of the property, be sustained by proof that e offender embezzled any piece of coin or any banknote or any portion of the lue thereof, although such piece of coin or banknote may have been delivered him in order that some part of the value thereof should be returned to any rson and such part has been returned accordingly. As to where there is a neral deficiency of moneys*, see post, p. 619. *But an indictment alleging the*

embezzlement of money is not sustained by evidence of the embezzlement of a cheque unless it be also proved that the prisoner cashed the cheque and so converted it into money. R. *v.* Keena, L. R. 1 C. C. R. 113; 37 L. J. (M. C.) 43. *As to mode of description,* see R. *v.* Adey, 1 Den. 571; 19 L. J. (M. C.) 149; 4 Cox, 208; and ante, p. 46, 47. *As to amending misdescription,* see R. *v.* Marks, 10 Cox, 367, and ante, p. 54. *It has been said that it must show that the defendant was servant, etc., at the time.* R. *v.* Somerton, 7 B. & C. 463: see, however, R. *v.* Lovell, 2 M. & Rob. 236 (post, p. 620).

Verdict.]—*If it is proved that the defendant stole the property in question, he is not by reason thereof entitled to be acquitted, but the jury may find him guilty of stealing, and thereupon he is liable to be punished accordingly.* 6 & 7 Geo. 5, c. 50, s. 44 (2) (ante, p. 506). *But it would seem that a general verdict of guilty cannot be sustained upon evidence of larceny only.* R. *v.* Gorbutt, Dears. & B. 166; 26 L. J. (M. C.) 47.

Summary proceedings.]—*As to summary proceedings for embezzlement of materials, tools, etc., by persons employed in the woollen, linen, cotton, flax, mohair, or silk manufacture,* see 6 & 7 Vict. c. 40, ss. 2, 3, 11. *As to summary proceedings for certain forms of embezzlement,* see 34 & 35 Vict. c. 31, s. 12; 39 & 40 Vict. c. 22, s. 5 (*trade unions*); 37 & 38 Vict. c. 42, s. 31 (*building societies*): R. *v.* Redford, 11 Cox, 367: R. *v.* Hastie, L. & C. 269; 32 L. J. (M. C.) 63; 9 Cox, 264; 56 & 57 Vict. c. 39, s. 64 (*industrial societies*); 59 & 60 Vict. c. 25, s. 87; 59 & 60 Vict. c. 26, s. 14 (2) (*friendly and collecting societies*): R. *v.* Marsh, 3 F. & F. 523: R. *v.* Bennett, 63 L. J. (M. C.) 181; and post, p. 608. 57 & 58 Vict. c. 60, s. 225 (1) (*f*) (*Seamen*). *And as to summary trial of embezzlement,* see 42 & 43 Vict. c. 49, ss. 11-13, sched. 1, *as amended by* 4 & 5 Geo. 5, c. 58, s. 15.

Evidence.

"Clerk or servant."]—Prove that the defendant, at the time he received the chattel, money, or valuable security, was clerk or servant to J. N., or employed for the purpose or in the capacity of a clerk or servant as stated in the indictment, acting under and bound to obey, the orders of his master or employer. *See R.* v. *Negus,* L. R. 2 C. C. R. 34; 42 L. J. (M. C.) 62; 12 Cox, 492. This may be proved by evidence that he acted as such. *See R.* v. *Beacall,* 1 C. & P. 312: *R.* v. *Wellings,* 1 C. & P. 454: *R.* v. *Welch,* 20 L. J. (N. S.) M. C. 101; 1 Den. 199; 2 C. & K. 296; 2 Cox, 85. If the contract of service was in writing, parol evidence of it is inadmissible, unless notice to produce has been given. *R.* v. *Clapton,* 3 Cox, 126: *R.* v. *Dodson,* 62 J. P. 729, Kennedy, J. Where the prisoner was charged with embezzlement, but his employer, who made the engagement with him, was not called to prove the terms thereof, but only his managing clerk, who knew them through repute alone, having been informed of them by his employer, it was held that there was no evidence to go to the jury that the prisoner was servant to the prosecutor. *R.* v. *Taylor,* 10 Cox, 544, Russell Gurney, Recorder. Whether the defendant was clerk or servant is a question of fact for the jury. *R.* v. *Negus, supra: R.* v. *Chater,* 9 Cox, 1; *and see* Steph. Dig. Cr. L. (6th ed.) 271 n. A female servant is within the

neaning of the Act. *R.* v. *Smith*, R. & R. 267. So is an apprentice, though nder age. *R.* v. *Mellish*, R. & R. 80. "*In the capacity of clerk or servant*" nly applies when the prisoner is employed on temporary occasions. and does ot usually fill the situation. *R.* v. *Woolley*, 4 Cox, 255, *per* Patteson, J.; *ed quære* "only." A son who lives with his father, and performs for him luties usually performed by a clerk, is "employed for the purpose or in the capacity of a clerk or servant" within the statute, although he receives no alary, and although there is no contract binding him to go on doing those luties. *R.* v. *Foulkes*, L. R. 2 C. C. R. 150; 44 L. J. (M. C.) 65; 13 Cox, 63. A butty collier, paid so much for every ton of coal he raised, was allowed to ell coal for his employer. It was his duty to pay over the gross price received, nd he was subsequently allowed a poundage. He converted to his own use noney received for coal. Held that he was servant to the colliery owner. *R.* v. *Thomas*, 6 Cox, 403. As to the distinction between servants and mere bailees, *ee R.* v. *Gibbs*, Dears. 445; 24 L. J. (M. C.) 62; 6 Cox, 455. The statute is not confined to the clerks and servants of persons in trade, but extends to the clerks and servants of all persons whomsoever, if they be employed to receive money, etc. : and therefore a person employed as accountant and treasurer to the overseers of the poor, whose duty it is to receive and pay moneys receivable and payable to them, is a clerk and servant within the statute. *R.* v. *Squire*, R. & R. 349; 2 Stark. (N. P.) 348. *See R.* v. *Townsend*, 1 Den. 167; 2 C. & K. 168; 2 Cox, 224: *R.* v. *Adey*, 1 Den. 578; 19 L. J. (M. C.) 149; 4 Cox, 210; *but see R.* v. *Harris*, 17 Cox, 656 (C. C. R.), *post*, p. 613. In a case decided before 12 & 13 Vict. c. 103, s. 15, a collector of poor and other rates within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of that parish (appointed under 10 G. 4, c. lxxxvii), though he was elected by the vestrymen of the parish. *R.* v. *Callahan*, 8 C. & P. 154. A clerk of a savings-bank was held to be properly described as clerk to the trustees, though elected by the managers. *R.* v. *Jenson*, 1 Mood. 434. An assistant overseer, elected by the parishioners in vestry under 59 G. 3, c. 12, s. 7, who fixed his duties and salary, was held to be rightly described as the servant of the inhabitants of the parish, in an indictment charging him with embezzling moneys collected by him for the poor rate. *R.* v. *Carpenter*, L. R. 1 C. C. R. 29; 35 L. J. (M. C.) 169; 10 Cox, 246. But he is not clerk or servant of the overseers; *and see R.* v. *Sampson*, 1 Cox, 355. The appointment is now made in rural parishes by the parish council or parish meeting, 56 & 57 Vict. c. 73, s. 5 (1), 19 (5); but a rural assistant overseer may still be described as servant of the inhabitants. *R.* v. *Smallman* [1897] 1 Q. B. 4; 66 L. J. (Q. B.) 82; 18 Cox, 451. The mode of appointment in many urban parishes has been altered under 56 & 57 Vict. c. 73, s. 33. Where, however, C. had been nominated by the inhabitants of a township as an assistant overseer, and the nomination did not specify as one of the duties he was to perform the duty of receiving money, it was held that he could not be convicted as a clerk or servant of the inhabitants of embezzling rates collected by him. *R.* v. *Coley*, 16 Cox, 226 (C. C. R.). The learned reporter in a note on this case at p. 230, after reviewing other cases on the same subject, concludes that the "decision appears

open to question," and it is not reported in the Law Reports. In *R.* v. *Truman*, 2 Cox, 306, it was held by Maule, J., that a rate collector appointed by guardians of the poor under 4 & 5 W. 4, c. 76, s. 46, was not their clerk or servant: *cf. R.* v. *Townsend*, *ante*, p. 607; *but see* s. 97 of that Act. In *R.* v. *Welch*, 20 L. J. (N. S.) M. C. 100; 1 Den. 199; 2 C. & K. 296; 2 Cox, 85; a treasurer to guardians of the poor appointed under a local Act was held to be their servant.

It is not necessary that the employment should be permanent; if it is only occasional it will be sufficient. Where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was held to be a servant within 39 G. 3, c. 85 (*rep.*). *R.* v. *Spencer*, R. & R. 299. So, where a servant usually employed to receive sums of one description at one place was employed in one instance to receive at a different place a sum of a different description, *R.* v. *Smith*, R. & R. 516, *and see R.* v. *Beechey*, *Id.* 319. And where a drover, who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was held to be a servant within the meaning of 7 & 8 G. 4, c. 29, s. 47 (*rep.*). *R.* v. *Hughes*, 1 Mood. 370; but *cf. R.* v. *Goodbody*, 8 C. & P. 665. The duties of the secretary of a money club were held to be sufficiently cognate to that of the receipt of money for and on the account of the club, to make his employment to receive money in a particular instance an employment by him as clerk or servant within the same enactment, although he had recourse to an action in his own name to get in the money. *R.* v. *Tongue*, Bell, 289; 30 L. J. (M. C.) 49; 8 Cox, 386. But where the treasurer of a charitable institution, in his individual capacity, directed the defendant (who was the schoolmaster of the charity school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of the children) in one single instance to receive a voluntary contribution, for which he was to have no remuneration; it was held that he was not a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant. *R.* v. *Nettleton*, 1 Mood. 259. A member of, and secretary to, a society, who fraudulently withheld money received from a member to be paid over to the trustees, was held to be guilty of embezzlement, and to be properly described as the clerk and servant of the trustees, and it was held that the money was properly described as their property, although it ought, in the ordinary course, to have been received by the steward, and although the articles of the society were not enrolled, and the society was not conducted strictly according to the Act of Parliament. *R.* v. *Hall*, 1 Mood. 474: *R.* v. *Miller*, 2 Mood. 249: *R.* v. *Woolley*, 4 Cox, 255, Patteson, J.: *R.* v. *Proud*, L. & C. 97; 31 L. J. (M. C.) 71; 9 Cox, 22. Cases of this kind appear to be covered by s. 20 (1) (iv) of this Act (*post*, p. 621).

Cases prior to the Larceny Act, 1868.]—A mere unpaid treasurer of a friendly society, not appointed by the trustees of the society, is not a clerk or servant of the trustees in whom the moneys of the society are vested, and could not be indicted under 24 & 25 Vict. c. 96, s. 68 (*rep.*), for embezzling the moneys of

the society. *R.* v. *Tyree*, L. R. 1 C. C. R. 177; 38 L. J. (M. C.) 58; 11 Cox, 241. "I believe," says Bovill, C.J. (*see* L. R. 1 C. C. R. at p. 181), "there is no case to show that the treasurer of a friendly society can be indicted for embezzlement. The essence of the indictment in this case is this, that the prisoner was a clerk or servant of the trustees. The trustees have all moneys of the society vested in them by statute, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant." And the secretary, who was also a member of a friendly society, established under 18 & 19 Vict. c. 63 (*rep.*), for which no trustees had been appointed, could not, previously to 31 & 32 Vict. c. 116 (now repealed and replaced by s. 40 (4) of the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50) (*ante*, p. 503), be convicted on an indictment for embezzling the society's moneys, laying the property in A. B. (another member of the society) and others, and describing him as their servant, because the "others" would have comprised himself, and so the indictment would in fact have charged him with embezzling his own money as his own servant. *R.* v. *Diprose*, 11 Cox, 185 (C. C. R.): *R.* v. *Taffs*, 4 Cox, 169, Maule, J.: *and cf. R.* v. *Blackburn*, 11 Cox, 157. So where a committee, formed of the members of two friendly societies, for the purpose of conducting an excursion, appointed certain persons to sell the excursion tickets, and the money received from their sale was to be paid over to a specified person, and was to belong to the two societies: the prisoner, who was a member of the committee, was one of those appointed to sell tickets without any remuneration for his services; he sold some of the tickets, and fraudulently misappropriated the money received for the sale to his own use; it was held (previously to 31 & 32 Vict. c. 116) that he could not be convicted on an indictment charging him, as servant to the other members of the committee, with embezzling their moneys. *R.* v. *Bren*, L. & C. 346; 33 L. J. (M. C.) 59; 9 Cox, 398.

Effect of Larceny Act, 1868.]—The *Larceny Act*, 1868 (31 & 32 Vict. c. 116, s. 1, now repealed and replaced by s. 40 (4) of the *Larceny Act*, 1916, *ante*, p. 503), was passed to meet the difficulties which arose in the above cases, An association having for its object not the acquisition of gain but the spiritual and mental improvement of its members is not a "co-partnership" within the meaning of the term as used in 31 & 32 Vict. c. 116, s. 1 (*rep.*). Consequently a member of such an association who has embezzled money belonging to it cannot be convicted on an indictment charging him with embezzling the moneys of a "co-partnership," and containing no count describing the moneys as moneys of which he was a joint beneficial owner. *R.* v. *Robson*, 16 Q. B. D. 137; 55 L. J. (M. C.) 55; 15 Cox, 772. But such an indictment might now probably be amended under 5 & 6 Geo. 5, c. 90, s. 5 (*ante*, p. 54). A member and secretary of a *fête* committee, the members of which had guaranteed the expenses of the *fête*, may be a "beneficial owner" of the entrance moneys so as to make him criminally liable for their misappropriation within 31 & 32 Vict. c. 116, s. 1 (*rep.*). *R.* v. *Neat*, 69 L. J. (Q. B.) 118: 12 Cox, 424; 16 L. L. R. 109.

Unlawful societies.]—A person cannot be convicted of embezzlement as clerk or servant to a society which, in consequence of administering an unlawful oath to its members, is an unlawful combination and confederacy within 37 G. 3, c. 123, and 57 G. 3, c. 19: *R.* v. *Hunt*, 8 C. & P. 642. Registered friendly societies which comply with the Act of 1896 are not within those Acts (59 & 60 Vict. c. 25, s. 32). And a society which is of the nature of a friendly society, although not enrolled or certified under the Friendly Societies Acts, some of the rules of which are in restraint of trade, and therefore void, is not an illegal society in the sense that it is disabled from prosecuting a servant for embezzling its funds under 24 & 25 Vict. c. 96, s. 68 (*rep.*). *R.* v. *Stainer*, L. R. 1 C. C. R. 230; 39 L. J. (M. C.) 54; 11 Cox, 483, and the members of such a society are clearly "beneficial owners" within 5 & 6 Geo. 5, c. 50, s. 40 (4) (*ante*, p. 503), *R.* v. *Tankard* [1894] 1 Q. B. 548; 63 L. J. (M. C.) 61; 17 Cox, 719: *and see* *R.* v. *Frankland*, L. & C. 276; 32 L. J. (M. C.) 69; 9 Cox, 273: *R.* v. *Webb* [1893] 9 T. L. R. 199 (C. C. R.).

A prisoner, who had been employed sometimes as a regular labourer, sometimes as a roundsman for a day at a time, and had on several occasions been sent to a banker's to receive the amount of cheques, was sent to the banker's with a cheque for payment, for which he was to receive 6*d.*, he not being in the prosecutor's employment at the time; he received the money for the cheque and embezzled it; and being indicted for the embezzlement, Park, J. (after consulting Taunton, J.), held, that he was not a clerk or servant within the meaning of the Act of Parliament. *R.* v. *Freeman*, 5 C. & P. 534. The person employed to collect sacrament money from the communicants is not the servant of the minister, churchwardens, or poor. *R.* v. *Burton*, 1 Mood. 237.

Where several employers.]—If the clerk of several partners embezzles the private money of one of them, he is within the Act: for he is a servant of each. *See R.* v. *Leech*, 3 Stark. (N. P.) 70. So where a clerk was appointed and paid by a joint committee of directors of several railway companies, and employed at a joint station of the companies. *R.* v. *Bayley*, Dears. & B. 121; 26 L. J. (M. C.) 4; 7 Cox, 179. So where a traveller is employed by several persons, and paid wages, to receive money, he is the individual servant of each. *Id.: R.* v. *Carr*, R. & R. 198. So where a clerk in the employ of a railway company at one of their stations was also employed separately by W. & G. to sell coals for them, it was held that he could be convicted of embezzlement as the servant of W. *R.* v. *Batty*, 2 Mood. 257. So, a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners. *R.* v. *White*, 8 C. & P. 742; 2 Mood. 91.

A county court bailiff, who had fraudulently misappropriated the proceeds of levies made under county court process, could not formerly be indicted for embezzling the moneys of the high bailiff his master. *R.* v. *Glover*, L. & C. 466; 33 L. J. (M. C.) 169; 9 Cox, 501. That case, however, was decided upon the county court Rules then in existence, setting forth the duties of the

bailiff, but it has been held that by virtue of the county court Rules of 1875, a county court bailiff, misappropriating moneys as did the bailiff in *R.* v. *Glover*, might be indicted for embezzling the moneys of the high bailiff his master. *R.* v. *Parsons*, 16 Cox, 498, Cave, J. The county court Rules of 1903 are in the same terms on this as those of 1875. And under s. 33 of the *County Courts Act*, 1888 (51 & 52 Vict. c. 43), the bailiffs appear to be servants of the high bailiff. A distraining broker employed exclusively by the prosecutor, and paid by a weekly salary and by a commission, was held to be a servant within 24 & 25 Vict. c. 96, s. 68 (*rep.*). *R.* v. *Flanagan*, 10 Cox, 561.

The mode by which the defendant is remunerated for his service is immaterial. Where a defendant, who was employed as a master of a barge, to carry out and sell coals, and was allowed a portion of the profits, after deducting the price of the coals at the colliery, for his labour, took a quantity of coals, sold them, received the price, and absconded with the money; it was held by a majority of the judges, that he was a servant within 39 G. 3, c. 85 (*rep.*). *R.* v. *Hartley*, R. & R. 139. So, where the defendant was employed as a traveller to take orders and collect money, was paid by a percentage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as traveller by other persons also; he was held to be a clerk to the prosecutors, within the meaning of the Act. *R.* v. *Carr*, R. & R. 198: *R.* v. *Hoggins*, *Id.* 145: *see R.* v. *Tite*, L. & C. 29; 30 L. J. (M. C.) 142; 8 Cox, 458; *and see R.* v. *Solomons* [1909] 2 K. B. 980; 79 L. J. (K. B.) 8; 25 T. L. R. 747. The prisoner agreed with the prosecutor, an earthenware manufacturer, to act as his traveller, to employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the goods manufactured by the prosecutor, and that he would not, without the prosecutor's consent, take or execute any order for selling any goods of the kind manufactured by the prosecutor, for or on account of himself or any other person, except the prosecutor. And it was further agreed that the prisoner should pay his own travelling expenses, that he should be paid a commission, and should render weekly accounts. The prosecutor afterwards gave the prisoner permission to take orders for two other manufacturers. It was held on these facts, that the prisoner was a clerk or servant of the prosecutor. *R.* v. *Turner*, 11 Cox, 551, Lush, J. And where the cashier of a firm had, besides his salary, a percentage on the profits made by the firm, but was not to be liable for its losses, and had no control over the management of the business, it was held that he might be indicted as a servant for embezzling the firm's moneys. *R.* v. *M'Donald*, L. & C. 85; 31 L. J. (M. C.) 67; 9 Cox, 10. The defendant entered into an agreement with the prosecutor, whereby he undertook to take charge of the prosecutor's glebe land, his wife undertaking the dairy and poultry, at 15*s.* a week, till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profits, after all expenses of rent, rates, labour, and interest on capital, etc., were paid, on a fair valuation, made from Michaelmas to Michaelmas; three months' notice on either side to be given, at the expiration of which time a cottage, which was to be occupied by the defendant as bailiff, in addition to his salary, was to be vacated. It was held that this was not a contract of partnership, but an agreement for the hire of the defendant as a labourer: and that

he was rightly convicted of embezzlement, in fraudulently denying the receipt of moneys which he had received for and on account of the prosecutor, though such denial was after Michaelmas, the period agreed on for the valuation to be made and the profits ascertained. *R.* v. *Wortley*, 2 Den. 333; 21 L. J. (M. C.) 44; 5 Cox, 382. *R.* v. *Hartley* (*ante*, p. 611), *R.* v. *M'Donald*, and *R.* v. *Wortley* were decided before the *Larceny Act*, 1868 (31 & 32 Vict. c. 116, s. 1 (repealed and replaced by s. 40 (4) of the *Larceny Act*, 1916, *ante*, p. 503). Where the prosecutors, manure manufacturers, engaged the defendant, who kept a refreshment house at B., to get orders for the manure, on which orders they supplied it from their stores: the defendant was to collect the money, and pay it over to them, and send a weekly account, and was called agent for the B. district: "he was to go through the county and see the farmers, and get orders, and to be continually during the season among the farmers:" subsequently the prosecutors sent large quantities of manure to stores at B., which were under the defendant's control, who took them in his own name and paid the rent for them, being repaid such rent by the prosecutors when their accounts were adjusted: and the defendant signed a proposal to a guarantee society to insure the prosecutors, which stated that his salary was 1*l.* a year, besides commission, which was estimated at 65*l.* a year: and the prosecutors deposed that at this time they had agreed to give the salary of 1*l.* a year—the defendant was held to be an agent, and not a servant within the statute. *R.* v. *Walker*, Dears. & B. 600; 27 L. J. (M. C.) 207; 8 Cox, 1. So, where the defendant was employed to obtain orders for the sale of iron manufactured by the prosecutors, and was to receive a commission on the orders he got; it being his duty to account to the prosecutors for all moneys he should receive, but it was not expressly found to be his duty to receive money; he was held not to be a clerk or servant, etc., within the statute. *R.* v. *May*, L. & C. 13; 30 L. J. (M. C.) 81; 8 Cox, 421. Where a man assigned his estate to trustees for the benefit of creditors, and was employed by the trustees to manage the business and collect the book debts, he was held not to be their clerk or servant. *R.* v. *Barnes*, 8 Cox, 129, Byles, J. As to persons employed by a debtor acting under such an arrangement with his creditors, *see R.* v. *Dixon*, 11 Cox, 178 (C. C. R.). A solicitor engaged as land agent to a limited company at 300*l.* a year to collect rents, etc., was held to be a clerk or servant of the company. *R.* v. *Gibson*, 8 Cox, 436.

The conclusion to be drawn from the cases appears to be that a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, or is bound to devote the whole or at least some portion of his time to the service of his employer, *is*—but that a commission agent who is not under orders to go here and there, and who is not bound to devote any portion of his time to the service of his principal, but who may get or abstain from getting business for his principal as he chooses, *is not*—a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant within 6 & 7 Geo. 5, c. 50, s. 17. Thus, where the prisoner was employed by the prosecutor to solicit orders and collect moneys, for which he was paid by commission, being at liberty to get orders when and where he pleased, but to be exclusively in the employ of the prosecutor, *and to give the whole of his time*

to *the prosecutor's service*, he was held to be the servant of the prosecutor. *R.* v. *Bailey*, 12 Cox, 56 (C. C. R.). And the prisoner would still have been the servant of the prosecutor, if he was a traveller under orders to go here and there, even although he might have been at liberty to obtain orders for other persons besides the prosecutor, and so was not bound to devote all his time to the prosecutor's service. *R.* v. *Tite*, L. & C. 29; 30 L. J. (M. C.) 142; 8 Cox, 458. But where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect moneys in connection with his orders, but was at liberty to dispose of his time as he thought best, *and to get or abstain from getting orders as he might choose*, he was held not to be a clerk or servant within the statute. *R.* v. *Bowers*, L. R. 1 C. C. R. 41; 35 L. J. (M. C.) 206; 10 Cox, 250. In delivering judgment in that case, Erle, C.J., said, "The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the moneys of his employer, to be within the statute; but if a man be intrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute." *Id.* Where the prisoner was employed by one of the overseers of a parish to collect the poor-rate and keep the rate books, but was left complete liberty as to the method of collection and keeping the books, he was held not to be a clerk or servant. *R.* v. *Harris*, 17 Cox, 656 (C. C. R.). *See also R.* v. *Mayle*, 11 Cox, 150: *R.* v. *Marshall*, 11 Cox, 490 (C. C. R.). The test whether a person charged with embezzlement was the clerk or servant of his alleged master, is—Was he under the control of and bound to obey his alleged master? See the judgment of Blackburn, J., in *R.* v. *Negus*, L. R. 2 C. C. R. 34: 42 L. J. (M. C.) 62; 12 Cox, 492. And, therefore, where the prisoner was employed to solicit orders for the prosecutors, and was to be paid by a commission on the sums received through his means, and he was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors, it was held that these facts alone did not show him to be a clerk or servant within the meaning of 24 & 25 Vict. c. 96, s. 68 (*rep.*). *Id.* The distinction between the case last cited, and *R.* v. *Bailey* (*supra*), is, that in *R.* v. *Bailey* the prisoner was under the prosecutor's control, having to devote his whole time to the service, whereas in *R.* v. *Negus*, although the prisoner was not to employ himself for any other persons than the prosecutors, he might go away to amuse himself whenever he liked. *See* the remarks of Bovill, C.J., and Blackburn, J., L. R. 2 C. C. R. 35. The prosecutors employed the prisoner, who carried on an independent business as an accountant and debt collector, to collect certain debts for them at a commission on the amount recovered, the time and mode of collecting the debts being in the prisoner's discretion, and it being his duty to pay over the amounts received by him to the prosecutors as soon as he had collected them. It was held that he was not employed in the capacity of clerk to the prosecutors. *R.* v. *Hall*, 13 Cox, 49.

A director and shareholder in a limited company, who is employed at a salary to superintend its business and collect moneys due to the company, may be convicted of embezzlement of such moneys as a servant of the company.

R. v. *Stuart* [1894] 1 Q. B. 310; 63 L. J. (M. C.) 63; 17 Cox, 723 (C. C. R.). *And see also* 6 & 7 Geo. 5, c. 50, s. 20 (1) (ii) (*post*, p. 621).

"**For or in the name or on the account of his master.**"]—Prove that the defendant received the money, etc., stated in the indictment, for or in the name or on account of his master or employer.

Where the defendant misappropriates money received by him from his master himself, for the purpose of paying it to a third person, this is not embezzlement. *R.* v. *Smith*, R. & R. 267: *R.* v. *Hawkins*, 1 Den. 584; 4 Cox, 224, *but see* 6 & 7 Geo. 5, c. 50, s. 20 (1) (iv) (*post*, p. 621). Nor is it embezzlement where the money misappropriated is constructively in the possession of the master, by the hands of any other clerk or servant. *R.* v. *Murray*, 1 Mood. 276; 5 C. & P. 145. *See R.* v. *Hayward*, 1 C. & K. 518: *R.* v. *Watts*, 2 Den. 14; 19 L. J. (M. C.) 192: *R.* v. *Reed*, Dears. 168, 257; 23 L. J. (M. C.) 25: 6 Cox, 284. But the fraudulent appropriation of money, which has never been in the master's own posession, and which the defendant has received from a fellow-servant to give to his master, is embezzlement. *R.* v. *Masters*, 1 Den. 332; 2 C. & K. 930; 18 L. J. (M. C.) 2; 3 Cox, 178.

A conductor of a tramway car was charged with embezzling 3*s*. It was proved that on a certain journey there were fifteen threepenny fares and twenty-five twopenny fares (altogether 7*s*. 11*d*.), and the prisoner was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way-bill for the journey, debiting himself only with nine threepenny fares and sixteen twopenny fares (altogether 4*s*. 11*d*.). The mode of accounting was to deliver the way-bills for each journey to a clerk and to hand in all the money received during each day on the following morning. The prisoner's way-bills for the day showed the receipt by him of 3*l*. 1*s*. 9*d*., but he paid in only 3*l*. 0*s*. 8*d*. It was held that there was sufficient evidence of the receipt of 7*s*. 11*d*., the total amount of fares of the particular journey, and of the embezzlement of 3*s*. part thereof. *R.* v. *King*, 12 Cox, 73 (C. C. R.). If the indictment alleges the embezzlement of money or bank-notes, such allegation, so far as regards the description of the property, will be sustained by proof that the defendant embezzled any piece of coin or any banknote or any portion of the value thereof, although such piece of coin or banknote may have been delivered to him in order that some part of the value thereof should be returned to any person, and such part has been returned accordingly. 6 & 7 Geo. 5, c. 50, s. 40 (2) (*ante*, p. 503). But an indictment alleging the embezzlement of money is not sustained by evidence of the embezzlement of a cheque, unless it be also proved that the prisoner cashed the cheque, and so converted it into money. *R.* v. *Keena*, L. R. 1 C. C. R. 113; 37 L. J. (M. C.) 43; 11 Cox, 123. Where the defendant's duty was to place every night in an iron safe, provided by his employers for that purpose, in an office where he conducted the business of his employers (though in his own house) the moneys received by him on their account and not used during the day, it was held that by placing it there he determined his own exclusive possession of the money, and that, by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny. *R.* v. *Wright*, Dears & B.

131; 27 L. J. (M. C.) 65. Where a son acted as clerk to his father, who himself held the office of clerk to a local board, and whose duty it was to receive moneys on account of such board, and some of such moneys were received by the son as his father's clerk in the ordinary course of business and appropriated by him to his own use, it was held that he was rightly convicted on an indictment charging him with embezzling such moneys, and alleging them to be the moneys of the father. *R.* v. *Foulkes*, L. R. 2 C. C. R. 150; 44 L. J. (M. C.) 65; 13 Cox, 63. Where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity, which he doubted; the stranger bought the goods, and the shopman embezzled the money: the judges held this to be a case within the Act. *R.* v. *Whittingham*, 2 Leach, 912: *R.* v. *Headge*, *Id.* 1033, R. & R. 160, confirmed in *R.* v. *Gill*, Dears. 289; 23 L. J. (M. C.) 50; 6 Cox, 295. Where the defendant's duty was to sell his master's goods, entering the sales in a book, and settling accounts with his master weekly, and upon such a sale the defendant fraudulently omitted to make an entry of it in the book, and appropriated the money which he received from the buyer, this was held to be embezzlement and not larceny. *R.* v. *Betts*, Bell, 90; 28 L. J. (M. C.) 69; 8 Cox, 140. A defendant whose business it was to receive orders, to take the materials from his master's shop, work them up, deliver the goods, receive the price for them, and pay it over to his master, who, at the end of the week, paid the defendant a proportion of the price for his work, received an order for certain goods, took his master's materials, worked them up on his premises, delivered them, and received the price, but concealed the transaction, and embezzled the money; upon a conviction for embezzlement, it was doubted whether this was not a larceny of the materials, rather than a case within the statute; the judges held the conviction right. *R.* v. *Hoggins*, R. & R. 145. But where it appeared that the defendant was employed as a town traveller and collector, to receive orders from customers, and enter them in the books and receive the money for the goods supplied thereon, but had no authority to take or direct the delivery of the goods from his master's shop, and a customer having ordered two articles of the defendant, he entered one of them only in the order-book, for which an invoice was made out by the prosecutor to the customer; but the defendant entered the price of the other at the bottom of the invoice, and, having caused both to be delivered to the customer, received the price of both, and accounted to the prosecutor only for the former: this was held not to be embezzlement but larceny. *R.* v. *Wilson*, 1 C. & P. 27. The prosecutor had contracted with a railway company to find and provide them with necessary horses and carmen for the purpose of conveying and delivering to the company's customers the coals of the company, in their own waggons; and that he or his carmen should daily account for and deliver to the company's coal manager all moneys received in payments for coals so delivered; the delivery-notes, as well as receipted invoice, for the coals, being handed to the carman, and the former taken to the prosecutor's office, the latter left with the customers on payment. The defendant, one of the prosecutor's carmen, delivered coals of the company to a customer, and brought back the delivery-order to the prosecutor's office to be entered; he received

5*l*. 10*s*. from the customer for the coals, leaving with him the receipted invoice, and embezzled the money. It was held that there was such a privity as to make the defendant the agent of the company in receiving the money, and that it was not received for or on account of the prosecutor, his master, but for and on account of the company. *R.* v. *Beaumont*, Dears. 270; 23 L. J. (M. C.) 54; 6 Cox, 269. H., the defendant's master, was the agent of a railway company for delivering goods, and employed his own servants, of whom the defendant was one, and used his own drays and horses, and was answerable to the company for moneys collected by his servants for carriage. It was the defendant's duty to go out with a dray, to take with him goods and a delivery-book handed to him by a clerk of the company, and to receive the amount of carriage therein specified as due to the company, and then to account for the sums so received with the company's clerk. The sums charged as being embezzled were sums received by the defendant for carriage, and entered in the delivery-book, and such sums were paid to the defendant and received by him as due to the company, and he gave receipts for the same in the name of the company. It was held that the defendant was properly convicted on an indictment charging that he received the money for and in the name and on the account of H., his master; for that, although he received it *in the name* of the company, he received it for and on account of his master. *R.* v. *Thorpe*, Dears. & B. 562; 27 L. J. (M. C.) 64; 8 Cox, 29. The defendant was the miller of a mill in a county gaol, being paid a weekly salary as such out of the county rate, and it was his duty to direct persons who brought grain to be ground at the mill to obtain at the porter's lodge a ticket specifying the quantity of grain brought, and his business then was to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account for it to the governor of the gaol, who in his turn accounted to the county treasurer. The defendant received and ground grain brought without a ticket, and, without directing the persons who brought it to obtain one, received the money for grinding it, and did not account for it, but applied it to his own use. It was held that upon these facts he could not be convicted of embezzlement, as the conclusion to be drawn from them was that he had made an improper use of the mill by grinding the corn for his own benefit, and so he did not receive the money for or on behalf of his masters. *R.* v. *Harris*, Dears. 344; 23 L. J. (M. C.) 110; 6 Cox, 363: *and see R.* v. *Cullum* (*infra*). It is not necessary, however, that the person paying the money to the servant should have paid it to him on account of his master; it is sufficient if the servant received it on account of his master. The prisoner was the clerk of an insurance company, and head manager at their chief office at L. In course of business he received several cheques payable to his order from the managers of branch offices, and it was his duty to indorse these cheques and hand them over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. The money thus obtained the prisoner appropriated to his own use, and, having been convicted of embezzling it, it was held that the proceeds of the cheques, though received by the prisoner, not from the bankers, but from third persons who knew nothing of the prisoner's

nasters in the transactions, were received by him on account of the company, nd that he was rightly convicted. *R.* v. *Gale*, 2 Q. B. D. 141; 46 L. J. M. C.) 134; 13 Cox, 340: *cf. R.* v. *Wheeler*, 14 W. R. 848 (C. C. R. Ir.).

Under 6 & 7 Geo. 5, c. 50, s. 44 (2) (*ante*, p. 506), upon an indictment for mbezzlement, the defendant is not entitled to be acquitted if the offence turns ut to be larceny, but may be convicted and punished as for larceny, and *vice ersâ*. Where, however, the prisoner is indicted for larceny a *general* verdict f guilty cannot be sustained upon evidence of embezzlement only. *R.* v. *Gorbutt*, Dears. & B. 166; 26 L. J. (M. C.) 47; 7 Cox, 221.

Though it is not necessary, under 6 & 7 Geo. 5, c. 50, s. 17, that the money, tc., alleged to have been embezzled should have been received by the servant *y virtue of his employment*, it is necessary that it should when received by he servant be the master's property, and therefore a servant cannot be guilty f embezzling money which he has earned by an unauthorized and wrongful se of his master's implements of trade from a person who contracted with the ervant only and knew nothing of the master in the transaction. *R.* v. *Cullum*, L. R. 2 C. C. R. 28; 42 L. J. (M. C.) 64; 12 Cox, 469. Therefore where a ervant whose duty it was to take a barge belonging to his master with cargo rom A. to B., and receive back such return cargo, and from such persons as is master should direct, and such only, contrary to the express orders of his master, which were to return empty from B. to C., part of the return voyage o A., took nevertheless a return cargo from B. to C., and received the freight rom the owner of the cargo (who knew only the prisoner in the transaction), nd did not account to his master for the freight, and denied having carried uch return cargo; it was held, that an indictment against the servant for mbezzling the money received by him as freight for such return cargo could ot be sustained. *Id.* And where a gamekeeper, not authorized to kill or take abbits for his own use, took and killed some wild rabbits upon his master's and, and dishonestly converted them to his own use by selling them,—the aking, killing, removing, and selling, being parts of one continuous action; t was held that a conviction of the gamekeeper for embezzling the rabbits ould not be sustained, apparently on the ground that the rabbits could not e said to have been received or taken into possession by him for or in the ame or on account of his master. *R.* v. *Read*, 3 Q. B. D. 131; 47 L. J. M. C.) 50; 14 Cox, 17.

And, lastly, prove that the defendant embezzled the money, etc., so received, r some part of it. An unstamped receipt for the money given by the defendant admissible as evidence against him (*see ante*, p. 447). As to the constructive eceipt of the money, *see R.* v. *Baxter*, 5 Cox, 302. The usual presumptive vidence of this fact is, that the defendant never accounted with his master or the money, etc., so received by him, or that he denied his having received . Where the defendant charged himself in his master's book with money eceived by him, it was held that an embezzlement was not proved *merely* by is not paying it over to the master. *R.* v. *Hodgson*, 3 C. & P. 422. On the ther hand, the defendant is not exempted from the operation of the statute *erely* by entering the receipt of the money correctly in his master's book. . v. *Lister*, Dears. & B. 118; 26 L. J. (M. C.) 26; 7 Cox, 203: *R.* v. *Guelder*,

Bell, 284; 30 L. J. (M. C.) 34; 8 Cox, 372. If, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he ought not to be convicted of embezzlement; *R.* v. *Norman*, C. & Mar. 501, Cresswell, J.; even though he afterwards absconds and does not *pay over* the money. *R.* v. *Creed*, 1 C. & K. 63. But where it is the servant's duty to account for and pay over the moneys received by him at stated times, his wilfully not doing so is an embezzlement, although he does not actually deny the receipt of them. *R.* v. *Jackson*, 1 C. & K. 384, Coleridge, J. *R.* v. *Jones*, 7 C. & P. 833, which seems to the contrary, must be taken to be overruled. And even where no precise time can be fixed at which it was his duty to pay them over, his not accounting for them, if found by the jury to have been done fraudulently, is equally an embezzlement. *R.* v. *Welch*, 20 L. J. (K. B.) 101; 1 Den. 199; 2 C. & K. 296; 2 Cox, 85. See R. *v.* Squire (ante, p. 607): *R.* v. *Wortley* (ante, p. 612), *and as to where there is a general deficiency*, see post, p. 619.

Venue.]—The defendant, who was employed as a travelling salesman by a tradesman living at Nottingham, received two sums for his master in the county of Derby, appropriated them to his own use, and neglected to return and account to his master for the money as it was his duty to do. Two months afterwards he was met by his master in Nottingham; and being asked by him respecting the two sums of money, said he was very sorry for what he had done, that he had spent the money. It was held that there was evidence to go to the jury of an embezzlement in Nottingham, and therefore that the defendant was rightly tried there. *R.* v. *Murdock*, 2 Den. 298; 21 L. J. (M. C.) 22; 5 Cox, 360. It was the duty of the prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the money which he collected. The prisoner on the 1st and 2nd March, 1878, collected at Newark two sums of money, which he never remitted and did not account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him, and taxed him with receiving moneys and not accounting for them. The prisoner then and there handed to his employer a list of moneys he had collected, and not accounted for, including the above two sums. There was no evidence that the prisoner returned from Newark (which is within fifteen miles of Grantham) to Grantham on either of the days on which he received the money, nor indeed that he was ever at Grantham between the time when he received the sums of money and the time when he met his employer there. It was held upon these facts there was no evidence of embezzlement at Grantham, and therefore that the defendant could not be tried at the quarter sessions for that borough. *R.* v. *Treadgold*, 48 L. J. (M. C.) 102; 14 Cox, 220. A clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him, collected at York, on the 18th April, a sum of money, but never remitted it. On the 21st April, he wrote and posted at Doncaster to his employers in Middlesex a letter which was intended to make them believe that he had not then collected the money in question. The letter was received by the employers in Middlesex.

t was held that the receipt of such letter in Middlesex was evidence of mbezzlement in that county, and that the prisoner was rightly tried there. . v. *Rogers*, 3 Q. B. D. 28; 47 L. J. (M. C.) 11; 14 Cox, 22. *Semble*, also. hat on these facts there was evidence of embezzlement in Yorkshire, and that he prisoner might have been tried there. *Id.*

By s. 39 (1) of the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50, *ante*, p. 502), person charged with embezzlement, or any other offence against the Act, ay be proceeded against, indicted, tried, and punished in any county or lace in which he was apprehended or is in custody as if the offence had been ommitted in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be eemed to have been committed in that county or place. This provision will et rid of the difficulties formerly experienced in some cases of embezzlement.

Where general deficiency of moneys.]—In *R.* v. *Grove*, 1 Mood. 447; 7 C. & P. 635, a majority of the judges (eight against seven) are reported to have eld that an indictment for embezzlement might be supported by proof of a general deficiency of money's that ought to be forthcoming, without showing ny particular sum received and not accounted for. *See also R.* v. *Lambert*, 2 Cox, 309, Erle, J.: *R.* v. *Moah*, Dears. 626; 25 L. J. (M. C.) 66; 7 Cox, 60: R. v. *King*, 12 Cox, 73 (C. C. R.), *ante*, p. 614: and *R.* v. *Skerrett* [1902] 2 West Austr. Rep. 101. But in *R.* v. *Lloyd Jones*, 8 C. & P. 288; where upon an indictment for embezzlement, it was opened that the prisoner had been shopman to the prosecutrix, and it would be proved that there was a deficiency n the prisoner's accounts, but that there was no proof of the embezzlement f any particular sum, Alderson, B., said, "Whatever difference of opinion there night be in *R.* v. *Grove* (*supra*), that proceeded more upon the particular facts of hat case than upon the law. It is not sufficient to prove at the trial a general leficiency in account. Some specific sum must be proved to be embezzled, n like manner as in larceny some particular article must be proved to have een stolen." *See also R.* v. *Chapman*, 1 C. & K. 119; 1 Cox, 47, Williams, J.: R. v. *Wolstenholme*, 11 Cox, 313, Brett, J.: 2 Russ. Cr. (7th ed.) 1396. Where mbezzlement of a cheque was charged and the cheque could not be found the ounterfoil was admitted in evidence. *R.* v. *Wilkinson*, 10 Cox, 537.

Where the indictment contains only one count, charging the receipt of a ross sum on a particular day, and it appears in evidence that the money was eceived in different sums on different days, the prosecutor will be put to his lection and must confine himself to one sum and one day. *R.* v. *Williams*, C. & P. 626. If, however, in that case, it had appeared that although the ross amount had been received in different sums on different days, the risoner's duty was, on a certain day, to render an account and pay over the ross amount received, and that the prisoner had on that day failed to account r to pay over the gross amount, but embezzled the money, the prisoner might ave been indicted in only one count for embezzling the gross amount, and vidence of the different sums received on different days might have been dmitted to show how such gross amount was made up. *R.* v. *Balls*, L. R. C. C. R. 328; 40 L. J. (M. C.) 148; 12 Cox, 96. And in *R.* v. *Wright*,

27 L. J. (N. S.) M. C. 65; Dears. & B. 431 (*ante*, p. 614), which was an indictment for larceny by a bank clerk, where the evidence showed a deficiency of over 3,000*l.*, and the prisoner admitted that he had taken over 3,000*l.*, it was held that the jury need not find that a specific sum was taken on any specific day, but might find that he stole some money. In *R.* v. *Balls*, *supra*, the prisoner was a member of a co-partnership, and was indicted under 31 & 32 Vict. c. 116, s. 1 (*rep.* and re-enacted by 6 & 7 Geo. 5, c. 50, s. 40 (4), *ante*, p. 503), for embezzling the co-partnership moneys. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money. It was held that he might be properly charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to show how these aggregates were made up. The difficulties arising in the above cases with regard to the embezzlement of gross amounts can now often be surmounted by indicting the defendant under 38 & 39 *Vict. c.* 24 (*The Falsification of Accounts Act*, 1875): *post*, p. 734.

Where an indictment for embezzlement charged three offences, and it appeared that the prisoner had made correct entries of a number of payments made by him in one week, but had cast up the whole 2*l.* less than the correct amount; and in another week there was a precisely similar error of the same amount, and the same in a third week, and these were the cases charged in the indictment: it was held that evidence of a series of similar errors, both before and after those which formed the subject of the indictment, was admissible in order to anticipate the defence that the three cases contained in the indictment were merely accidental errors. *R.* v. *Richardson*, 2 F. & F. 343; 8 Cox, 448. *See R.* v. *Proud*, L. & C. 97; 31 L. J. (M. C.) 71; 9 Cox, 22: *R.* v. *Stephens*, 16 Cox, 387 (C. C. R.); *and for general rules as to such evidence*, *ante*, pp. 355, 360. While the receipt of the money must have taken place during the service—*R.* v. *Hoare*, 1 F. & F. 647—it seems not to be necessary to allege or prove the embezzling to have taken place while the prisoner continued clerk or servant to the prosecutor. *R.* v. *Lovell*, 2 M. & Rob. 236, Coleridge, J.: *see* 2 Russ. Cr. (7th ed.) 1401.

An indictment for embezzling money will not be sustained by evidence of embezzling goods. *R.* v. *Clarke*, 69 J. P. 150 (C. C. R.).

FRAUDULENT CONVERSION OF PROPERTY.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 20.—*Conversion.*]—(1) Every erson who—(i) being entrusted either solely or jointly with any other person ith any power of attorney for the sale or transfer of any property, fraudulently ells, transfers, or otherwise converts the property or any part thereof to his wn use or benefit, or the use or benefit of any person other than the person y whom he was so entrusted; or (ii) being a director, member or officer of any ody corporate or public company, fraudulently takes or applies for his own se or benefit, or for any use or purposes other than the use or purposes of uch body corporate or public company, any of the property of such body cor- orate or public company; or (iii) being authorised to receive money to arise rom the sale of any annuities or securities purchased or transferred under the rovisions of Part V. of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. . 50), or under any Act repealed by that Act, or under the *Municipal Corporation Iortgages, &c., Act*, 1860 (23 & 24 Vict. c. 16), or any dividends thereon, or ny other such money as is referred to in the said Acts, appropriates the same therwise than as directed by the said Acts or by the Local Government Board r the Treasury (as the case may be) in pursuance thereof; or (iv) (*a*) being ntrusted either solely or jointly with any other person with any property in rder that he may retain in safe custody or apply, pay, or deliver, for any pur- ose or to any person, the property or any part thereof or any proceeds thereof; r (*b*) having either solely or jointly with any other person received any property or or on account of any other person; fraudulently converts to his own use or enefit, or the use or benefit of any other person, the property or any part thereof r any proceeds thereof; shall be guilty of a misdemeanour and on conviction hereof liable to penal servitude for any term not exceeding seven years.

(2) Nothing in paragraph (iv) of subsection (1) of this section shall apply to affect any trustee under any express trust created by a deed or will, or any ortgagee of any property, real or personal, in respect of any act done by the rustee or mortgagee in relation to the property comprised in or affected by any ch trust or mortgage. [*This section re-enacts* 24 & 25 Vict. c. 96, ss. 77, 81; & 46 Vict. c. 50, s. 117; and 1 Edw. 7, c. 10, s. 1. *For indictment*, see post, 627.]

Sect. 21.—*Conversion by trustee.*]—Every person who, being a trustee as reinafter defined, of any property for the use or benefit either wholly or rtially of some other person, or for any public or charitable purpose, with tent to defraud converts or appropriates the same or any part thereof to or r his own use or benefit, or the use or benefit of any person other than such rson as aforesaid, or for any purpose other than such public or charitable rpose as aforesaid, or otherwise disposes of or destroys such property or any rt thereof, shall be guilty of a misdemeanor and on conviction thereof liable penal servitude for any term not exceeding seven years. Provided that no osecution for any offence included in this section shall be commenced—(*a*) by

any person without the sanction of the Attorney-General, or, in case that office be vacant, of the Solicitor-General; (*b*) by any person who has taken any civil proceedings against such trustee, without the sanction also of the court or judge before whom such civil proceedings have been had or are pending. [*This section re-enacts* 24 & 25 Vict. c. 96, s. 80. *For indictment*, see post, p. 634.]

Sect. 22.—*Factors obtaining advances on the property of their principals.*]—(1) Every person who, being a factor or agent entrusted either solely or jointly with any other person for the purpose of sale or otherwise, with the possession of any goods or of any document of title to goods contrary to or without the authority of his principal in that behalf for his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, and in violation of good faith—(i) Consigns, deposits, transfers, or delivers any goods or document of title so entrusted to him as and by way of a pledge, lien, or security for any money or valuable security borrowed or received, or intended to be borrowed or received by him; or (ii) accepts any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title; shall be guilty of a misdemeanor, and on conviction thereof, liable to penal servitude for any term not exceeding seven years: Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery, was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent.

(2)—(*a*) Any factor or agent entrusted as aforesaid and in possession of any document of title to goods shall be deemed to have been entrusted with the possession of the goods represented by such document of title. (*b*) Every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates. (*c*) Any such factor or agent as aforesaid shall be deemed to be in possession of such goods or documents whether the same are in his actual custody or are held by any other person subject to his control, or for him or on his behalf. (*d*) Where any loan or advance is made in good faith to any factor or agent entrusted with and in possession of any such goods or document of title on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title and such goods or documents of title are actually received by the person making such loan or advance, without notice that such factor or agent was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or documents of title and within the meaning of this section, though such goods or documents of title are not actually received by the person making such loan or advance till the period subsequent thereto. (*e*) Any payment made whether by money or bill of exchange or other negotiable security shall be deemed to be an advance within the meaning of this section. (*f*) Any contract or agreement whether made direct with such factor or agent

s aforesaid or with any person on his behalf shall be deemed to be a contract r agreement with such factor or agent. (*g*) Any factor or agent entrusted as foresaid, and in possession of any goods or documents of title to goods shall be leemed, for the purposes of this section, to have been entrusted therewith by he owner thereof, unless the contrary be shown in evidence. [*This section re-enacts* 24 & 25 Vict. c. 96, ss. 78, 79. *For indictment*, see post, p. 636.]

Sect. 38 (1) (b).—*Offences against ss.* 20, 21, 22 *of this Act are not triable at Quarter Sessions.*]—See ante, p. 106.

Sect. 43.—*Evidence.*]—(2) No person shall be liable to be convicted of any offence against sections six, seven subsection (1), twenty, twenty-one, and twenty-two of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been *bonâ fide* instituted by any person aggrieved.

(3) In any proceedings in respect of any offence against sections six, seven subsection (1), twenty, twenty-one, and twenty-two of this Act, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person.

Sect. 46 (1).—*Definition of "property."*]—The expression "property" includes any description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

Id.—Definition of "trustee."]—The expression "trustee" means a trustee on some express trust created by some deed, will, or instrument in writing, and includes the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future Act relating to joint stock companies or bankruptcy.

FRAUDS BY DIRECTORS, OFFICERS, AND MEMBERS OF PUBLIC COMPANIES.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 82.—*Keeping fraudulent accounts.*] —Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment

of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned. [*i.e. penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years.* See 24 & 25 Vict. c. 96, s. 75 (*rep.*); 1 Edw. 7, c. 10, s. 1 (*rep.*); 6 & 7 Geo. 5, c. 50, s. 20, ante, p. 621. *This section re-enacts* 20 & 21 Vict. c. 54, s. 6.]

Sect. 83.—*Wilfully destroying or mutilating books, etc.*]—Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned. [*Now under* 6 & 7 Geo. 5, c. 50, s. 20, ante, p. 621. *This section re-enacts* 20 & 21 Vict. c. 54, s. 7. *For indictment*, see post, p. 628. *As to offences within this section*, see Re Arton, No. 2 [1896] 1 Q. B. 509, Russell, C.J.

Sect. 84.—*Publishing fraudulent statements.*]—Whosoever being a director, manager, or public officer of any body corporate or public company, shall make, circulate or publish, or concur in making, circulating, or publishing any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor, of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned; *i.e.*, *now under* 6 & 7 Geo. 5, c. 60, s. 20, ante, p. 621. [*This section re-enacts* 20 & 21 Vict. c. 54, s. 8. *For indictment*, see post, p. 629.]

Sect. 85.—*No person exempt from answering questions in any court.*]—Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved [*or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or*

insolvency.] [*This section is partly a re-enactment of* 20 & 21 Vict. c. 54, s. 11, *and partly new: see* 24 & 25 Vict. c. 96, s. 29 (ante, p. 561). *So much of this section as is in italics and square brackets was repealed by* 53 & 54 Vict. c. 71, s. 27 (*now repealed and replaced by* 4 & 5 Geo. 5, c. 59, s. 166, infra). *As to the meaning of "compulsory process,"* see R. *v.* Noel [1914] 3 K. B. 848 (*ante*, p. 561)].

4 & 5 *Geo.* 5, *c.* 59 (*Bankruptcy Act*, 1914), *s.* 166.—*Evidence as to frauds by agents.*]—A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in section eighty-five of the *Larceny Act*, 1861 (which section relates to frauds by agents, bankers and factors). *A bankrupt's statement of affairs is not within this section, and is admissible as evidence against him.* R. *v.* Pike [1902] 1 K. B. 552. *So is an admission of guilt made before his examination in civil proceedings.* R. *v.* Oliver, 3 Cr. App. R. 246.

24 & 25 *Vict. c.* 96, *s.* 86.—*Not to deprive party aggrieved of remedy.—Conviction not to be evidence in civil suit.*]—Nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him: and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Sect. 87.—*Offences not triable at quarter sessions.*]—No misdemeanor against any of the last twelve preceding sections of this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

26 & 27 *Vict. c.* 87 (*Savings Bank Act*, 1863), *s.* 9.—*Officers of savings banks receiving deposits and not paying over same.*]—If any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank shall receive any sum or sums of money from or on account of any depositor or person desirous of becoming such, or on account of such savings bank, and shall not forthwith, or in the case of local receivers acting on behalf of any savings bank within the time specified in the rules of the said savings bank, duly account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the said savings bank, such actuary, cashier, secretary, officer, or local receiver, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanor. [*Punishable as stated*, ante, pp. 238, 239. *As to friendly societies, etc.*, see ante, p. 608.]

8 *Edw.* 7, *c.* 69 (*Companies Consolidation Act*, 1908), *s.* 175.—*Power in England to order public examination of promoters, directors, etc.*]—(1) When

an order has been made in England for winding up a company by the court, and the official receiver has made a further report under this Act stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director, or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof.

(2) The official receiver shall take part in the examination, and for that purpose may, if specially authorised by the Board of Trade in that behalf, employ a solicitor with or without counsel.

(3) The liquidator, where the official receiver is not the liquidator, and any creditor or contributory, may also take part in the examination either personally or by solicitor or counsel.

(4) The court may put such questions to the person examined as the court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the court may put or allow to be put to him.

(6) A person ordered to be examined under this section shall at his own cost, before his examination, be furnished with a copy of the official receiver's report, and may at his own cost employ a solicitor with or without counsel, who shall be at liberty to put to him such questions as the court may deem just for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

(8) The court may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the court so directs, and subject to general rules, be held before any judge of county courts, or before any officer of the Supreme Court, being an official referee, master, or registrar in bankruptcy, or before any district registrar of the High Court named for the purpose by the Lord Chancellor, or, in the case of companies being wound up by a palatine court, before a registrar of that court, and the powers of the court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held. [*This section re-enacts* 53 *&* 54 *Vict. c.* 63, *s.* 8.]

Sect. 216.—*Falsification of books.*]—If any director, officer, or contributory of any company being wound up destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any

false or fraudulent entry in any register, book of account, or document belonging to the company with intent to defraud or deceive any person, he shall be guilty of a misdemeanor, and be liable to imprisonment for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 25 & 26 Vict. c. 82, s. 166, *and appears to apply only to falsification of books, etc., on or in connection with the winding-up of a company. In the case of the* London and Globe Finance Corporation [1903] 1 Ch. 728, *an order was made under* 25 & 26 Vict. c. 82, s. 167 (rep.), *by* Buckley, J., *directing the official receiver* "*to institute and conduct against* W. W. *a criminal prosecution for such offences under ss.* 83 *and* 84 *of the* Larceny Act, 1861, *and s.* 166 *of the* Companies Act, 1862, *as he may be advised.*" *The falsifications charged against the accused having been committed upon dates prior to the winding-up of the company in question, and having no direct reference thereto, no count alleging an offence against s.* 166 *was included in the indictment eventually preferred against him.*]

Sect. 217.—(1) : *Direction of prosecution by Court in case of winding-up by Court.—Expenses of prosecution.*]—If it appears in the course of a winding-up by or subject to the supervision of the Court that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company, for which he is criminally responsible, the Court may, on the application of any person interested in the winding-up or of its own motion, direct the liquidator to prosecute the offence, and may order the costs and expenses to be paid out of the assets of the company. [*This section re-enacts* 25 & 26 Vict. c. 82, s. 167. *See* Re London and Globe Finance Corporation, supra.]

(2) If it appears to the liquidator in the course of a voluntary winding-up that any past or present director, manager, officer, or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible, the liquidator, with the previous sanction of the Court, may prosecute the offender, and all expenses properly incurred by him in the prosecution shall be payable out of the assets of the company, in priority to all other liabilities. [*This section re-enacts* 25 & 26 Vict. c. 82, s. 168.]

Indictment against a Director of a Public Company for fraudulently appropriating the Company's Money. (6 & 7 *Geo.* 5, *c.* 50, *s.* 20 (1) (ii), ante, p. 621.)

THE KING *v.* A. B.

Surrey Assizes
held at Guildford.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Fraudulent conversion of property, contrary to section 20 (1) (ii) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. 1917, in the county of Surrey, then being a director ["*director, member, or public officer*"] of a certain public company ["*any body corporate or public company*"] called the —— Company (Limited), fraudulently did take or apply for his own use or benefit ["*for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company*"] certain money, to wit, one thousand pounds being the property ["*any property,*" see 6 & 7 Geo. 5, c. 50, s. 46, ante, p. 508] of the said company.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, not exceeding two years, 6 & 7 Geo. 5, c. 50, s. 20 (ante, p. 621); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour,* see 6 & 7 Geo. 5, c. 50, s. 37 (5) (a) (c) (ante, p. 501).

"*Then being a director*" *is a sufficient averment of the fact that J. S. was a director:* cf. R. *v.* Somerton, 7 B. & C. 463 (ante, p. 606).

This offence is not triable at quarter sessions. 6 & 7 Geo. 5, c. 50, s. 38 (1) (b) (ante, p. 106).

Evidence.

Prove that the defendant was, at the time of the commission of the offence, a director of the public company mentioned in the indictment. It is doubtful whether proof of his acting in that capacity will be sufficient *primâ facie* evidence of his being director. *R.* v. *Atkins*, 64 J. P. 361; *but see R.* v. *Lawson*, *post*, p. 630. The statute does not define what is to be deemed a "public company" within these sections; but there can be no doubt that any company constituted by Act of Parliament or by charter, or registered under the Companies Acts, 1862-1908, would be held within them. *See In re Griffith*, 12 Ch. D. 655. Prove also that he took and applied to his own use the money of the company, as stated in the indictment, or some part thereof, and that he did so fraudulently (*see ante*, pp. 352, 360). *See Nelson* v. *R.* [1902] App. Cas. 250; 71 L. J. (P. C.) 55; 20 Cox, 150. The provisions of 6 & 7 Geo. 5, c. 50, s. 43 (3) (*ante*, p. 506), and 4 & 5 Geo. 5, c. 59, s. 166 (*ante*, p. 625), apply to an indictment for this offence, where the defendant has been examined in bankruptcy: but a similar protection is not afforded to a defendant who has been examined in the winding-up of a company. 8 Edw. 7, c. 69, s. 175 (7) (*ante*, p. 625).

Indictment against Directors and Members of a body corporate for making false entries in Books. (24 & 25 *Vict. c.* 96, *s.* 83, ante, p. 624).

Commencement as in last precedent.

STATEMENT OF OFFENCE.

Falsifying books, contrary to section 83 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., C. D. and E. F., in the county of ——, then being directors of a certain body corporate ("*any body corporate or public company*"), to wit, the —— Building Society; and G. H. then being a member of the said body corporate on the —— day of ——, A.D. ——, with intent to defraud, did make or concur in the making of a false entry ("*make or concur in the making of any false entry, or omit or concur in omitting any material particular*") in a book of account of the said body corporate ("*in any book of account, or other document*") called the ledger, to wit, an entry of the sum of ——*l.*, under the name of premium, to the credit of an account in the said ledger called the "Premiums" account.

Misdemeanor: penal servitude for not more than seven nor less than three years or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 96, s. 83 (ante, p. 624); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour*, see 24 & 25 Vict. c. 96, s. 117 (ante, p. 562).

This offence is not triable at quarter sessions. 24 & 25 Vict. c. 96, s. 87 (ante, p. 106).

Indictment against Directors, etc., for publishing Fraudulent Statements.
(24 & 25 *Vict. c.* 96, *s.* 84, ante, p. 624).

Commencement as in precedent on p. 627.

STATEMENT OF OFFENCE.

Publishing fraudulent statements, contrary to section 84 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——. A.D. ——, in the county of ——, being a director of a public company called the —— Company (Limited), did circulate or publish ["*make, circulate, or publish, or concur in making, circulating, or publishing*"] a certain written statement or account ["*any written statement or account*"], which was false in certain material particulars, to wit, in that it was therein falsely stated that (*state the particulars*), he the said A. B. knowing the said written statement or account to be false in the several particulars aforesaid; with intent thereby then to deceive or defraud J. N., a shareholder of the said public company or to induce divers persons unknown to become shareholders therein ["*with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof*"].

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two

years. 24 & 25 Vict. c. 96, s. 84; 54 & 55 Vict. c. 69, s. 1 (ante, p. 238). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour*, see 24 & 25 Vict. c. 96, s. 117 (ante, p. 562). See *the last precedent.*

This offence is not triable at quarter sessions. 24 & 25 Vict. c. 96, s. 87 (ante, p. 625).

Evidence.

Prove that the defendant was a director. If the indictment is against a manager, it is sufficient to prove that the defendant in fact managed the business of the company; and it is not necessary to prove that he was duly appointed to the office of manager. *R.* v. *Lawson* [1905] 1 K. B. 541; 74 L. J. (K. B.) 296; 20 Cox, 812: *Gibson* v. *Barton*, L. R. 10 Q. B. 329; 44 L. J. (N. S.) M. C. 81. It is submitted that *R.* v. *Lawson* is equally applicable to directors and other officers, *but see R.* v. *Atkins*, 64 J. P. 361. Prove also that he circulated and published, or concurred in circulating and publishing a statement in writing, or in print, relating to the affairs of the company, false in some material particular or particulars, as stated in the indictment (the materiality will be a question for the judge to determine); that it was false in such particular or particulars to the defendant's knowledge, which may be shown either expressly, by his acts or declarations, or impliedly, from the situation he filled in the company, the part he took in its management, and his opportunities of knowing its condition; and that he did so with the fraudulent intent set forth in the indictment, which will in general be inferred from its tendency to produce the effect alleged to have been intended; and prove his knowledge of the falsehood of the statement. This last head of evidence of course includes the proof that J. N. was a shareholder, etc., as stated in the indictment. It is not necessary to prove that any person was actually prejudiced by the fraudulent statement. On the indictment against the manager and secretary of a joint-stock bank, charging them in one set of counts with this offence, and in another set of counts with conspiracy to commit this offence, the prosecution was put to elect upon which set of counts it would proceed. *R.* v. *Burch*, 4 F. & F. 407, Montague Smith, J. As to the evidence necessary to prove such conspiracy, *Id.*, *and see R.* v. *Brown*, 7 Cox, 442; *S. C. sub nom. R.* v. *Esdaile*, 1 F. & F. 213. The provisions of 24 & 25 Vict. c. 96, s. 85 (*ante*, p. 624), and of 4 & 5 Geo. 5, c. 59, s. 166 (*ante*, p. 625), apply to an indictment for this offence; but a similar protection is not afforded to a defendant who has been examined in the winding up of a company. 8 Edw. 7, c. 69, s. 175 (7) (*ante*, p. 626). It would seem that if the statements are proved to be false to the knowledge of the accused, an intention to defraud may be presumed; *see R.* v. *Birt*, 63 J. P. 328, Ridley, J.

Deceive or defraud.]—" To deceive is to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course

of action" : *Re London and Globe Finance Corporation* [1903] 1 Ch. 728, 732; 72 L. J. (Ch.) 368, Buckley, J. : cited with approval in *R.* v. *Bennett*, 23 Cox, 609; 9 Cr. App. R. 146.

Indictment for fraudulent conversion of Property. (6 & 7 *Geo.* 5, *c.* 50, *s.* 20 (1) (*iv.*), *ante*, p. 621.)

Commencement as ante. p. 627.

STATEMENT OF OFFENCE.

First Count.

Fraudulent conversion of property, contrary to section 20 (1) (iv.) (*a*) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, fraudulently converted to his own use and benefit certain property, that is to say, 100*l.* intrusted to him by H. S., in order that he, the said A. B., might retain the same in safe custody.

STATEMENT OF OFFENCE.

Second Count.

Fraudulent conversion of property, contrary to section 20 (1) (iv.) (*b*) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, fraudulently converted to his own use and benefit certain property, that is to say, the sum of 200*l.* received by him for and on account of L. M.

Misdemeanor.—Penal servitude for not more than seven or less than three years, or imprisonment with or without hard labour not exceeding two years. 6 & 7 Geo. 5, c. 50, s. 20 (ante, p. 621; Id. s. 37 (4) (ante, p. 501). *As to fines and recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 37 (5) (a) (c) (ante, p. 501).

This offence is not triable at quarter sessions. 6 & 7 Geo. 5, c. 50, s. 38 (1) (b) (ante, p. 502).

Evidence.

Upon the first count prove that the defendant was intrusted, either solely or jointly with any other person, with the property, as stated in the indictment, and that it was intrusted to him for safe custody (*a*), or for the purpose stated

(*a*) "*Safe custody.*"]—Trust money had been invested on mortgage, which was paid off, and the money left in the hands of the defendant, the solicitor to the trust, who wrote to the person beneficially interested:—"R.'s money was paid on the 6th of April.

—and, lastly, that he converted it to his own use and benefit, or to the use and benefit of some other person.

H. received sums of money from S. and others who entered his employment as security for their honesty whilst in his employment, and promised to repay the said sums to the depositors on their leaving his employment. He did not do so, but used the money for his own purposes. On an indictment against H. under s. 1 (*a*) of 1 Edw. 7, c. 10 (*rep.*), alleging that H. had been intrusted by S. with certain property, to wit, ten pounds in money of and belonging to S., in order that (in one set of counts) he, H., might retain the same in safe custody and thereafter pay it back to S., and (in another set of counts) in order that he, H., might thereafter pay ten pounds the proceeds thereof back to S. in three months' time or on S. leaving the service of H., it was held by Bosanquet, Common Serjeant, after consulting Phillimore, J., that there was no evidence against H. of the offence so charged against him. *R.* v. *Hotine*, 68 J. P. 143. This case is of doubtful authority, but was followed in *R.* v. *O'Brien*, 75 J. P. 392. It is submitted that in cases of this description, where there is evidence from which the jury may infer that the prisoner never intended to repay the money, he might be indicted for larceny by a trick. See *R.* v. *Buckmaster*, 20 Q. B. D. 182, *ante*, p. 518. In a later case the defendant was employed by the prosecutors to collect debts due to them from customers. His duty was to collect the money and pay it over to the prosecutors, after deducting a percentage for his own remuneration. He collected various sums, but did not pay them over or account for them to the prosecutors. It was held that the defendant was rightly convicted of an offence under s. 1 (1) (*b*) (*rep.*) (*ante*, p. 621), Alverstone, C.J., expressing no opinion upon *R.* v. *Hotine*, *supra*, and Darling, J., adding that the question in that case may have to be considered

Let me know how you would like to have it invested, whether in the funds or on mortgage." The answer, dated 9th of April, was:—"Will consult G. at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time." At or very near the date of these letters it was clear that the defendant had fraudulently appropriated the money to his own use. Held, that this was a fraudulent conversion to his own use of property intrusted to the defendant for safe custody within 24 & 25 Vict. c. 96, s. 76 (*rep.*). *R.* v. *Fullagar*, 14 Cox, 370 (C. C. R.); 41 L. T. (N. S.) 448. In the course of the argument in that case, Hawkins, J., said:—"If you say that the letters show that the defendant was intrusted with the money to invest on mortgage, then they amount to a direction in writing within s. 75; and if they do not, then the money was intrusted to the defendant for safe custody within s. 76 until the prosecutrix gave further directions how it was to be dealt with." But where a solicitor was intrusted by a client with money to invest on mortgage on the client's behalf, and he, instead of doing so, fraudulently appropriated the money to his own use, it was held that he was not intrusted with such money "*for safe custody*" within s. 76. *R.* v. *Newman*, 8 Q. B. D. 706 (C. C. R.); 51 L. J. (M. C.) 87. The decision in this case turned upon the absence of any evidence that the money was to be treated as intrusted for safe custody until opportunity for investment should arise, and Stephen, J., expressly approved of the direction of Bowen, J., to the jury in the Court below, viz., that "if they were satisfied that the money was intrusted to the prisoner to be invested on mortgage, and to be kept safely in his own hands until such mortgage was effected by him, and if instead of investing the money so intrusted to him he converted it fraudulently to his own use, they should find the prisoner guilty." *See* also the observations of Denman and Stephen, JJ., upon *R.* v. *Cooper*, L. R. 2 C. C. R. 123; 43 L. J. (M. C.) 89; 12 Cox, 600.

again some day. *R.* v. *Lord* [1905] 69 J. P. 467 (C. C. R.). *See also R.* v. *Noel* [1914] 3 K. B. 848; 84 L. J. (K. B.) 142; 112 L. T. 47; 24 Cox, 486; 10 Cr. App. R. 255.

6 & 7 Geo. 5, c. 50, s. 20, does not affect trustees under an express trust created by deed or will nor mortgagees, in respect to any act done by them in relation to the property comprised in or affected by the trust or mortgagee (*see ante*, p. 621). As to the liability of such trustees, *see* s. 21, *ante*, p. 621. The sanction of the Attorney-General is not a necessary preliminary to the prosecution of an offender against s. 20. *R.* v. *Davies* [1913] 1 K. B. 573; 82 L. J. (K. B.) 471; 23 Cox, 351.

No person shall be convicted of an offence against s. 20 by any evidence in respect of any act done by him, if at any time previously to his being charged with the offence he shall have first disclosed such act on oath, in consequence of any compulsory process of any court of law, or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, 6 & 7 Geo. 5, c. 50, s. 43 (2) (*ante*, p. 506). *See R.* v. *Strahan*, 7 Cox, 85; and the cases discussed *ante*, pp. 561, 564. Nor is a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy admissible in evidence against that person in any proceeding in respect of any offence against s. 20 (*see* 6 & 7 Geo. 5, c. 50, s. 43 (3), *ante*, p. 506).

Upon the second count prove that the defendant received the property for and on account of another person, as stated in the indictment, and that he converted to his own use, etc., all or part of the property or some of the proceeds thereof. As to what constitutes receipt for or on account of another, *see ante*, p. 613. S. having traded as a coal dealer under a trade name, by an agreement with the prosecutor gave him the right to trade under that name. S. was to obtain orders for coal, for which he was to be paid by certain royalties or commissions, paying over to the prosecutor sums received from customers, in full, twice a week. The prosecutor was to supply the coal to the customers. Business was entered into under this agreement, and S. failed to hand over or account for certain sums received from customers. It appeared that the customers knew S. under the trade name he had transferred to the prosecutor, and that they did not know the prosecutor, or that they were doing business with him. On these facts Bosanquet, Common Serjeant, held that there was no evidence to go to the jury that S. had received the moneys "for or on account of" the prosecutor. *R.* v. *South* [1907] 71 J. P. 191. *And see R.* v. *Solomons* [1909] 2 K. B. 980; 79 L. J. (K. B.) 8; 22 Cox, 178; 25 T. L. R. 747; 2 Cr. App. R. 288: *Doggett* v. *Waterloo Taxicab Co. Ltd.* [1910] 2 K. B. 336; 79 L. J. (K. B.) 1085: *R.* v. *Messer*, 107 L. T. 31; 23 Cox, 59; 82 L. J. (K. B.) 913.

A person may be "entrusted" with property, or may "receive" it for or on account of another person within the meaning of the section, notwithstanding that the property is not delivered to him directly by the owner, and that the owner does not know of his existence and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person under circumstances whereby he becomes entrusted,

or whereby his receipt becomes a receipt for or on account of another person, and fraudulently converts it or the proceeds, he commits an offence within the section. *R.* v. *Grubb* [1915] 2 K. B. 683; 84 L. J. (K. B.) 1744; 113 L. T. 510; 25 Cox, 77; 79 J. P. 430; 31 T. L. R. 429; 11 Cr. App. R. 153.

On a mere contract of sale and purchase of shares and the payment of money by the purchaser to the vendor, followed by failure on the part of the vendor to deliver the shares, there is not an entrusting of the money to the vendor within the meaning of sub-s. (1) (iv.) (*a*) But where there is no company, and therefore no shares in existence at the time of the agreement between the parties, and the recipient of the money undertakes to allot shares in the company when formed to the persons who have paid the money, it is open to the jury to find that the money was paid in order to assist the promotion of the company, and this would be an entrusting of the money for the purpose of applying it in a particular way within the meaning of the sub-section. *R.* v. *Laurens*, 11 Cr. App. R. 215.

Indictment for fraudulent conversion by a trustee. (6 & 7 *Geo.* 5, *c.* 50, *s.* 21.)

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Fraudulent Conversion of Property contrary to section 21 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, being a trustee of certain property, to wit, five thousand pounds three per centum consolidated bank annuities, for the benefit of J. N. [*or* for a certain public (*or* charitable) purpose, that is to say (*stating the purpose*)] did convert or appropriate the said property to his own use [" *convert or appropriate the same or any part thereof to or for his own use of benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof* "] with intent to defraud.

Definition of Property.]—See ante, p. 508.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 6 & 7 Geo. 5, c. 50, s. 21 (ante, p. 621); Id. s. 37 (4) (ante, p. 501). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour*, see s. 37 (5) (a) (c) (ante, p. 501).

This offence is not triable at quarter sessions. Id. s. 38 (1) (b) (ante, p. 502).

The prosecution must be commenced with the sanction of the attorney-general, and, if civil proceedings have already been taken against the accused, also of the judge before whom the civil proceeding has been heard or is pending. Id. s. 21 (ante, p. 621). *It is not necessary to aver the obtaining of such sanction.* Vide ante, p. 122.

Evidence.

Prove that the defendant was a trustee within 6 & 7 Geo. 5, c. 50, s. 46 (1) (*ante*, p. 623), as stated in the indictment, by producing and proving the deed, will, or other instrument in writing whereby the trust (which must be an express and not an implied trust) was created, and also, if the defendant is the heir or personal representative of the original trustee, by proving his heirship, or the will or letters of administration, as the case may be, of the original trustee (*see ante*, pp. 426, 445). Also to produce to the clerk of the Court the written *fiat* of the attorney-general authorizing the prosecution. *See R.* v. *Dexter*, 19 Cox, 360 (*ante*, p. 122): *R.* v. *Waller* [1910] 1 K. B. 364; 79 L. J. (K. B.) 184: *R.* v. *Turner*, *Id.* 346. A trustee of a savings bank is not a trustee of property "for a public or charitable purpose" within s. 21, *supra*. He is, however, a trustee for the benefit "of some other persons" within that section. *R.* v. *Fletcher*, L. & C. 180; 31 L. J. (M. C.) 206; 9 Cox, 189: *cf. R.* v. *Gibbs*, Dears. 445; 24 L. J. (M. C.) 62; 6 Cox, 455. The rules of a savings bank are an "instrument in writing" within s. 46 (1) (*ante*, p. 623). *Id.* The defendant applied to his bankers for an advance as against goods consigned to him and then at sea. The advance was made on his signing a letter of hypothecation by which he undertook to hold the goods in trust for the bankers, and to hand over to them the proceeds to the amount of the advance. It was held that this letter contained a declaration of an express trust such as made the giver of it a trustee for the bankers within the meaning of 24 & 25 Vict. c. 96, s. 80 (*rep.*). *R.* v. *Townshend*, 15 Cox, 466, Day, J. It was also held that a letter of hypothecation is a bill of sale within the definition of the Bill of Sale Acts as being a declaration of trust without transfer of possession, and is required to comply with the provisions of those Acts as to form and registration; but that in this case, the goods being at sea at the time of the execution of the letter of hypothecation, it came within the exception as to "goods at sea" contained in the Bill of Sale Acts, and so was not affected by these provisions. *Id.* If the defendant is charged as a trustee in bankruptcy, the proceedings must be produced and proved (*see ante*, p. 430), in order to show his character as trustee. If as liquidator under the *Companies Consolidation Act*, 1908 (8 Edw. 7, c. 69), or any of the Acts thereby repealed, it must be shown that the company was one that had been duly registered by producing the certificate of registration: and if the appointment as liquidator was one by the Court of Chancery, the order of the Court appointing the defendant must be proved; if by the company in general meeting, the appointment by such general meeting must be proved. Then prove that the defendant appropriated the property of which he was such trustee, or some part thereof, to his own use, or disposed of or destroyed it, or some part of it, as the case may be, and that he did so with intent to defraud, which intent must in general be implied from the circumstances of the case (*see ante*, pp. 352, 360). The definition of "property" is very wide (*see ante*, p. 508).

A statement or admission by the defendant in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible in evidence against him. 6 & 7 Geo. 5, c. 50, s. 43 (3) (*ante*, p. 506). *See R.* v. *Pike* [1902] 1 K. B. 552; 71 L. J. (K. B.) 287; 20 Cox, 164.

And if he has previously to the charge, first disclosed the act on oath under compulsory process of any court of law or equity, in any action, etc., *bonâ fide* instituted by any party aggrieved, he cannot be convicted by any evidence whatever, 6 & 7 Geo. 5, c. 50, s. 43 (2) (*ante*, p. 506). As to what constitutes first disclosure, *see R.* v. *Oliver*, 3 Cr. App. R. 246, and *ante*, p. 561; and as to what amounts to compulsory process, *see R.* v. *Noel* [1914] 3 K. B. 848 (*ante*, p. 561).

Indictment against a Factor for unlawfully pledging Goods of the Principal. (6 & 7 *Geo.* 5, *c.* 50, *s.* 22, ante, p. 622.)

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Unlawful pledging, contrary to section 22 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the 1st day of June, A.D. ——, in the county of ——, being a factor or agent intrusted by J. N. with ten bales of cotton ("*intrusted with the possession of goods or of any document of title to goods*"), contrary to or without the authority of the said J. N., for his own use or benefit, and in violation of good faith, made a deposit of the said ten bales of cotton with one J. P., as a pledge, lien, or security for the sum of fifty pounds, then borrowed by the said A. B. from the said J. P.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour, not exceeding two years. 6 & 7 Geo. 5, c. 50, s. 22 (ante, p. 622); Id. s. 37 (4) (ante, p. 50). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour, see* Id. s. 37 (5) (a) (c) (ante, p. 501).

This offence is not triable at quarter sessions. Id. s. 38 (1) (b) (ante, p. 502).

Evidence.

Prove that the goods, etc., described in the indictment were intrusted by J. N. to the defendant as his agent: that the defendant deposited the goods with J. P. as a security for an advance of money, etc.; and, lastly, circumstances must be shown from which the jury may infer that the defendant pledged the goods in violation of good faith, and contrary to and without the authority of the prosecutor. A factor who has a lien upon goods may pledge them to the extent of his lien. 6 & 7 Geo. 5, c. 50, s. 22 (1), *proviso* (*ante*, p. 622). A statement or admission by the defendant in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible in evidence against him. *Id.* s. 43 (3) (*ante*, p. 506). And if he have, previously to the charge, first disclosed the act on oath under compulsory process of any court of law or equity, in any action, etc., *bonâ fide*

instituted by any party aggrieved, he cannot be convicted by any evidence whatever. *Id.* s. 43 (2). (*See ante*, p. 506).

As to what is an *intrusting* within the statute, *see* s. 22 (2) (*a*) (*ante*, p. 622), and as to what are to be considered as documents of title to goods, *see* s. 46 (1) (*ante*, p. 508). A person intrusted with goods, or the documents of title thereto, as agent, was held, after his authority as agent had been revoked, not to be "an agent intrusted" within the meaning of 5 & 6 Vict. c. 39, s. 1 (*rep.*), so as to protect a pledge by him to an innocent pledgee. *Fuentes* v. *Montes*, L. R. 4 C. P. 93; 38 L. J. (C. P.) 95 (Ex. Ch.). The *Factors Act*, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 2, and the *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 25, appear to protect the innocent pledgee in such a state of circumstances, but the question perhaps still remains whether a person whose authority has been so revoked is "a factor or agent intrusted" within the meaning of 6 & 7 Geo. 5, c. 50, s. 22. (*See ante*, p. 622).

Agent.]—The words "or other agent" occurring after the words "bankers, merchant, broker, attorney" in the repealed s. 75 of 24 & 25 Vict. c. 96 were held to apply only to persons whose occupation is *ejusdem generis* with that of a "banker, etc." *R.* v. *Portugal*, 16 Q. B. D. 487; followed in *R.* v. *Kane* [1901] 1 K. B. 472; 19 Cox, 658; and *semble* the meaning of "agent" in s. 78 is similarly limited to an "agent" *ejusdem generis* with "factor," though the word "other" does not occur in s. 78. *See R.* v. *Portugal*, *supra*.

ROBBERY, ASSAULT WITH INTENT TO ROB, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 23.—*Robbery.*]—(1) Every person who—(*a*) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; (*b*) robs any person and, at the time of or immediately before or immediately after such robbery, uses any personal violence to any person; shall be guilty of felony and on conviction thereof liable to penal servitude for life, and, in addition, if a male, to be once privately whipped. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 43; *and reproduces the provisions of* 26 & 27 Vict. c. 44, s. 1, *as amended by* 4 & 5 Geo. 5, c. 58, s. 36, *relating to whipping.*] (2) Every person who robs any person shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years. [*This sub-section re-enacts so much of* 24 & 25 Vict. c. 96, s. 40, *as related to robbery. The portion relating to larceny from the person is re-enacted by* 6 & 7 Geo. 5, c. 50, s. 14, ante, p. 597.] (3) Every person who assaults any person with intent to rob shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 42.]

Sect. 44.—*Verdict.*]—(1) If on the trial of any indictment for robbery it is proved that the defendant committed an assault with intent to rob, the jury may acquit the defendant of robbery and find him guilty of an assault with intent to rob, and thereupon he shall be liable to be punished accordingly. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 41.]

Indictment for robbery.

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Robbery, contrary to section 23 (2) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, robbed C. D. of a watch.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour: 6 & 7 Geo. 5, c. 50, ss. 23 (2); 37 (4) (ante, pp. 501, 637). *As to recognizances and sureties for keeping the peace*, see Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

Robbery consists in the felonious and forcible taking from the person of another, or in his presence against his will, of any money or goods to any value, by violence, or putting him in fear. 4 Bl. Com. 243; 1 Hawk. c 34; 2 Russ. Cr. (7th ed.) 1137. *See R.* v. *Reane*, 2 Leach, 616; 2 East, P. C. 734: *R.* v. *Edwards*, 1 Cox, 32. And in order to maintain this indictment, you must prove a larceny, and prove it to have been committed under the circumstances which, together with it, constitute the offence of robbery, and which we shall now consider under the following heads:—

In bodily fear, etc.]—The prosecutor must either prove that he was actually in bodily fear, from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the Court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; Fost. 128; and in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the Court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knocks another down, and steals from him his property whilst he is insensible on the ground, this is robbery. Fost. 128. A stage-coach having frequently been robbed on a particular road, J. N. went in it for the purpose of apprehending the robber; the robber met the coach, presented a pistol and demanded money of the passengers; J. N. delivered his money but immediately afterwards jumped out of the coach, and with the assistance of others, secured the robber; and this was held to be robbery. *Norden's case*, Fost. 129. Where the defendant tore a lady's ear through, in snatching an earring from

it, the judges held it to be robbery. *R.* v. *Lapier*, 1 Leach, 320: 2 East, P. C. 557, 708. So, where the prisoner tore some hair from a lady's head in snatching a diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair, this was held to be robbery. *R.* v. *Moore*, 1 Leach, 335. Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pulling and two or three jerks, he broke the chain, and then ran off with the watch, this was held to be robbery. *R.* v *Mason*, R. & R. 419. So, if there be a struggle for the property, and it be wrested from the prosecutor by superior force, it will be robbery. *R.* v. *Davies*, 2 East, P. C. 709. But merely snatching property from a person unawares and running away with it, will not be robbery. *R.* v. *Steward*, 2 East, P. C. 702; *R.* v. *Horner*, *Id.* 703: *R.* v. *Baker*, 1 Leach, 290: *R.* v. *Robins*, *Id.*, n.: *R.* v. *Macauley*, *Id.* 287: *R.* v. *Walls*, 2 C. & K. 214, because fear cannot in fact be presumed in such a case. Where the prisoner caught hold of the prosecutor's watch chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued, and the prisoner was secured, Garrow, B., held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it. *R.* v. *Gnosil*, 1 C. & P. 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery unless some injury is done to the person, or there has been a previous struggle for the possession of the property, or some force used to obtain it.

If a man takes another's child, and threatens to destroy him unless the other give him money, this is robbery. *Per* Eyre, C.J., in *R.* v. *Reane*, 2 East, P. C. 735, 736; *and see R.* v. *Donnally*, *Id.* 715, 718; 1 Leach, 193. So, where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given, and the prosecutor thereupon gave him 5*s.*, but he insisted on more, and the prosecutor, being terrified, gave him 5*s.* more; the defendant and the mob then took bread, cheese, and cider from the prosecutor's house, without his permission, and departed; this was held to be a robbery. *R.* v. *Simons*, 2 East, P. C. 731: *R.* v. *Brown*, *Id.* So, where, during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give him a certain sum of money he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was held by the judges to be robbery. *R.* v. *Astley*, 2 East, P. C. 729. So, where, in the riots of 1780, a mob, headed by the defendant, came to the prosecutor's house and demanded half-a-crown, which the prosecutor, from terror of the mob, gave, this was held to be robbery, although no threats were uttered. *R.* v. *Taplin*, 2 East, P. C. 712.

Upon an indictment for robbery, it appeared that a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them and prevent mischief, by which

means they obtained money from the prosecutor; and Parke, J. (after consulting Vaughan, B., and Alderson, B.), admitted evidence of the acts of the mob at other places before and after on the same day, to show that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor. *R.* v. *Winkworth*, 4 C. & P. 444.

Obtaining money under a threat of charging the prosecutor with an unnatural crime had in many cases been held to be robbery at common law. *R.* v. *Jones*, 1 Leach, 139; 2 East, P. C. 714: *R.* v. *Donnally*, 1 Leach, 193; 2 East, P. C. 715: *R.* v. *Cannon*, R. & R. 146; *R.* v. *Gardner*, 1 C. & P. 479; even where it appeared that the prosecutor parted with his money from a fear merely of losing his character or situation by such an imputation; *R.* v. *Hickman*, 1 Leach, 278; 2 East, P. C. 728: *R.* v. *Egerton*, R. & R. 375: *R.* v. *Elmstead*, 2 Russ. Cr. (7th ed.) 1149. It was held that the property must be at once parted with in consequence of fear due to the threat. *R.* v. *Fuller*, R. & R. 308: *R.* v. *Jackson*, 1 Leach, 193 n.; 2 *Id.* 618 n. This form of robbery is now punishable under 6 & 7 Geo. 5, c. 50, s. 29 (1) (iii.) (*post*, p. 681). But it would seem that where by such accusation or threat any property is actually obtained, the offender may still be indicted for robbery. *See R.* v. *Stringer*, 2 Mood. 261; 1 C. & K. 188; doubting *R.* v. *Henry*, 2 Mood. 118. Where the property is parted with by threats to accuse, other than those specified in the statute, the indictment may also be for robbery, if the party was put in fear, and parted with his property in consequence. *R.* v. *Norton*, 8 C. & P. 671.

Where the prosecutrix was threatened by some persons at a mock auction to be sent to Bow-street, and from thence to Newgate, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling she must go with him: and she gave him a shilling accordingly, not from any apprehension of personal danger, but from a fear of being taken to prison; the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery; it was nothing more than a simple duress. *R.* v. *Knewland*, 2 Leach, 721: *R.* v. *Wood*, 2 East, P. C. 732. It would seem, however, that a similar state of facts would sustain an indictment under 6 & 7 Geo. 5, c. 50, s. 30 (*post*, p. 682): *R.* v. *Robertson*, L. & C. 483; 34 L. J. (M. C.) 35, and that it would also sustain an indictment for simple larceny. *R.* v. *MacGrath*, L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7: *R.* v. *Lovell*, 8 Q. B. D. 185; 50 L. J. (M. C.) 91; *ante*, p. 526. Where the defendant, with intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her while thus handcuffed, put her into a hackney-coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach hire; the jury, finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held that this was robbery. *R.* v. *Gascoigne*, 2 East, P. C. 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she, without any demand from him, gave him some money to desist, which he put into his pocket, and then continued hi

attempt until he was interrupted; this was held by the judges to be robbery. *R.* v. *Blackham*, 2 East, P. C. 711.

And it is of no importance under what pretence the robber obtains the money, etc., if the prosecutor is forced to deliver it from actual fear, or under circumstances from which the Court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him, through mistrust and apprehension of violence, it is as much a robbery as if he had demanded money in the ordinary way. 4 Bl. Com. 242. So, if thieves come to rob A., and finding little upon him, force him by menaces to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continued to operate upon him. Fitz. Cor. Pl. 464; 1 Hale, 532. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart; this was held to be a robbery. *Merriman* v. *Chippenham Hundred*, 2 East, P. C. 709. So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them; this was held to be robbery. *R.* v. *Simons*, 2 East, P. C. 712; *and see R.* v. *Spencer*, *Id.*

The fear must precede the taking. For, if a man privately steals money from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent to the taking. *R.* v. *Harman*, 1 Hale, 534; 1 Hawk. c. 34, s. 7; *see R.* v. *Gnosil*, 1 C. & P. 304 (*ante*, p. 639).

From the person, etc.]—The goods must be proved to have been taken either from the person of the prosecutor or in his presence. *See R.* v. *Francis*, 2 Str. 1015; 2 East, P. C. 708: *R.* v. *Grey*, 2 East, P. C. 708: *R.* v. *Hamilton*, 8 C. & P. 49. If a thief puts a man in fear, and then in his presence drives away his cattle, it is robbery. 1 Hale, 533. So, if a man, assaulted by a robber, throws his purse into a bush, or flying from a robber, lets fall his hat, and the robber, in his presence, takes up the purse or hat and carries it away; this would be robbery. *Id.* Upon an indictment for robbery, it appeared that the prosecutor was in company with another, who had the prosecutor's bundle, and who, upon the prosecutor being attacked with great violence by the prisoners, dropped the bundle, and ran to the prosecutor's assistance, when one of the prisoners took up the bundle, and ran off with it: Vaughan, B., is reported to have held that this was not robbery, because the bundle was not in the prosecutor's possession at the time. *R.* v. *Fallows*, 5 C. & P. 508; *sed quære. See R.* v. *Thompson*, L. & C. 225; 32 L. J. (M. C.) 53; 9 Cox, 244 (*ante*, p. 533).

Against the will.]—It must appear in evidence that the goods were taken against the will of the party robbed; that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. Therefore, where the party robbed concerted and connived at the robbery, and got one of his confederates to procure two strangers to commit

it, for the purpose of getting a reward upon the apprehension and conviction of the strangers, the judges held that it was not a robbery, because the property was not taken against the party's will. *R.* v. *MacDaniel*, 19 St. Tr. 745; Fost. 121, 228.

Take and carry away.]—An actual taking either by force or upon delivery must be proved: that is, it must appear that the robber actually got *possession* of the goods. Therefore, if a robber cuts a man's girdle in order to get his purse, and the purse thereby falls to the ground, and the robber runs off or is apprehended before he can take it up: this would not be robbery, because the purse was never in the possession of the robber. 1 Hale, 533. But it is immaterial whether the taking were by force or upon delivery; and if by delivery, it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colourable pretence. *See ante*, p. 638.

A carrying away must also be proved, as in other cases of larceny. (*See ante*, p. 533.) And therefore, where the defendant, upon meeting a man carrying a bed, told him to lay it down, or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended; the judges held that the robbery was not complete. *R.* v. *Farrell*, 1 Leach, 322 n. (*b*). But where the defendant snatched at a lady's earring, and succeeded in separating it from the ear, and it was afterwards found among the curls of her hair; the Court held this a sufficient proof of asportation to support the indictment. *R.* v. *Lapier*, 1 Leach, 320; 2 East, P. C. 557, 708. Where the prisoner put his hand into the prosecutor's pocket, seized his purse and drew it to the edge of the pocket, but failed to draw it completely out of the pocket owing to its being caught in the prosecutor's belt, this was held to be sufficient evidence of asportation to support a charge of simple larceny, but not of larceny from the person. *R.* v. *Taylor* [1911] 1 K. B. 674; 80 L. J. (K. B.) 311; 75 J. P. 1; 27 T. L. R. 108.

It may be necessary to add here, that if the property is once taken, the offence will not be purged by the robber's delivering it back to the owner. 1 Hale, 53; 1 Hawk. c. 34, s. 2: *R.* v. *Peat*, 1 Leach, 228; 2 East, P. C. 557.

On this indictment the accused can be convicted of and punished for an assault with intent to rob. 6 & 7 Geo. 5, c. 50, s. 44 (1) (*ante*, p. 638).

Indictment for Robbery with Violence. (6 & 7 *Geo.* 5, *c.* 50, *s.* 23 (1) (b) *ante*, p. 637.)

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Robbery with violence, contrary to section 23 (1) (b) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, robbed C. D. of a watch, and at the time of or immediately before or immediately after such robbery did use personal violence to the said C. D.

Felony: penal servitude for life or for any term not less than three years, or imprisonment for not more than two years, with or without hard labour. The Court may also order the convict to be whipped. 6 & 7 Geo. 5, c. 50, ss. 23 (1), 37 (4) (ante, pp. 637, 501). *As to recognizances, and sureties for keeping the peace*, see Id. s. 37 (5) (b), ante, p. 501.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

The evidence to support this indictment will be the same as in ordinary cases of robebry, *see ante*, pp. 638 *et seq.* But in addition you must prove that the defendant either immediately before, at the time of, or immediately after the robbery, according to the allegation, wounded, beat, etc., the prosecutor, as the case may be. As to the nature of the evidence necessary to sustain the allegation of a wounding, *see post, tit. Assaults, etc.* What period of time can be comprised within the words "immediately before" or "immediately after," will be a question for the Court.

If the prosecutor should fail to prove the wounding, etc., the prisoner may be convicted of the robbery, and have sentence for the minor offence accordingly. And if he should fail to prove a robbery, but should prove an assault with intent to rob, the defendant may, on this indictment, be convicted and sentenced for such assault. 6 & 7 Geo. 5, c. 50, s. 44 (1), *ante*, p. 638. And wherever a robbery with aggravated circumstances, *i.e.*, by a person armed, or by several persons together, is charged in the indictment, the jury may convict of an assault with intent to rob attended with the like aggravation, and the defendant may, upon such conviction be sentenced to penal servitude for life, etc., under 6 & 7 Geo. 5, c. 50, s. 23 (1) (a): the assault following the nature of the robbery. *R.* v. *Mitchell*, 2 Den. 468; 21 L. J. (M. C.) 135: *R.* v. *Greenwood*, 2 C. & K. 359: *R.* v. *Barnett*, 2 C. & K. 594; 3 Cox, 432.

Indictment for Robbery by a Person armed. (6 & 7 Geo. 5, c. 50, s. 23 (1) (a), ante, p. 637.)

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Robbery with aggravation, contrary to section 23 (1) (a) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, being armed with a life preserver, robbed C. D. of 10*l*.

Felony: for punishment, see *notes to last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p 106).

Evidence.

The evidence to support this indictment will be the same as in ordinary cases of robbery (*see ante*, p. 638 *et seq.*), with the additional proof that the prisoner at the time of the robbery was armed with an offensive weapon or instrument. As to what will amount to an offensive weapon or instrument, see the cases referred to under the heads *Smuggling* and *Poaching*, *post*. If the offence were committed by several persons, and one of them were armed, the others being present aiding and abetting, it would seem that that would be sufficient to convict them all of the whole charge in the indictment. *See R.* v. *Smith*, R. & R. 368. The defendant may be convicted of the robbery only, or of an assault with intent to rob (*ante*, p. 638).

An indictment for robbery by two or more persons in company will be the same as an indictment for robbing alone (see infra), *except that it should charge that the defendants* together *robbed the prosecutor; if one of them only be apprehended, it will charge him by name*, "and a certain other person [*or* certain other persons] unknown," etc. *See R.* v. *Raffety*, 2 Lew. 271: *R.* v. *Ramsden*, 1 Cox, 37.

Indictment for an Assault with Intent to Rob. (6 & 7 *Geo.* 5, *c.* 50, *s.* 23 (3), ante, p. 637.)

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Assault, with intent to rob, contrary to section 23 (3) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

J. S., on the first day of June, A.D. ——, in the county of ——, assaulted J. N. with intent to rob him.

Felony: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 6 & 7 Geo. 5, c. 50, ss. 23 (3), 37 (4), ante, pp. 637, 501. *As to recognizances and sureties for keeping the peace*, Id. s. 37 (5) (b), ante, p. 501. *On an indictment for this offence the prisoner cannot be convicted of a common assault.* R. *v.*

Woodhall, 12 Cox, 240, Denman, J. : cf. R. *v.* King [1900] 19 N. Z. L. R. 409; and see R. *v.* Sandys, 1 Cox, 8.

The defendant may be convicted of this offence on an indictment for robbery. Id. s. 44 (1), ante, p. 638.

Indictments for assault with intent to rob, the prisoner being armed, or for assault with intent to rob, together with one or more person or persons, may easily be framed by comparing this with the precedents for robbery under the same circumstances. (See ante, p. 643). *The punishment is the same as for such robbery.* (See ante, p. 643.)

Evidence.

To support this indictment, you must prove the assault, and that it was coupled with an intent to rob. *See R.* v. *Barnett*, 2 C. & K. 594; 3 Cox, 432.

In proof of the former, it is not necessary to show that the defendant committed actual violence upon J. N.; for an assault is an attempt to commit a forcible crime upon another; and therefore, if the defendant, intending to rob J. N., did anything in his presence, with reference to him, in furtherance of that intent, it will be sufficient. The evidence upon this indictment usually proves a robbery with the exception of the taking and carrying away. In *R.* v. *Thomas*, 1 Leach, 330; 1 East, P. C. 417, it was held, that an indictment which alleged the assault to have been made upon J. N., was not supported by proof that the assault was made upon the driver of the post-chaise in which J. N. was; but this indictment was framed on 7 G. 3, c. 21 (*rep.*), which made it felony for any person with an offensive weapon to assault any other person, with intent to rob *such person;* and the more general words of the present statute would probably be satisfied by an indictment charging an assault upon A. with an intent to rob B.

The intent to rob must, of course, be proved from circumstances. It is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the assault, the time and place in which it was committed, the expressions or gestures of the defendant at the time, and the like. No actual demand of money, etc., is necessary to support this indictment. *R.* v. *Trusty*, 1 East, P. C. 418 : *R.* v. *Sharwin*, Id. 421. Assaulting and threatening to charge with an infamous crime, with intent thereby to extort money, was held to be an assault with intent to rob. *R.* v. *Stringer*, 2 Mood. 261; 1 C. & K. 188.

Where the defendant decoyed the prosecutor into a house, and chained him down to a seat, and there compelled him to write orders for the payment of money and for the delivery of deeds, and the paper on which he wrote remained in his hands half an hour, but he was chained all the time, this was held not to be an assault with intent to rob. *R.* v. *Edwards*, 6 C. & P. 515, 521; *see R.* v. *Phipoe*, 2 Leach, 673; 2 East, P. C. 599. Such cases as this, however, are now provided for by 6 & 7 Geo. 5, c. 50, s. 29 (2), *post*, p. 681.

PIRACY JURE GENTIUM.

Indictment.

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Piracy.

PARTICULARS OF OFFENCE.

J. S., K. S., and L. T., on the first day of August, A.D. ——, upon the high seas, assaulted and put in fear of their lives certain mariners, unknown, in a ship called the Windsor Castle, and stole the apparel and tackle of the said ship and seventy chests of opium on board the said ship.

As to venue and place of trial, see ante, pp. 29 *et seq.*

Piracy jure gentium *is robbery within the Admiralty jurisdiction;* Att.-Gen. for Hong-Kong, *v.* Kwok a Sing, L. R. 5 P. C. 179, 200; 42 L. J. (P. C.) 64; 12 Cox, 565: R. *v.* Dawson, 13 St. Tr. 451, Holt, C.J.; and see Republic of Bolivia *v.* Indemnity Mutual Marine Assurance Co., Ltd. [1909] 1 K. B. 785, *where the meaning of "piracy" in international, criminal, and commercial law is fully considered. Unlike piracy under municipal law, it is justiciable by the courts of every nation. In England it was justiciable only by the admiral* (2 Hale, 370), *until by* 28 H. 8, c. 15, *it was made triable according to the course of the common law, and punishable with death, and with loss of lands and goods, in the same manner as upon an attainder for robbery on land. The* Offences at Sea Act, 1799 (39 G. 3, c. 37), ss. 1, 2, *made all offences committed within the jurisdiction of the Admiralty punishable in the same manner as if they had been committed on land.* See R. *v.* Curling, R. & R. 123. *The* Offences at Sea Act, 1820 (1 G. 4, c. 90), s. 1, *extended to such offences the benefit of clergy, as if committed on land; and subjected the offences so made clergyable to the same punishment as if committed on land. And the* Criminal Law Act, 1827 (7 & 8 G. 4, c. 28), s. 12, *enacts that "all offences prosecuted in the High Court of Admiralty of England should, upon every first and subsequent conviction, be subject to the same punishment, whether of death or otherwise, as if such offences had been committed upon the land."* See now 7 W. 4 & 1 Vict. c. 88, s. 3 (post, p. 652). *The law as to piracy* jure gentium *and the mode of trying that offence is not altered by the* Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73); see s. 6. *But where such offence is also an offence defined by that Act it may be tried under that Act.*

The procedure as to arraignment, pleading, etc., on the trial of piracy is the same as in the case of felony. See 7 & 8 G. 4, c. 28, ss. 1, 2, 3 (ante, pp. 165,

191). 12 G. 3, c. 20, *as to the consequences of standing mute on arraignment, is virtually repealed as to England.*

Evidence.

Prove a robbery, and prove it to have been committed within the jurisdiction of the Admiralty. Attend also to the following particulars of evidence :—

Upon the high seas.]—The offence must be proved to have been committed within the jurisdiction of the Court of Admiralty, that is, upon some part of the sea which is not *infra corpus comitatûs*. 15 R. 2, c. 3 (*repealed* 1879, 42 & 43 Vict. c. 59, to " in any wise "). According to Coke, all rivers in this country, until they flow past the furthest point of land next the sea, are within the jurisdiction of the courts of common law, and not of the Court of Admiralty (*see* 3 Co. Inst. 113; *Velthusen* v. *Ormsby*, 3 T. R. 315); and the Admiralty jurisdiction does not extend to any haven, creek, arm of the sea, or other place within the body of a county : 3 Co. Inst. 113; 1 Hawk. c. 37, s. 16; thus, where the sea flows in between two points of land in this country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within, the Court of Admiralty of all offences without it. According to Hale, whose opinion seems to be better, the Admiralty had concurrent jurisdiction in such waters as to murder and maiming, and exclusive jurisdiction as to piracy. *R.* v. *Bonnet*, 15 St. Tr. 1231; *and see ante*, p. 31. And if a robbery be committed in creeks, harbours, ports, etc., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy. *R.* v. *Jemot*, Old Bailey, 28th Feb., 1812, MS. For the Court of Admiralty has jurisdiction over British ships in foreign rivers, below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to exercise concurrent jurisdiction. *R.* v. *Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M. C.) 12, *ante*, p. 32 : *R.* v. *Carr*, 10 Q. B. D. 76; 52 L. J. (M. C.) 12, *ante*, p. 33; *and see* Russell, Cr. (7th ed.) 32 n. Indeed, on an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R.* v. *Allen*, 1 Mood. 494. The Admiralty have exclusive jurisdiction over offences committed beyond the low-water mark; and between that and the high-water mark the Court of Admiralty has jurisdiction over offences done upon the water when the tide is in : and the courts of common law over offences committed upon the strand when the tide is out. *But see Embleton* v. *Brown*, 3 E. & E. 234 : 30 L. J. (M. C.) 1. *and ante*, p. 31 *et seq.* All the other parts of the high seas are indisputably within the jurisdiction of the Admiralty. *See ante*, pp. 31 *et seq.*

In a ship, etc.]—This must be proved as laid. If the name of the ship is unknown, it should be so stated in the indictment. (*See ante*, pp. 49, 51).

In the King's peace.]—If the persons robbed are subjects of a state at war with this country, although it may perhaps be piracy, yet it is not cognizable

as such in any court of Admiralty within this realm. 4 Co. Inst. 154; Y. B. 2 Ric. 3, f. 2. *See R.* v. *Sawyer*, R. & R. 294.

In fear, etc.]—This must be proved in the same manner as in robbery. Sir L. Jenk. xciv.

Piratically.]—The goods must be proved to have been taken *animo furandi*, as in other cases of larceny. Molloy, 71, s. 73. (*See ante*, pp. 511 *et seq.*) And they must be proved to have been either taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute robbery upon land. (*See ante*, pp. 638 *et seq.*)

The taking, to be piracy, must be without authority from any prince or state. If a party making a capture at sea does so by the authority of any prince or state, it cannot be considered piracy; for a nation never can be deemed pirates; fixed domain, public revenue, and a certain form of government exempt a people from that character. Even a capture by authority of the states of Algiers, Tunis, or Tripoli, was not treated as piracy. 2 Sir L. Jenk. 790; 1 Russ. Cr. (7th ed.) 256.

At common law, if a subject of this realm committed acts of hostility against another subject, under the authority of a commission from a foreign prince, it was not piracy; 2 Sir L. Jenk. 754; but the law has been altered in this respect by 11 W. 3, c. 7, and 18 G. 2, c. 30, s. 1 (*post*, p. 651). *See R.* v. *Evans*, 2 East, P. C. 798. As to trials for piracy of persons acting under the commission of Jas. 2, after his deposition, *see R.* v. *Golding*, 12 St. Tr. 1269.

If the subjects of the same state commit robbery upon each other, upon the high seas, it is piracy. If the subjects of different states commit robbery upon each other, upon the high seas, if their respective states are in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility. 1 Sir L. Jenk. xciv.; 4 Co. Inst. 154.

But if a commissioned ship, by mistake, capture a vessel belonging to the subjects of a friendly power, imagining it to belong to an enemy, and bring it into port for condemnation, that is not piracy. *See* 1 Sir L. Jenk. xciv.

PIRACY BY STATUTE.

Statutes.

28 *H.* 8, *c.* 15.—*Trial of Piracy according to the course of the Common Law.*]—See ante, pp. 31, 646.

11 *W.* 3, *c.* 7, *s.* 7 (*s.* 8 *in Ruffhead*).—*Piratical acts done under colour of foreign commission.*]—If any of his Majesty's natural born subjects or denizens of this kingdom shall commit any piracy or robbery or any act of hostility

gainst other his Majesty's subjects upon the sea under colour of any commission rom any foreign prince or state, or pretence of authority from any person whatoever, such offenders, and every of them, shall be deemed, adjudged, and aken to be pirates, felons. and robbers, and they and every of them being duly onvicted thereof according to this Act or the aforesaid statute of King Henry he Eighth (28 H. 8, c. 15) shall have and suffer such pains of death, loss of ands, goods and chattels, as pirates, felons, and robbers, upon the seas ought o have and suffer. [*See* R. *v.* Quelch, 14 St. Tr. 1067, *and for present punishnent*, 7 W. 4 & 1 Vict. c. 88, s. 3, post, p. 652.]

Sect. 8.—*Certain acts of commanders, seamen, etc., to be piracy.*]—. . . If ny commander or master of any ship, or any seaman or mariner shall, in any lace where the admiral has jurisdiction, betray his trust and turn pirate, enemy, r rebel, and piratically and feloniously run away with his or their ship or ships, r any barge, boat, ordnance, ammunition, goods, or merchandise, or yield hem up voluntarily to any pirate; or shall bring any seducing messages from ny pirate, enemy or rebel; or consult, combine or conferedate with, or attempt, r endeavour to corrupt any commander, master, officer, or mariner to yield up r run away with any ship, goods, or merchandizes, or turn pirate, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship, and goods committed to his trust, or that shall confine (*R.* v. *Jones*, 11 Cox, 393, *post*, p. 653) his master r make, or endeavour to make a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof according to the directions of this Act shall have and suffer pains of death, losses of lands, goods and chattels, as pirates, felons and robbers upon the seas ought to have and suffer. [*See* R. *v.* Dawson, 13 St. Tr. 454, 478; *and as to present punishment*, 7 W. 4 & 1 Vict. c. 88, s. 3, post, p. 652.] *In an indictment under this statute, it is no justification that the conduct of the captain had been unreasonable or vexatious, or that his orders had been unjust. But if his conduct was such as to afford reasonable ground for concluding that unless the men had imprisoned him, the crew, or any one of them, would have been in danger of their lives, or of suffering some grievous bodily harm from his conduct, it is a justification.* R. *v.* Rose, 2 Cox, 329. *A seaman engaged by the master of a vessel, and taken to sea without any such written agreement having been entered into between them as is rendered necessary by* 7 & 8 Vict. c. 112, s. 2, *is not a seaman or mariner within* 11 W. 3, c. 7, s. 8, *and therefore is not liable for any offence under that section. Semble, a merchant vessel is a ship within the meaning of that section.* R. *v.* Smith [1848] 3 Cox, 443.

Sect. 9.—*Accessories before the fact to piracy.*]— . . . All and every person and persons, whatsoever, who after the 29th day of September, 1700, shall, either on the land or upon the seas, wittingly or knowingly set forth any pirate, or aid or assist, or maintain, procure, command, counsel, or advise any person or persons, whatsoever, to do or commit any piracies or robberies upon the seas, and (*? if*) such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons, whatsoever, so as aforesaid, setting forth any pirate, or aiding, assisting, maintaining, procuring, commanding, counselling, or advising the same, either on the land or on the

sea shall be, and are hereby declared, and shall be deemed and adjudged to be accessory to such piracy and robbery done and committed.

Sect. 10.—*Concealing pirates or vessels taken by them.*]— . . . after any piracy or robbery is, or shall be, committed by any pirate or robber whatsoever, every person and persons who knowing that such pirate or robber has done or committed such piracy and robbery, shall on the land or upon the sea, receive, entertain, or conceal any such pirate or robber, or take or receive into his custody any ship, vessel, goods, or chattels, which have been by such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged to be accessory to such piracy and robbery. . . . [*Trial to be under* 28 H. 8, c. 15.]

4 *G.* 1, *c.* 11 (*Piracy Act*, 1717), *s.* 7.—*Mode of trial.*]—"And be it hereby declared that all and every person and persons who have committed or shall commit any offence or offences for which they ought to be judged, deemed, and taken to be pirates, felons, or robbers by 11 W. 3, c. 7 (*ante*, p. 648) may be tried and judged for every such offence in such manner and form as is by 28 H. 8, c. 15 directed and appointed for the trial of pirates. . . ."

8 *G.* 1, *c.* 24 (*Piracy Act*, 1721), *s.* 1.—*Certain acts of commanders, seamen, etc., to be piracy.*]— . . . If any commander or master of any ship or vessel, or any other person or persons shall . . . anywise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provisions, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with or supply or correspond with any pirate, felon, or robber on the seas, or if any person or persons shall any ways (*sic*) consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of any such piracy, felony, or robbery, such offender and offenders, and every of them, shall in each and every of the said cases be deemed, adjudged, and taken to be guilty of piracy, felony, and robbery, and he and they shall and may be inquired of, tried, heard, and adjudged of and for all or any of the matters aforesaid, according to [28 H. 8, c. 15] and [11 W. 3, c. 7] . . . [*punishment, rep.*, see post, p. 651] . . . and in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person or persons who shall be guilty thereof shall in all respects be deemed and punished as pirates as aforesaid.

Sect. 3.—*Accessories to be dealt with as principals.*]—And whereas there are some defects in the laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy and robbery is not nor cannot be apprehended and brought to justice. Be it therefore enacted . . . that every person and persons whatsoever who, by [11 W. 3, c. 7], are declared to be accessory or accessories to any

racy or robbery therein mentioned are hereby declared and shall be deemed
d taken to be principal pirates, felons, and robbers, and shall and may [from
d after March 25, 1758] be inquired of, heard, determined, and adjudged in
e same manner as persons guilty of piracy may and ought to be inquired of,
ied, heard, determined, and adjudged by the said statute (11 W. 3, c. 7) . . .
As to punishment, see 7 W. 4 & 1 Vict. c. 88, s. 3, post, p. 652.]

18 *G.* 2, *c.* 30 (*Piracy Act*, 1744), *s.* 1.—*Piracy committed under enemy's ommission.*]—. . . all persons being the natural born subjects or denizens of is Majesty who during the present or any future wars have committed or shall ommit any hostilities upon the sea, or in any haven, river, creek, or place here the admiral or admirals have power, authority, or jurisdiction against is Majesty's subjects by virtue of or under colour of any commission from any f his Majesty's enemies, or have been, or shall be any other ways adherent or iving comfort to his Majesty's enemies upon the sea [or in any haven, river, reek, or place where the admiral or admirals have power, authority, or jurisdiction] may be tried as pirates, felons, and robbers in the said Court of Admiralty, pon ship-board, or upon the land in the same manner as persons guilty of iracy, felony, and robbery are by the said Act [28 H. 8, c. 15] directed to be ried. . . . [*As to punishment*, see 7 W. 4 & 1 Vict. c. 88, s. 3, post, p. 652. ee R. *v.* Golding, 12 St. Tr. 1269 : R. *v.* Vaughan, 13 St. Tr. 485, 503, 524. *s to adhering to the King's enemies*, see post, tit. High Treason.]

Sect. 2.—*Persons acquitted or convicted not to be retried on the same facts for igh treason.* [See 52 & 53 Vict. c. 63, s. 33, ante, p. 160.]

Sect. 3.—*Persons offending against the Act and not tried under it to be riable under* 28 H. 8, c. 15, *for high treason.*

12 *G.* 3, *c.* 20.—*Proceedings against persons standing mute on arraignment or felony or piracy.*]—Virt. rep. 7 & 8 G. 4, c. 28, s. 2 (E.); 9 G. 4, c. 54, 8 (1) (see ante, p. 169).

5 *G.* 4, *c.* 113 (*Slave Trade Act*, 1824), *s.* 9.]—If any subject or subjects of is Majesty, or any person or persons residing or being within any of the lominions, forts, settlements, factories, or territories, now or hereafter belonging to his Majesty, or being in his Majesty's occupation or possession, or under he government of the United Company of Merchants of England trading to he East Indies, shall upon the high seas, or in any haven, river, creek, or lace, where the admiral has jurisdiction, knowingly and wilfully carry away, onvey, or remove, or aid or assist in carrying away, conveying or removing ny person or persons as a slave or slaves, or for the purpose of his, her, or heir being imported or brought as a slave or slaves into any island, colony, ountry, territory or place whatsoever, or for the purpose of his, her, or their eing sold, transferred, used or dealt with as a slave or slaves, or shall upon he high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, mbark, receive, detain or confine, or assist in shipping, embarking, receiving, letaining, or confining on board any ship, vessel, or boat, any person or persons or the purpose of his, her, or their being carried away, conveyed or removed

as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory or place, whatsoever, or for the purpose of his, her or their being sold, transferred, used or dealt with as a slave or slaves, then and in every such case, the person or persons so offending, shall be deemed and adjudged guilty of piracy, felony and robbery. . .

7 *W.* 4 *& 1 Vict. c.* 88 (*Piracy Act*, 1837), *s.* 2.—*Piracy with violence.*]—Whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut or wound any such person, or unlawfully do any act, whereby the life of such person may be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Sect. 3.—*Punishment of piracy.*]—Whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall, be liable . . . to be transported beyond the seas for the term of the natural life of such offender. . . . [" *The Acts hereinbefore referred to*" *are those mentioned in s.* 1 *of* 7 W. 4 & 1 Vict. c. 88 (*which section is repealed by* 37 & 38 Vict. c. 35), *and are as follows:*—28 H. 8, c. 15; 11 W. 3, c. 7; 4 G. 1, c. 11; 8 G. 1, c. 24, and 18 G. 2, c. 30. *Penal servitude was substituted for transportation by* 20 & 21 Vict. c. 3, s. 2, ante, p. 237.]

Sect. 4.—*Punishment of accessories.*]—See post, tit. Accessories.

5 *& 6 Vict. c.* 28, *ss.* 16, 18, *punishment for piracy in Ireland.*]—*Assimilated to that in England under* 7 W. 4 & 1 Vict. c. 88, s. 3, supra.

13 *& 14 Vict. c.* 26 (*Piracy Act*, 1850), *s.* 2.—*Jurisdiction of Admiralty Court and Vice-Admiralty Courts to adjudge as to alleged pirates attacked or captured by King's ships.* See *The Magellan Pirates*, 1 Spinks (Eccl. & Adm.), 81; 16 Jur. 1145.

33 *& 34 Vict. c.* 90.—*Fitting out expeditions against friendly states.*]—See post, tit. Foreign Enlistment.

36 *& 37 Vict. c.* 88, *s.* 26.—*Jurisdiction and procedure on offences against Slave Trade Acts.*]—Ante, p. 32.

41 *& 42 Vict. c.* 73 (*Territorial Waters Jurisdiction Act*, 1878), *s.* 6.]—The Act shall not prejudice or affect the trial in manner heretofore in use of an act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto: and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the admiral, such offence may be tried in pursuance of this Act or in pursuance of any other Act of Parliament law or custom relating thereto.

20 & 21 *Vict. c.* 3, *s.* 2.—*Substitution of penal servitude for transportation.*]—See ante, p. 237.

54 & 55 *Vict. c.* 69, *s.* 1.—*Terms of penal servitude and imprisonment.*]—See ante, pp. 238, 239.

Indictment for Piracy with Violence. (7 *W.* 4 & 1 *Vict. c.* 88, *s.* 2.)

Commencement as ante, p. 627.

STATEMENT OF OFFENCE.

Piracy with violence, contrary to section 2 of the Piracy Act, 1837.

PARTICULARS OF OFFENCE.

J. S., K. S., and L. T., on the 1st day of August, A.D. ——, on the high seas assaulted and put in fear of their lives certain mariners unknown in a ship called the *Good Hope*, and stole 100*l.* on board the said ship, and at the time of or immediately before or immediately after such piracy stabbed, cut, or wounded one J. N. on board the said ship.

The evidence will be the same as stated ante, p. 647, *with the addition of the proof necessary to sustain the above allegation. An indictment against sailors for "confining their master" under* 11 W. 3, c. 7, s. 8, *will be supported by evidence that, although no force was used, the master was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel.* R. *v.* Jones, 11 Cox, 393, Bovill, C.J., and *cf.* R. *v.* McGregor, 1 C. & K. 429.

Felony: death. 7 W. 4 & 1 Vict. c. 88, s. 2. *This sentence may be recorded.* 4 G. 4, c. 48, s. 1 (ante, p. 235).

The offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

As to offences made piracy by other statutes, see ante, pp. 648-652. *As to the offence of fitting out vessels, etc., for the slave trade, etc.*, see 5 G. 4, c. 113, ss. 10, 11, and 36 & 37 Vict. c. 88, and R. *v.* Zulueta, 1 C. & K. 215. See further *as to the offence of piracy*, 1 East, P. C. 792; 1 Russ. Cr. (7th ed.) 255; Wheaton (4th Eng. ed.), p. 198; (8th Amer. ed., by Dana), ss. 122-125; 1 Phillimore, Int. Law, 411.

LARCENY IN DWELLING-HOUSES, SACRILEGE, BURGLARY, HOUSEBREAKING, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 13.—*Larceny in dwelling-houses.*]—Every person who steals in any dwelling-house any chattel, money, or valuable security shall—(*a*) if the value of the property stolen amounts to five pounds; or (*b*) if he by any menace or threat puts any person being in such

dwelling-house in bodily fear; be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years. [*This section re-enacts* 24 & 25 Vict. c. 96, ss. 60, 61.]

Sect. 24.—*Sacrilege.*]—Every person who—(1) breaks and enters any place of divine worship and commits any felony therein; or (2) breaks out of any place of divine worship, having committed any felony therein; shall be guilty of felony called sacrilege and on conviction thereof liable to penal servitude for life. [*This section re-enacts* 24 & 25 Vict. c. 96, s. 50.]

Sect 25.—*Burglary.*]—Every person who in the night—(1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or (2) breaks out of the dwelling-house of another, having—(*a*) entered the said dwelling-house with intent to commit any felony therein; or (*b*) committed any felony in the said dwelling-house; shall be guilty of felony called burglary and on conviction thereof liable to penal servitude for life. [*This section re-enacts* 24 & 25 Vict. c. 96, ss. 51, 52.]

Sect. 26.—*Housebreaking and committing felony.*]—Every person who—(1) breaks and enters any dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, *office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty, or to any Government Department, or to any municipal or other public authority*, and commits any felony therein; or (2) breaks out of the same, having committed any felony therein; shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years. [*This section re-enacts* 24 & 25 Vict. c. 96, ss. 55, 56, *with the additions italicised.*]

Sect. 27.—*Housebreaking with intent to commit felony.*]—Every person who with intent to commit any felony therein,—(1) enters any dwelling-house in the night; or (2) breaks and enters any dwelling-house, place of divine worship or any building within the curtilage, or any school-house, shop, warehouse, counting-house, *office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty, or to any Government Department, or to any municipal or other public authority;* shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding seven years. [*This section re-enacts* 24 & 25 Vict. c. 96, ss. 54, 57, *with the additions italicised.*]

Sect. 28.—*Being found by night, armed or in possession of housebreaking implements.*]—Every person who shall be found by night—(1) armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any building and to commit any felony therein; or (2) having in his possession without lawful excuse (the proof whereof shall lie on such person) any key, picklock, crow, jack, bit, or other implement of housebreaking; or (3) having his face blackened or disguised with intent to commit any felony; (4) in any building with intent to commit any felony therein; shall be guilty of a misdemeanor and on conviction thereof liable—(*a*) if he has been previously convicted of any such misdemeanor or of any felony, to penal servitude for any term not exceeding ten years; (*b*) in all other cases, to penal servitude for any term not exceeding five years. [*This section re-enacts* 24 & 25 Vict.

. 96, ss. 58, 59; *the words "key, picklock" in sub-s.* 2 *being transposed in order o give effect to the decision in* R. *v.* Oldham, 2 Den. 472; 3 C. & K. 249; 1 L. J. (M. C.) 134.]

Sect. 38.—*Jurisdiction of quarter sessions.*]—(1) A court of quarter sessions —(*a*) notwithstanding anything in the Quarter Sessions Act, 1842 (5 & 6 Vict. . 38), shall in England have jurisdiction to try an indictment for burglary. (2) A justice of the peace in England when committing for trial a person harged with burglary shall commit him for trial before a court of assize unless, wing to the absence of any circumstances which make the case a grave or difficult one, he thinks it expedient in the interest of justice to commit him for rial before a court of quarter sessions; and the Assizes Relief Act, 1889 (52 & 53 Vict. c. 12), shall apply. [*These provisions re-enact* 59 & 60 Vict. c. 57.]

Sect. 41 (3).—*Arrest without warrant.*]—Any constable or peace officer may ake into custody without warrant any person whom he finds lying or loitering n any highway, yard, or other place during the night, and whom he has good ause to suspect of having committed or being about to commit any felony gainst this Act, and shall take such person as soon as reasonably may be efore a justice of the peace to be dealt with according to law. [*This sub- ection re-enacts* 24 & 25 Vict. c. 96, s. 104. *For rest of section*, see ante, . 504.]

Sect. 46 (1).—*Definition of "night."*]—The expression "night" means the nterval between nine o'clock in the evening and six o'clock in the morning f the next succeeding day. [*This definition is taken from* 24 & 25 Vict. . 96, s. 1.]

43 *& 44 Vict. c.* 9 (*Statutes (Definition of Time) Act*, 1880), *s.* 1.]—Whenever any expression of time occurs in any Act of Parliament, deed, or other egal instrument, the time referred to shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be *Greenwich* mean time, and n the case of Ireland, Dublin mean time. [*This enactment overrides the lecision in* Curtis *v.* Marsh, 28 L. J. (Ex.) 36.]

6 *& 7 Geo.* 5, *c.* 50, *s.* 46 (2) (*Definition of "dwelling-house"*).]—The expression "dwelling-house" does not include a building although within the same urtilage with any dwelling-house and occupied therewith unless there is a ommunication between such building and dwelling-house, either immediate or y means of a covered and enclosed passage leading from one to the other. [*This definition is taken from* 24 & 25 Vict. c. 96, s. 53.]

14 *& 15 Vict. c.* 19 (*Prevention of Offences Act*, 1851), *s.* 11.—*Apprehension of offenders.*]—It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

Sect. 12.—*Assaults in course of apprehension.*]—If any person liable to be apprehended under the provisions of this Act shall assault or offer any violence

to any person by law authorized to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years. (*See ante*, p. 239.)

Sect. 13.—*Definition of "night."*]—The time at which the night shall commence and conclude in any offence against the provisions of this Act shall be the same as in cases of burglary (*ante*, p. 655).

Indictment for Burglary, and Larceny to the value of 5l. (6 & 7 *Geo.* 5, *c.* 50, *ss.* 13, 25.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Burglary and larceny, contrary to sections 13 and 25 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., in the night of the —— day of ——, in the county of ——, did break and enter the dwelling-house of C. D. with intent to steal therein, and did steal therein one watch, the property of S. T., the said watch being of the value of ten pounds.

It is usual and proper to add a count for receiving where the felony intended and committed was larceny (see post, p. 726).

This form of count charges two offences. R. *v.* Hungerford, 2 East, P. C. 518 : R. *v. Withal*, 1 Leach, 88 ; *but has always been held good, notwithstanding the rules against duplicity* (vide ante, p. 53).

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—6 & 7 Geo. 5 c. 50, ss. 25, 37 (4) (ante, pp. 654, 501). *As to recognizances and sureties for keeping the peace*, Id. s. 37 (5) (b) (ante, p. 501). *As to the punishment for the larceny*, see s. 13 (ante, p. 653).

This offence is triable at quarter sessions, but the justices may commit for trial at assizes if to do so appears to be in the interests of justice. Id. s. 38 (ante p. 655).

Evidence.

Burglary, at common law, is the *breaking* and *entering* of the dwelling-house of another *in the night-time*, with intent to commit a felony therein : 1 Hale 549, 556; 1 Hawk. c. 38, ss. 1, 2; 4 Bl. Com. 224; 3 Co. Inst. 63; 2 Stephen Hist, Cr. L. 56; 3 *Id.* 150 : *R.* v. *Polly*, 1 C. & K. 77. A man cannot be indicted for committing burglary in his own house. Kel. (J.) 84; 2 East, P. C. 502, 506. At common law it would seem that a church may be the subject of

burglary: 3 Co. Inst. 64; 1 Hale, 559: *R.* v. *Baker*, 3 Cox, 581; but church breaking is now dealt with under 6 & 7 Geo. 5, c. 50, s. 24 (*ante*, p. 654). By 6 & 7 Geo. 5, c. 50, s. 25 (1) (*ante*, p. 654), the common law definition of burglary is incorporated into the *Larceny Act*, 1916, while by s. 25 (2) (*ante*, p. 654), the breaking out of the dwelling-house of another in the night-time, having entered it with intent to commit felony, or having committed a felony while in it, is also declared to be a burglary, thus re-enacting 24 & 25 Vict. c. 96, s. 51 (*rep.*). In order to maintain the above indictment, the prosecutor must prove that the defendant broke and entered the dwelling-house of C. D., in the night-time, with an intent to steal: and whether he succeed or fail in this, he may proceed to prove a larceny of the goods of S. T. in the dwelling-house of C. D. to the value of 5*l.*, in the manner directed *post*, p. 673, and if he succeeds in proving the larceny, but fails in proving it to have been committed in the dwelling-house of C. D., or the goods to have been of the requisite value, the defendant may be convicted of the simple larceny.

Having made these few general observations, we shall now proceed to state the evidence in burglary more particularly.

In the night.]—By the old authorities with reference to the meaning of night-time in cases of burglary, the day was divided into three parts: daylight, twilight, and night. If the breaking and entering were in the night, it was burglary, if in daylight it was not. If it were committed during twilight, then, if there were not daylight, or *crepusculum*, enough. begun, or left, to discern a man's face withal, it was a burglary; otherwise not. 3 Co. Inst. 63; 1 Hale, 550; 1 Hawk. c. 38, s. 2; 4 Bl. Com. 224. But this did not extend to moonlight; for then many midnight burglaries would go unpunished. 4 Bl. Com. 224; 1 Hale, 551. These authorities are superseded by the definition of night in 6 & 7 Geo. 5, c. 50, s. 46 (1) (*ante*, p. 655). The time appears now to be ascertained by reference to Greenwich mean time. (*See ante*, p. 655).

The breaking and entering must both be committed in the night-time: if the breaking is in the day, and the entering in the night, or the breaking in the night, and entering in the day, it is no burglary. 1 Hale, 551. But the breaking may be on one night, and the entry on another, *Id.*, provided the breaking be with intent to enter, and the entry with intent to commit a felony. *Id.*: *R.* v. *Smith*, R. & R. 417: *R.* v. *Jordan*, 7 C. & P. 432.

The dwelling-house of C. D.]—To prove this allegation, the prosecutor must prove that the defendant broke and entered the dwelling-house of C. D., in which he was in the habit of residing; 4 Co. Inst. 64; or some building between which and the dwelling-house there was a communication, either immediate, or by means of a covered and enclosed passage leading from the one to the other. 6 & 7 Geo. 5, c. 50, s. 46 (2) (*ante*, p. 655). And evidence of a breaking and entering of such a dwelling will sustain an indictment charging a breaking and entry of the dwelling-house. *R.* v. *Garland*, 1 Leach, 144: 2 East, P. C. 493, 512.

Every permanent building in which the tenant or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it.

Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. 1 Hale, 556; 3 Co. Inst. 65; 1 Hawk. c. 38, s. 18 : *see Monks* v. *Dykes*, 2 M. & W. 567 : *Fenn* v. *Grafton*, 2 Bing. (N. C.) 617; 3 Scott, 56. And it will be sufficient if any part of the family reside in the house. Thus, where a servant boy of the prosecutor always slept over his brewhouse, which was separated from his dwelling-house by a public passage, but occupied therewith, it was held, upon an indictment for burglary, that the brewhouse was a distinct dwelling-house of the prosecutor, although, being separated by the passage it could not be deemed to be part of the house in which he himself actually dwelt. *R.* v. *Westwood*, R. & R. 495. So, where upon an indictment for burglary in a shop, it appeared that the prosecutor had left his house without an intention of returning, and had let some of the rooms to lodgers, but continued his business there, and his apprentice and foreman and the foreman's wife, who was also his servant, employed in keeping the apartments clean, dwelt there, but received weekly wages, it was held to be the dwelling-house of the prosecutor. *R.* v. *Gibbons*, R. & R. 442. And where a counting-house, over which there were two rooms communicating by a trapdoor, which was never used, was broken open, and it appeared that the prosecutor's cooper and his family lived in the two rooms, under a contract that they should have the rooms to live in, and firing, and weekly wages, it was held that the counting-house was the dwelling-house of the prosecutor. *R.* v. *Stock*, R. & R. 185; 11 R. R. 605. The mere temporary absence of the owner and his family will not deprive the house of this protection the law gives it; as, for instance, if a man has a town and a country house, in which he resides alternately, and whilst he and his family are residing for the season in the country house, the town house is broken and entered; 1 Hale, 556; or if a man locks up his house and goes a journey, and, during his absence, it is broken and entered : *R.* v. *Murray*, 2 East, P. C. 496; or if a barrister has a set of chambers, in which he resides during the term only, and during the vacation they may be broken and entered : 1 Hale, 556; in these and the like cases the houses and set of chambers respectively, even although no person actually resided in them at the time, are deemed dwelling-houses, and the breaking and entering of them, burglary; provided it appear that the owners, when they left them, had an intention to return to them. 1 Hale, 556; Fost. 77 : *R.* v. *Nutbrown*, Fost. 76. But burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodges in it; 1 Hawk. c. 38, s. 35; 1 Hale, 557; because it is a temporary, not a permanent edifice. But if it is a permanent building, though used only for the purposes of a fair, it is a dwelling-house. *R.* v. *Smith*, 1 M. & Rob. 256. Breaking open a house in which no man resides, or is in the habit of residing, is no burglary, even though the owner use it for his meals and the purposes of his businesses; for it is not a dwelling-house. *R.* v. *Martin*, R. & R. 108. If a porter spends the night in a warehouse for the purpose of protecting goods, *R.* v. *Smith*, 2 East, P. C. 497; 2 Leach, 1019 n., or a servant spends the night in a barn in order to watch thieves, *R.* v. *Brown*, 2 East, P. C. 501; 2 Leach, 1018 n.; this does not make the warehouse or barn a dwelling-house, in which burglary can be committed. So, where the landlord of a dwelling-house, after the tenant had quitted it, put a servant into it, to sleep

there at night, until he should re-let it to another tenant, but had no intention to reside in it himself: the judges held that it could not be deemed the dwelling-house of the landlord. *R.* v. *Davies*, 2 Leach, 876; 2 East, P. C. 499. And where the prosecutor left his house without an intention of returning to live in it, but retained it as a workshop and warehouse, and two women employed in his business, not as domestic servants, slept in the house merely for the purpose of taking care of it, but did not take their meals there, or use the house for any other purpose, it was held not to be the dwelling-house of the prosecutor. *R.* v. *Flanagan*, R. & R. 187. So, where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it: it was held not to be a dwelling-house in which burglary could be committed. *R.* v. *Hallard*, 2 East, P. C. 498: *R.* v. *Thompson*, *Id.*; 2 Leach, 771. And the same has been ruled, where, under such circumstances, the tenant had put a person (not being one of the family) into the house, and for the protection of the goods and furniture in it, until it should be ready for his residence. *R.* v. *Harris*, 2 Leach, 701; 2 East, P. C. 498: *R.* v. *Fuller*, 2 East, P. C. 498; 1 Leach, 186 n. *See R.* v. *Jones*, 2 East, P. C. 499: *R.* v. *Flanagan*, R. & R. 187: and where a house was under repair and was not inhabited though containing property of the owner. *R.* v. *Lyons*, 1 Leach, 185; 2 East, P. C. 497.

A dwelling-house may be divided so as to form two or more dwelling-houses (within the meaning of the word in the definition of burglary), by letting a part of it to a tenant: provided there be no internal communication between the part so let and the remainder of the dwelling-house. Upon an indictment for burglary it appeared that the house in which the burglary was alleged to have been committed formed the centre of a building, having two wings: in one of which A. lived, and the other consisted of the dwelling-houses of B. and C. respectively; the centre consisted of three manufactories, in one of which A., B., D. and other persons were jointly concerned, and of the remaining two D. was the sole proprietor; C. was merely in the employment of D. There was no internal communication between the centre building and the houses of A. and B., nor between it and the house of C., except a window in the house of C., which looked into a passage that ran the whole length of the centre building. One of the counts in the indictment alleged the centre building to be the dwelling-house of C.; but the judges held that the window merely was not such an internal communication as could make the centre building be deemed parcel of C.'s house. *R.* v. *Egginton*, 2 B. & P. 508. Whether a part of a dwelling-house let separately from the rest can be considered a distinct dwelling-house and the subject of burglary depends on the mode of its user. Thus if a man hires a shop, parcel of another man's house, and unconnected with it by internal communication, and the tenant works or trades in it, but never sleeps there, it is no dwelling-house, and burglary cannot be committed in it. 1 Hale, 557, 558. If, on the contrary, he or any part of his family lie there it is deemed his dwelling-house, and may be laid to be so in an indictment for burglary. *Id.*; *and see R.* v. *Rogers*, 1 Leach, 89, 428: 2 East, P. C. 506. So, if he lets off part, and does not by himself or any of his family dwell in the other part, the part let off is the dwelling-house of the tenant, whether it communicate with

the other part or not, but the part not let off is not the subject of burglary. But if the owner of the dwelling-house lets the shop, which is unconnected by internal communication with the house, and also lets some rooms in the house, which are connected with the other parts of it, to the same person; and the tenant or some of his family sleep in the rooms; a breaking and entering of the shop, in that case, will be burglary, and it may be laid to be committed in the dwelling-house of the landlord. *R.* v. *Gibson*, 1 Leach, 357; 2 East, P. C. 508. *See Lee* v. *Gansel*, 1 Cowp. 1, 8: *R.* v. *Stock*, R. & R. 185; 2 Leach, 1015: *R.* v. *North Collingham*, 1 B. & C. 578: *R.* v. *Great Bolton*, 6 L. J. (M. C.) 81; 8 B. & C. 71: *R.* v. *Ditcheat*, 7 L. J. (M. C.) 110; 9 B. & C. 176: *R.* v. *Macclesfield*, 2 B. & Ad. 870: *Fenn* v. *Grafton*, 2 Bing. (N. C.) 617; 3 Scott, 56.

The term "dwelling-house" includes in its legal signification all outhouses occupied with and immediately communicating with the dwelling-house. But by 6 & 7 Geo. 5, c. 50, s. 46 (2) (*ante*, p. 655), no building, although within the same curtilage (*see post*, p. 679) with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of that Act, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.

Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a washhouse on the ground-floor, and of three bedrooms upstairs, one of them over the washhouse, and the bedroom over the house-place communicated with that over the washhouse, but there was no internal communication between the washhouse and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the washhouse, and was breaking through the partition wall between the washhouse and the house-place, it was held that the defendant was properly convicted of burglary in breaking the house. *R.* v. *Burrowes*, 1 Mood. 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy. *R.* v. *Higgs*, 2 C. & K. 322, Wilde, C.J. To be within the meaning of this section, the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a warehouse let to and occupied by A. and B., it was held that the warehouse could not be considered a part of the dwelling-house of A. *R.* v. *Jenkins*, R. & R. 244. If the building is not proved to be a dwelling-house the defendant must be acquitted of burglary. If there is any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage. 6 & 7 Geo. 5, c. 50, s. 26, *ante*, p. 654; *and see post*, p. 678.

Ownership of the dwelling-house.]—It has been already stated that the house must be occupied; and occupation rather than legal ownership must be proved. Occupation by a tenant at will is enough to make him owner for the purposes of this indictment. *R.* v. *Collett*, R. & R. 498. The person described as owner

must be proved to occupy in his own right, however precarious his tenure. Thus, an insolvent has been held to be rightly described as owner of a house in which he lived, although it was rented by his daughter, and she carried on business but did not live there. *R.* v. *Bridges*, 1 Cox, 261, Erle, J.

Where it is laid to be the dwelling-house of J. N., proof that it was occupied by his wife and her establishment alone will support the indictment. In such a case it was at common law necessary to allege it to be the dwelling-house of the husband, even although the wife lived separate from him, and the house had been taken by her, and she paid the rent, taxes, etc. *R.* v. *Farre*, Kel. (J.) 43; 1 Leach, 1064 n.: *and see Boggett* v. *Frier*, 11 East, 301: *R.* v. *Smyth*, 5 C. & P. 201; 1 M. & Rob. 155, Tenterden, C.J.: *R.* v. *French*, R. & R. 491: *R.* v. *Wilford*, R. & R. 517. This rule does not apply where the wife has obtained a judicial separation under 20 & 21 Vict. c. 85, s. 25, or a protection order under s. 21 of that Act, or a justice's separation order under 58 & 59 Vict. c. 39, ss. 4, 5. And under the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), a wife can hold her separate property without the intervention of trustees (s. 1), and has the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*. (*See* 6 & 7 *Geo.* 5, *c.* 50, *s.* 36, *ante*, p. 48). If, therefore, the house in which a burglary is committed or goods therein are the separate property of a married woman and in her occupation, it should be described in the indictment as hers. *See R.* v. *Murray* [1906] 2 K. B. 385; 75 L. J. (K. B.) 593; 21 Cox, 256.

If a man occupies a dwelling-house by his servants, and does not reside in it himself, the indictment must allege it to be the dwelling-house of the master; and evidence of an occupation by his servants will maintain the indictment. A difficulty very frequently arises in such cases, to ascertain whether the occupation by the servant is in his own right or in that of his master. Where three persons were in partnership in a bank and brewhouse, the business of which was transacted in the lower rooms of the house in question, and a cooper in the service of the partnership, at weekly wages, lived with his family in the upper rooms, which communicated with the lower rooms by means of a trapdoor and a ladder, but there was also a separate entrance to these rooms from without; the lower rooms were broken and entered, and property stolen from them; and the judges held that the house was well laid in the indictment to be the dwelling-house of the partners. *R.* v. *Stock*, R. & R. 185; 2 Leach, 1015; 2 Taunt. 339. Where a warehouseman, with his family, lived in a dwelling-house upon his master's premises, for which and for coals he paid his master a rent of 11*l.* a year, and the master let the house, which was worth 20*l.* *per annum* to an ordinary tenant, to the warehouseman at the lower rent, that he might reside upon the premises as a security, it was held that the warehouseman stood in the character of tenant, for the master might have distrained upon him for rent, and could not arbitrarily have removed him. *R.* v. *Jarvis*, 1 Mood. 7. *See R.* v. *Smyth*, 5 C. & P. 501. So where, with certain wages, a workman had a cottage rent-free to live in, it was held that, as the workman occupied this cottage for his own benefit, and not for the benefit of his master, it was well described as the dwelling-house of the workman. *R.* v. *Jobling*, R. & R.

525. Where a toll-gate house, occupied by a person employed by the lessee of the tolls to collect the tolls, at weekly wages, with the privilege of living in the toll-gate house erected by the trustees of the road for that purpose, was broken and entered in the night-time, it was held that the house was well described as the dwelling-house of the toll-gate keeper, because he had the exclusive possession, and it was unconnected with the premises of the lessee, who did not appear to have any interest in it. *R.* v. *Camfield*, 1 Mood. 42. So, where a gardener lived in the house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in, and kept the key, it was held that it might be laid either as his or his master's house. *R.* v. *Rees*, 7 C. & P. 568, Denman, C.J. And where a servant lived rent-free in a house belonging to his master, and his master paid the taxes, and his master's business was carried on in the house, but the servant and his family were the only persons who slept in the house, and that part of the house in which his master's business was carried or was at all times open to those parts in which the servant lived; upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held that it might be described as the servant's house; but it was not decided that it might not also be described as the house of the master. *R.* v. *Witt*, 1 Mood. 248; *and see R.* v. *Courtenay*, 5 Cox, 218 (Ir.). Where the house was described as the house of J. B., and it appeared that J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining, J. B. receiving no more wages than before he went to live in the house, it was held not rightly laid. *R.* v. *Rawlins*, 7 C. & P. 150. Where apartments in the house of a corporation are appropriated as lodgings for servants of the corporation, a burglary committed in them must be laid to have been committed in the dwelling-house of the corporation. *R.* v. *Picket*, 2 East, P. C. 501: *R.* v. *Hawkins*, Fost. 38; 2 East, P. C. 485: *and see R.* v. *Maynard*, 2 East, P. C. 501. So, a club-house cannot be laid as being a dwelling-house of the house-steward, who sleeps in it, and has charge of the property stolen. *R.* v. *Ashley*, 1 C. & K. 198. So, where apartments are assigned to any person in a royal palace, a burglary committed in them must be laid to have been committed in the mansion of the King. *R.* v. *Williams*, 1 Hale, 522: *and see R.* v. *Burgess* [1663] Kel. (J.) 27. But where a company in the country rented a house in London for their agent, in the upper part of which he resided with his family, and in the lower part transacted his business, it is reported to have been held by Graham, B., and Grose, J., that a burglary in the house was well laid to have been committed in the dwelling-house of the agent. *R.* v. *Margetts*, 2 Leach, 930. Where a house rented by A. and B., partners, was divided into two houses for the convenience of their respective families, the family of A. residing in one, the family of B. in the other, and there was no internal communication between them; a burglary in the part occupied by A. was held to be well laid to have been committed in the dwelling-house of A., and not of the partners, although the rent of both houses was paid jointly out of the partnership funds. *R.* v. *Jones*, 1 Leach, 537; 2 East, P. C. 504. But a house, the joint property of partners in trade, in which their business is

carried on, may be described as the dwelling-house of all the partners, though only one of the partners reside in it. *R.* v. *Athea*, 1 Mood. 329.

Where the room occupied by a guest in an inn is broken and entered in the night-time, an indictment for the burglary must lay it to have been committed in the dwelling-house of the innkeeper; 1 Hale, 557: *R.* v. *Prosser*, 2 East, P. C. 502; and the same in all other cases where the occupier has the use merely, and no interest in the apartment he occupies. *See* 1 Hawk. c. 38, s. 26. Apartments let to lodgers, however, admit of a different consideration. If part of a house is let to a lodger, who sleeps there, and no other person resides in the remainder of the house, a burglary in the lodgings must be laid to have been committed in the dwelling-house of the lodger. Where a coachman rented the loft over a coach-house and stables, and he and his family resided in it, a burglary committed in it was held to be well laid to have been committed in the dwelling-house of the coachman. *R.* v. *Turner*, 1 Leach, 305; 2 East, P. C. 492. So, if the house is let out to several lodgers, and the owner does not reside in it, a burglary in it must be alleged to have been committed in the dwelling-house of the person whose lodgings were broken and entered. *R.* v. *Rogers*, 1 Leach, 89; 2 East, P. C. 506: *and see R.* v. *Trapshaw*, 1 Leach, 427; 2 East, P. C. 506, 780. So where the shop of a dwelling-house is divided into two shops, with a door in each opening towards the street, and another into a common passage leading to the common staircase, and the whole of the house is occupied by the two occupiers of the shops, the separate shop of each may be described as the dwelling-house of each. *R.* v. *Bailey*, 1 Mood. 23. And where a lodger occupied a sleeping-room on the first floor, and the workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was held by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it. *R.* v. *Carrell*, 1 Leach, 237; 2 East, P. C. 606. But if the owner of the house resides in a part of it, and lets the rest out in lodgings—then, if the part occupied by the lodger is severed from that occupied by the owner, that is, if there is no internal communication between them, and the lodger and owner enter the house by different outer doors, a burglary in the part occupied by each respectively must be laid to have been committed in the dwelling-house of the person so occupying it; but if they are not severed, and the lodger and the owner enter by the same outer door, then the burglary must be laid to have been committed in the dwelling-house of the owner. 1 Leach, 90 n.; Kel. (J.) 83, 84; 2 East, P. C. 503. Where, therefore, the servant of the prosecutor dwelt in part of the house, and the rest, excepting the shop, was let off to lodgers; it was held that the shop in the prosecutor's occupation was properly described as the dwelling-house of the prosecutor. *R.* v. *Gibbons*, R. & R. 442. And where the prosecutor let to his son a shop, which had a separate entrance from the street, but communicated with the dwelling-house of the prosecutor by a back door, and the son used the shop as a place of business only, and did not reside there, it was held that the shop was properly described as the dwelling-house of the prosecutor. *R.* v. *Sefton*, R. & R. 202. If a person lets off part of his house, but does not dwell in the part reserved, the part let is the dwelling-house of the tenant, but the part reserved is not the subject of burglary; it is not the dwelling-house

of the tenant, because it forms no part of his holding, and it is not that of the owner, because he does not dwell in it. *R.* v. *Wilson*, R. & R. 115. The governor of a workhouse, under a contract for seven years with the guardians and overseers of the poor, occupied and dwelt in the governor's house, with the exception of one room reserved to the guardians and overseers as their office, of which the governor had one key, and the clerk of the guardians and overseers the other, but the governor's servant cleaned the room; upon an indictment for breaking and entering this room, it was held that it could not be described as the dwelling-house of the governor. *Id.: and see R.* v. *Frowen*, 4 Cox, 266.

Break.]—There must be a *breaking* of the house, either actual or constructive, to constitute burglary. If a man leaves his doors or windows open, and another enters therein with intent to commit a felony, it is no burglary. 1 Hale, 551; 3 Co. Inst. 64. So if there is an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *R.* v. *Lewis*, 2 C. & P. 628: *R.* v. *Spriggs*, 1 M. & Rob. 357.

An actual breaking is, where the offender for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting a latch, or unlooses any other fastening to doors or windows which the owner has provided. 3 Co. Inst. 64; 1 Hale, 552. *Pugh* v. *Griffith*, 71 L. J. (N. S.) Q. B. 169; 7 A. & E. 827, 836, Coleridge, J. Thus, an entry effected by taking out the glass from a door, was held to be burglary. *R.* v. *Smith*, R. & R. 417. So also where a pane of glass was broken, *R.* v. *Perkes*, 1 C. & P. 300; 15 R. R. 280: *R.* v. *Tucker*, 1 Cox, 73: or a cut pane of glass was pushed out. *R.* v. *Bird*, 9 C. & P. 44. And where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was held to be burglary, although there was an outer shutter which was not put to. *R.* v. *Haines*, R. & R. 451. So, where he raised a sash-window which was shut down close, but not fastened, though it had a hasp which might have been fastened. *R.* v. *Hyams*, 7 C. & P. 441. And where a window opening upon hinges, and fastened with wedges, but so that by pushing against it, it could be opened, was opened; it was held to be burglary. *R.* v. *Hall*, R. & R. 355. So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and thus got at and removed the fastening of the window and opened it, it was held to be a sufficient breaking. *R.* v. *Robinson*, 1 Mood. 327: *and see Ryan* v. *Shilcock*, 7 Ex. 72. In *R.* v. *Callan*, R. & R. 157, the prisoner after committing larceny in a dwelling-house by night broke out of the premises by lifting up a heavy flap of a cellar, which was not bolted, and upon a question reserved whether this was a sufficient breaking out to constitute a burglary, the judges were equally divided. *Cf. R.* v. *Lawrence*, 4 C. & P. 231. But in *R.* v. *Russell*, 1 Mood. 377, it was decided that lifting up the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. *See R.* v. *Brown*, 2 East, P. C. 487; 2 Leach, 1016 n. If a window is partly open, but not sufficiently

o admit a person, the raising of it so as to admit a person, is not a breaking f the house. *R.* v. *Smith*, 1 Mood. 178. Obtaining admission to a house by getting down the chimney is burglary; for the chimney is as much closed as the nature of things will admit. *R.* v. *Brice*, R. & R. 450; *and see* 1 Hawk. c. 38, . 6; 1 Hale, 552.

A constructive breaking is where the offender, with intent to commit a felony, obtains admission by some artifice, trick, or threat, for the purpose of effecting t. As, for instance, if a man knocks at a door, and upon its being opened, rushes in with a felonious intent; or upon pretence of taking lodgings, falls upon the landlord and robs him; or procures a constable to gain admittance in order to search for traitors, and then binds the constable and robs the house: ll these entries have been adjudged burglaries, although there were no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. 1 Hawk. c. 38, ss. 9, 10; Bl. Com. 226. So, where the defendants frightened the inmates of the house into admitting them. *R.* v. *Swallow*, 2 Russ. Cr. (7th ed.) 1070, 2287. So, where the defendant obtained admission by promising a boy, who was in the care of the house, some ale; and whilst the boy was gone for the ale, robbed the house; his was held to be burglary. *R.* v. *Hawkins*, 2 East, P. C. 485; Fost. 38. And, if a servant conspires with a robber, and lets him into the house by night, his is burglary in both; 1 Hale, 553; 1 Hawk. c. 38, s. 14: *R.* v. *Cornwall*, 2 Str. 881; *and see Saqui & Lawrence* v. *Stearns* [1911] 1 K. B. 426; 80 L. J. (K. B.) 451. But if a servant pretending to agree with a robber, opens the door and lets him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. *R.* v. *Johnson*, C. & Mar. 218, Maule, J., and Rolfe, B. The prisoner induced a pawnbroker's assistant to let him have the key of the pawnbroker's shop so that he could have a false key made. The assistant, in allowing the prisoner to have the key, was acting with the knowledge of his employer and of the police in order to effect the arrest of the prisoner, who was arrested upon opening the door of the shop with the false key. It was held, distinguishing *R.* v. *Johnson* (*supra*), that the prisoner was rightly convicted of breaking and entering the shop with intent to steal, for he did not walk in by an open door, but broke open the door with a key. *R.* v. *Chandler* [1913] 1 K. B. 125; 82 (L. J. (K. B.) 106; 23 Cox, 330; 108 L. T. 352; 77 J. P. 80; 29 T. L. R. 83. *Cf. R.* v. *Lawrence*, 4 Cox, 440, *ante*, p. 533.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall, or doors, or windows of a house; if the thief gets admission into the house by the outer door or window being open, and afterwards breaks or unlocks, etc., an inner door, for the purpose of entering one of the rooms, etc., in the house, it is burglary. 1 Hale, 553; *R.* v. *Johnson*, 2 East, P. C. 488. So, if a servant opens his master's chamber-door, or the door of any other chamber not immediately within his trust, with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another door with such evil intent, it is burglary. 1 Hale, 553, 554. It is doubted, whether breaking open cupboards, etc., in the inside of a house, affixed to the freehold, is burglary; see 1 Hale, 527; Fost. 108; and

Mr. Justice Foster, *in favorem vitæ*, recommended that it should not be so considered. Fost. 109. And clearly, the breaking open chests, etc., in a dwelling-house is not burglary. 1 Hale, 553, 554. The breaking must be of some part of the house; and, therefore, when the defendant opened an area gate with a skeleton key, and thence passed through an open door into the kitchen, it was held not to be a breaking, there being no free passage from the area to the house in the hours of sleep. *R.* v. *Davis*, R. & R. 322. And upon the same principle, it was held that the breaking of a door which was in the outward fence of the curtilage of a dwelling-house, and opened, not into any building, but into the yard only, was not a breaking of the dwelling-house. *R.* v. *Bennett*, R. & R. 289. Where a shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panelling, lined with iron; it was held that the breaking and entering the shutter-box did not constitute burglary. *R.* v. *Paine*, 7 C. & P. 135.

And enter.]—And there must be an *entry*, as well as a breaking, to constitute burglary; although we have seen that the entry need not be on the same night as the breaking. (*Ante*, p. 657.) Any the least degree of entry, however, with any part of the body, or with any instrument held in the hand, is sufficient; as, for instance, after breaking the door or window, etc., to step over the threshold, to put a hand or a finger, *R.* v. *Davis*, R. & R. 499, or a hook or other instrument in at a window to draw out goods, or a pistol, with intent to kill or demand money, are all of them burglarious entries. 1 Andr. 114; 1 Hale, 555; 1 Hawk. c. 38, s. 11, 12; 3 Co. Inst. 54: *R.* v. *Gibbons* [1752] Fost. 107. See *R.* v. *Meal*, 3 Cox, 70, as to the amount of evidence necessary. So, if the defendant introduces his hand through a pane of glass broken by him, between the outer window and an inner shutter, for the purpose of undoing the window-latch, it is a sufficient entry. *R.* v. *Bailey*, R. & R. 341: *and see* *R.* v. *Tucker*, 1 Cox, 73. So, an entry down a chimney is a sufficient entry into a house, for the chimney is part of the house. *R.* v. *Brice*, R. & R. 450. But an entry through a hole in the roof left for the purpose of admitting light is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and needs protection; whereas, if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *R.* v. *Spriggs*, 1 M. & Rob. 357. It has even been said that discharging a loaded gun into a house is a sufficient entry. 1 Hawk. c. 38, s. 11; *secus* 1 Hale, 555. But there must be an entry: if, for instance, a man assaults a house, or even breaks a hole in it, and before the entry the owner flings his money to the thief, it would not be burglary. 1 Hawk. c. 38, s. 3; 1 Hale, 555. So, if the instrument with which the house is broken happens to enter the house, but without any intention on the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute a burglary. *R.* v. *Hughes*, 1 Leach, 406; 2 East, P. C. 491. *See* *R.* v. *Roberts*, 2 East, P. C. 487; *R.* v. *O'Brien*, 4 Cox, 398. Where, therefore, the defendant threw up a window, and introduced a crow-bar to force the shutters, which were three inches from the window, but no part of his hand was within the window, this was held not to be an entry,

lthough the jury found that the defendant did this with intent to steal. *R.* v. *Rust*, 1 Mood. 183. Where the breaking with intent to commit a felony is roved, but there is no proof of entry, the jury may convict the prisoner of he attempt to commit burglary. *R.* v. *Spanner*, 12 Cox, 155, *per* Bramwell, B., *fter consultation with* Martin, B.

Entry without breaking.]—The cases as to what constitutes entry are equally pplicable to offences under 6 & 7 Geo. 5, c. 50, s. 27 (*ante*, p. 654), which unishes entry by night into a dwelling-house without breaking with intent to ommit a felony therein.

With intent, etc.]—The intent laid in the indictment must be to commit ome *felony* (and whether a felony at common law or by statute is immaterial; Kel. (J.) 46, 67; 1 Hawk. c. 38, s. 38; 2 East, P. C. 513) in the dwelling-ouse, such as larceny, murder, rape, etc.; and the intent must be proved as aid. *See R.* v. *Pearson*, 74 J. P. 175; 4 Cr. App. R. 40. Where the intent s at all doubtful it may be laid in different ways in different counts: *R.* v. *Thompson*, 2 East, P. C. 515; 2 Leach. 1105 n.; or in the alternative in the ame count. 5 & 6 Geo. 5, c. 90, rule 5 (1), *ante*, p. 46.

The best evidence of the intent is, that the defendant actually committed the elony alleged to have been intended by him: *see R.* v. *Locost*, Kel. (J.) 30: r you may give in evidence any other facts from which the intent may be resumed by the jury. (*See ante*, pp. 357, 359.) Where the defendant was liscovered in the chimney of a shop in the night-time, and the jury found him guilty of the burglary with intent to steal, it was held that the evidence was sufficient to warrant the conviction. *R.* v. *Brice*, R. & R. 450.

And did steal therein, etc.]—There must be an actual and not merely a constructive taking, but in all other respects the larceny must be proved in the manner directed (*ante*, p. 511 *et seq.*). Then prove that it was committed in the dwelling-house of C. D, situate as described in the indictment, or in some building occupied therewith and connected or communicating therewith, either immediately or by means of a covered and inclosed passage. 6 & 7 Geo. 5, c. 50, s. 46 (2) (*ante*, p. 655; *post*, p. 679). It seems, however, that to convict the defendant of the felony charged to have been committed, it must appear to have been concurrent with the burglary; you cannot give evidence of a felony committed at a different time. Where it appeared in evidence, that, upon entering the house at three o'clock in the day, the owner found that some person had removed certain goods to a different part of the house from that in which he had placed them, seemingly for the purpose of stealing them; and the defendants afterwards, on the same evening, having broken and entered the house, were taken in it, before they had attempted to move or carry away anything: having failed at the trial to prove the burglary, the prosecutor was proceeding to prove the defendants guilty of the antecedent larceny: but the Court refused to receive the evidence, saying, that the transactions were perfectly distinct, and that the prosecutor might as well attempt to prove a larceny committed seven years before. *R.* v. *Vandercomb*, 2 Leach. 708; 2 East, P. C. 514.

If you succeed in proving a larceny, but fail in proving the burglary, the defendant may be convicted, as the proof may be, of the simple larceny, or of stealing in the dwelling-house. *R.* v. *Withal*, 1 Leach, 88; 2 East, P. C. 515, 517 : *and see R.* v. *Compton*, 3 C. & P. 418. *See also ante*, pp. 211, 212. If two or more are indicted, one may be found guilty of the burglary and larceny, and the other of the larceny only. *R.* v. *Butterworth*, R. & R. 520 (*see ante*, p. 56) : *R.* v. *Turner*, 1 Sid. 171, *contra*. Where a room-door was latched, and a person lifted the latch and entered the room, and concealed himself for the purpose of committing a larceny there, which he afterwards effected; and two other persons were present with him when he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella, it was held that those two were in law parties to the breaking and entering, and were answerable for the larceny which afterwards took place, though they were not near the spot when it was perpetrated. *R.* v. *Jordan*, 7 C. & P. 432. Where the breaking is on one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence. *Id.*

Indictment for Burglary by breaking out of a House after stealing therein. (6 & 7 *Geo.* 5, *c.* 50, *s.* 25 (2), ante, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Burglary, contrary to section 25 (2) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., in the night of the —— day of ——, in the county of ——, being in the dwelling-house of J. N., stole therein one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, the property of J. O., and having committed the felony aforesaid, afterwards, to wit, in the night of the same day, broke out of the said dwelling-house of the said J. N.

Felony: 6 & 7 Geo. 5, c. 50, s. 25 (2). See *the precedent*, ante, p. 656.

This offence is triable at quarter sessions. 6 & 7 Geo. 5, c. 50, s. 38 (ante, p. 655).

Evidence.

Prove a larceny in the dwelling-house of J. N., as directed *ante*, pp. 657 *et seq.* And prove a breaking of the house by the defendant, in the night-time, in order to get out of the same. In *R.* v. *Lawrence*, 4 C. & P. 231, Bolland, B., held that escaping from a house by lifting a heavy flap-door which had no fastening, but was kept down by its own weight, was not a sufficient breaking

out of a house, although, as we have seen (*ante*, p. 665), it would constitute a good breaking *into* a house. But in *R.* v. *McKearney*, Jebb, Circ. Ct. Ir., 99, it was held that a man was properly convicted of burglary by breaking out, who broke a skylight from within and put his head out but was struck and captured before he could get out. It is not the less a burglary, because the defendant was *lawfully* in the house, as a lodger, or a guest at an inn. *R.* v. *Wheeldon*, 8 C. & P. 747.

If it is doubtful whether a felony can be proved, but there is sufficient evidence of an intent to commit a felony, a count may be added stating the intent. To prove this count, the prosecutor must prove the entry, the intent as in other cases, and the breaking out.

Indictment for being found by Night armed, with intent to break into a building and to commit a Felony therein. (6 & 7 *Geo.* 5, *c.* 50, *s.* 28 (1), ante, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Being found by night armed, with intent, contrary to section 28 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., in the night of the —— day of ——, in the county of ——, was found armed with a crow-bar [*any dangerous or offensive weapon or instrument*], with intent to break and enter [*break or enter*] into the shop ["*any building*"] of J. N. and to steal the property of the said J. N. therein. *At the London County Sessions a stone and a piece of linen with treacle on it, such linen being used by housebreakers to prevent any sound of broken glass, were held each to be implements of housebreaking under this section;* R. *v.* Percival [1905] 69 J. P. 320. *It is not necessary to aver that the goods and chattels were the property of any particular person;* R. *v.* Lawes, 1 C. & K. 62 (*and ante*, p. 47). *The indictment must, as in burglary, allege the ownership of the premises intended to be broken into,* R. *v.* Jarrald, L. & C. 301; 32 L. J. (M. C.) 258; 9 Cox, 307; *and it seems also that it ought to allege the particular felony intended to have been committed.* Id. per Crompton, J.

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour; 6 & 7 Geo. 5, c. 50, ss. 28 (b), 37 (4). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour,* see Id. s. 37 (5) (a) (c) (ante, p. 501). *For the like offence after a previous conviction for felony or such misdemeanor, penal servitude for not more than ten nor less than three years, or imprisonment for not more than two years, with or without hard*

labour, Id. ss. 28 (a), 37 (4) (ante, p. 501). *As to recognizances and sureties for keeping the peace*, Id. s. 37 (5) (a) (c) ante, p. 501).

Evidence.

Prove that the defendant was found by night, that is, between nine o'clock p.m. and six o'clock a.m., see 6 & 7 Geo. 5, c. 50, s. 46 (1) (*ante*, p. 657), and armed as alleged in the indictment. Then prove the intent, which may be inferred from the nature of the weapon or instrument with which the defendant is found armed, the place in which he is found, or from his declarations, or from other circumstances (*see ante*, pp. 355, 357, 397). It is necessary that the defendant should be proved to have had the intent of breaking into or entering some particular building, and proof of a general intent to break into houses will be insufficient. *R.* v. *Jarrald*, *supra*.

Indictment for having in Possession, by Night, Implements of Housebreaking. (6 & 7 *Geo.* 5, *c.* 50, *s.* 28 (2), ante, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Being found by night with implements of housebreaking, contrary to section 28 (2) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., in the night of the —— day of ——, A.D. ——, in the county of ——, was found having in his possession without lawful excuse, certain implements of housebreaking, that is to say, ten keys, ten picklocks, and two crows.

Misdemeanor: 6 & 7 Geo. 5, c. 50, s. 28 (ante, p. 654). See *the last precedent*.

Evidence.

Prove that the defendant was found by night (that is, between nine p.m. and six a.m., *see supra*), having in his possession one or more of the implements of housebreaking mentioned in the indictment. Every instrument which from its nature is capable of being used for housebreaking, although ordinarily used for lawful purposes, *e.g.*, a house door-key, or a pair of pincers, is an implement of housebreaking within the statute, if the jury are of opinion, from the circumstances, that at the time when the defendant was found in possession of it, it was his intention to use it as such. *R.* v. *Oldham*, 2 Den. 472; 3 C. & K. 249; 21 L. J. (M. C.) 134. The lawful excuse for possession, if any, must be proved by the defendant. Where the alleged implements of housebreaking—namely, a chisel and a screwdriver—were tools ordinarily used by bricklayers, and the defendant stated at the trial that he was a bricklayer

and that the tools were the ordinary tools of his trade, it was held that he had *primâ facie* satisfied the onus cast upon him of proving that he had a lawful excuse for the possession of the tools, and that the onus was then cast upon the prosecution of proving that the accused had no lawful excuse for being in possession of the tools at the particular time and place. *R.* v. *Ward* [1915] 3 K. B. 696; 85 L. J. (K. B.) 483; 80 J. P. 16; 114 L. T. 192; 11 Cr. App. R. 245; 25 Cox, 255. Where several persons are found at night acting in pursuance of a common purpose to break into houses, but one only has housebreaking implements, all may be convicted of possessing them. *R.* v. *Thompson*, 11 Cox, 362 (C. C. R.). As to what constitutes finding by night, *see R.* v. *Stevenson*, 69 J. P. 84.

Semble, that it was a misdemeanor at common law to *have possession* of instruments of housebreaking, with intent to break into a house and steal the goods therein : *see R.* v. *Lee*, Cas. (K. B.) temp. Hardw. 371 (*cit.*); *sed quære*; *see ante*, p. 3.

Indictment for breaking and entering a Church or Chapel and stealing therein. (6 & 7 *Geo.* 5, *c.* 50, *s.* 24 (1), ante, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Sacrilege, contrary to section 24 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

J. S., on the 1st day of June, A.D. ——, in the county of ——, broke and entered the church of the parish of —— [*or* a certain chapel, in the parish of ——] ("*any place of divine worship*"), and stole, in the said church, one silver cup, the property of the parishioners of the said parish.

If a chapel which is private property be broken and entered, lay the property as in other cases of larceny.

As to burglary in a church, *see* R. v. Baker, 3 Cox, 581. *As to breaking into a church with intent to commit felony*, see 6 & 7 Geo. 5, c. 50, s. 27 (2) (ante, p. 654).

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour—6 & 7 Geo. 5, c. 50, ss. 24, 37 (4) (ante, p. 654). *As to recognizances, and sureties for keeping the peace*, Id. s. 37 (5) (b) (ante, p. 501).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant broke and entered the church or chapel described in the indictment, in the same manner as in burglary (*ante*, p. 664), except

that it need not be proved to have been done in the night-time. The vestry is part of the church for this purpose. *R.* v. *Evans*, C. & Mar. 298. So is a church tower, unless it is a structure quite separate from the church. *R.* v. *Wheeler*, 3 C. & P. 585. If the evidence fails in this respect, the defendant may be convicted for simple larceny. Then prove the larceny, as directed (*ante*, pp. 511 *et seq.*). In *R.* v. *Nicholas*, 1 Cox, 218, on an indictment for breaking into a church in the night-time, it was held unnecessary to lay the ownership of the property in the church in any person. *See now* 5 & 6 Geo. 5, c. 90, r. 6 (*ante*, p. 47). The allegation of property in the parishioners, rector or churchwardens, will be sufficiently proved by evidence that the church is a parish church; but the property in goods in a chapel must be proved as in ordinary cases. Where a prisoner was indicted for stealing a Bible, a hymn-book, and a pair of brass sconces, the property of J. B. and others, which it appeared had been stolen from a Methodist chapel at Fakenham, and the Bible and hymn-book had been presented to the Society of Methodists there, of which J. B. was one, and also a trustee of the chapel, but the trust deed was not produced, Parke, J., held, that as J. B. was one of the society, the property was well laid in him. *R.* v. *Boulton*, 5 C. & P. 537. Where the property stolen was a box containing money collected for the poor, which was screwed to the outside of a pew in the centre aisle of a church, the box was held not to be affixed to the freehold, and the property was held to be well laid in the churchwardens in their individual names. *R.* v. *Wortley*, 1 Den. 162; 2 C. & K. 283; 2 Cox, 32.

Indictment for Housebreaking. (6 & 7 *Geo.* 5, *c.* 50, *s.* 26 (1), ante, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Housebreaking and larceny, contrary to section 26 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, broke and entered the dwelling-house of J. N. and stole a dressing-case of the value of 5*l.* the property of the said J. N. in the said dwelling-house.

If the evidence fails to prove the actual stealing, but the breaking, entry and intent to steal is proved, the prisoner may be convicted under this indictment of the felony described in 6 & 7 Geo. 5, c. 50, s. 27 (2). *If the evidence fail to prove the breaking, but if the stealing in the dwelling-house to the amount of 5 be proved, the prisoner may be convicted of the felony described in* 6 & 7 Geo. 5 c. 50, s. 13 (a) (ante, p. 653).

Felony: penal servitude for not more than fourteen nor less than three years, r imprisonment for not more than two years, with or without hard labour.— & 7 Geo. 5, c. 50, ss. 26, 37 (4) (ante, p. 501). As to recognizances and ureties for keeping the peace, see Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

The dwelling-house of J. N.]—This must be proved in the same manner as in urglary. As to what buildings are included in the term dwelling-house, *see* & 7 Geo. 5, c. 50, s. 46 (2) (*ante*, p. 655).

Did break and enter.]—This must be proved in the same manner as in urglary; 1 Hale, 596; Fost. 108 (*see ante*, pp. 664 *et seq.*); except that it need ot be proved to have been done in the night-time, but if it is proved to have een done in the night-time, so as to amount to burglary, the defendant may otwithstanding be convicted upon this indictment.

In the said dwelling-house.]—There must be an actual and not merely a onstructive taking, but in all other respects the larceny may be proved in the nanner directed, *ante*, p. 511 *et seq.* Where the prosecutor, in consequence of he threat of an armed mob, fetched provisions out of his house and gave them o the mob, who stood outside the door, this was held not to be stealing in the dwelling-house. *R.* v. *Leonard*, Cheshire Special Commission, 1842. Where t appeared that the prisoner, after breaking and entering the house, took two alf-sovereigns from a bureau in one of the rooms, but, being immediately letected, threw them under the grate in that room, Park, J., held that this vas a sufficient asportation to constitute a stealing within this section of the tatute. *R.* v. *Amier*, 6 C. & P. 344. The value of the goods is immaterial, f a breaking and entry are proved.

If the prosecutor succeeds in proving the larceny, but fails in proving any f the other circumstances above mentioned, the defendant may be convicted of imple larceny; or if the prosecutor fails in proving the breaking and entry, nd the goods are laid and proved to be of the value of five pounds, the defendant ay be convicted of stealing in the dwelling-house. The defendant cannot, on is indictment, be convicted of breaking and entering the dwelling-house, and tempting to steal the prosecutor's goods, when it appears that the goods ecified in the indictment were not in the house at the time, though other ods of the prosecutor's were. *R.* v. *M'Pherson*, Dears. & B. 197; 36 L. J. [. C.) 134; 7 Cox, 281. He may, however, it would seem, under such circum- ances, be convicted of breaking and entering with intent to commit a felony nder 6 & 7 Geo. 5, c. 50, s. 27 (2) (*ante*, p. 632); *and see R.* v. *Ring*, 61 L. J. [. C.) 116 (*ante*, p. 534).

Indictment for breaking into and stealing in a Shop. (6 & 7 *Geo.* 5, *c.* 50, *s.* 26 (1), *ante*, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Shop breaking and larceny, contrary to section 26 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, broke and entered the shop of J. N. and stole twenty yards of muslin, the property of the said J. N. in the said shop. *The indictment need not allege expressly that the defendant stole the goods in the shop:* R. *v.* Andrews, C. & Mar. 121, *overruling* R *v.* Smith, 2 M. & Rob. 115.

Felony: see the last precedent. 6 & 7 Geo. 5, c. 50, s. 26 (1) (ante, p. 654).

Evidence.

Prove that the defendant broke and entered the shop, etc., in question, in the same manner as upon an indictment for burglary (*ante*, p. 664), except that it is immaterial whether the breaking and entry be by night or by day; if this proof fails, the defendant may be convicted of the simple larceny. Prove that the shop, etc., was at the time, etc., the shop of J. N., that is, that he occupied it, and carried on the business there; then prove the larceny of the goods enumerated in the indictment, in the same manner as upon an indictment for housebreaking (*supra*), or stealing in the dwelling-house (*post*, p. 675). The value is immaterial. And, lastly, prove that the shop, etc., is situate as described in the indictment.

A " warehouse " need not be such as factors or traders keep their goods for sale in, and where customers go to view them, but includes such as are used for the safe keeping of goods merely: *R.* v. *Hill*, 2 M. & Rob. 458, Rolfe, B. There is a *dictum* of Alderson, B., upon 7 & 8 G. 4, c. 29, s. 15 (*rep.*), that a *shop*, to be within it, must be a shop for the sale of goods, and that a mere workshop (such as a carpenter's or blacksmith's shop) would not be sufficient *R.* v. *Sanders*, 9 C. & P. 79; but in *R.* v. *Carter*, 1 C. & K. 173, Denman, C.J. dissented from that *dictum*, and held that a blacksmith's shop, used as a work shop only, was within 7 & 8 G. 4, c. 29, s. 15 (*rep.*). By 6 & 7 Geo. 5, c. 50, s. 26, a workshop is expressly protected.

As to what building is a *counting-house* within the statute, *see R.* v. *Potter*, 2 Den. 235; C. & K. 179; 20 L. J. (M. C.) 170; 5 Cox, 187, decided on 7 & 8 G. 4, c. 29, s. 15 (*rep.*).

By s. 26 of the *Larceny Act*, 1916, in addition to the buildings specified in 24 & 25 Vict. c. 96, s. 56 (*rep.*), it is made an offence to break and enter any " office, store, garage, pavilion, factory or workshop, or any building belonging to His Majesty, or to any Government Department, or to any municipal

other public authority," and to commit a felony therein. *See also* s. 27 (2) of the *Larceny Act*, 1916 (*ante*, p. 654).

Opening by a servant of the door of a shop under the same roof as the house in which he served, was held a breaking and entering within 7 & 8 G. 4, c. 29, s. 12 (*rep.*). *R.* v. *Wenmouth*, 8 Cox, 348.

Indictment for stealing in a Dwelling-house, some Person therein being put in fear. (6 & 7 *Geo.* 5, *c.* 50, *s.* 13 (b), ante, p. 653.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Larceny and threats, contrary to section 13 (b) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the first day of May, A.D. ——, in the county of ——, stole one silver basin, of the value of five pounds, the property of J. N., in the dwelling-house of the said J. N., and by a menace or threat put one J. L. and M. his wife, being therein, in bodily fear. *The indictment must expressly allege that some person in the house was put in fear by the defendant.* R. *v.* Etherington, 2 Leach, 671; 2 East, P. C. 635. *The value if amounting to 5l. had better always be inserted, as the prisoner may be convicted on this indictment of stealing to the value of 5l., in the dwelling-house, if no menace or threat should be proved.* See *ante*, p. 211.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour—5 & 7 Geo. 5, c. 50, ss. 13, 37 (4) (ante, p. 501). *As to recognizances and sureties for keeping the peace*, Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

Prove the larceny in the dwelling-house as directed (*ante*, pp. 511, 673). The value is immaterial, if some person was in the house at the time, and was put in bodily fear by a menace or threat of the defendant; which may be either by words or gestures. *R.* v. *Jackson*, 1 Leach, 267. Lastly, prove that the person mentioned in the indictment was in the house at the time, and was put in fear by the menaces or threats of the defendant or his accomplices. *R.* v. *Etherington* (*supra*). It is not necessary that all the accused should be in the house if some entered and all acted together. *R.* v. *Murphy*, 6 Cox, 340. On the former statutes, which did not require that the party should be put in fear *by a menace or threat*, it does not appear to have been settled whether it was necessary to prove an actual sensation of fear: but now, by the express words of the present statute, it must be proved that the putting in fear was by an actual menace or threat.

If the prosecutor fails to prove that the person mentioned in the indictment was in the dwelling-house, and was put in fear, the defendant may still be convicted of simple larceny; or if the goods stolen in the dwelling-house are laid and proved to be of the value of five pounds, he may be convicted of stealing in the dwelling-house.

Indictment for stealing in a Dwelling-house to the value of 5l.
(6 & 7 *Geo.* 5, *c.* 50, *s.* 13 (a), *ante*, p. 653.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Larceny, contrary to section 13 (a) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, stole one silver sugar basin, of the value of three pounds, six silver table-spoons, of the value of three pounds, and twelve silver tea-spoons, of the value of two pounds, the property of J. G., in the dwelling-house of J. N.

Felony: see *the last precedent*. 6 & 7 Geo. 5, c. 50, s. 13 (ante, p. 653).

Evidence.

Prove the larceny as directed *ante*, pp. 511 *et seq.* Prove it to have been committed in the dwelling-house of J. N., or in some building occupied therewith, and connected or communicating therewith, either immediately or by means of a covered and enclosed passage leading from the one to the other (*ante*, p. 655); and prove the goods stolen to be of the value of five pounds or more.

If you fail to prove the larceny, the defendant must be acquitted altogether unless you prove an *attempt* to commit larceny, in which case the defendant may be convicted of such attempt under 14 and 15 Vict. c. 100, s. 9 (*ante*, p. 215). If you fail to prove the larceny to have been committed in a dwelling-house or some building communicating therewith (such as burglary might be committed in, 2 East, P. C. 644, *and see ante*, p. 676), or fail to prove that it was the dwelling-house of J. N., *R.* v. *White*, 1 Leach, 252: *R.* v. *Woodward*, *Id.* 253 n.; or fail to prove the goods (stolen at any one time, *R.* v. *Petrie*, 1 Leach, 294: *see R.* v. *Hamilton*, *Id.* 348: *R.* v. *Jones*, 4 C. & P. 217: *R.* v. *Dunn*, 1 Mood. 146: *R.* v. *Smith*, *Id.* 178) to be of the value of five pounds, the defendant must be acquitted of the compound offence, and may be found guilty of simple larceny only, without a separate count for that offence. *See Campbell* v. *R.*, 11 Q. B. 799, at p. 812; 15 L. J. (N. S.) 76; *and ante*, p. 56.

It was held in several early cases, that if a man stole the goods of another in his own house (*R.* v. *Thompson*, 1 Leach, 338), or a woman stole the goods of a

stranger in the house of her husband (*R.* v. *Gould*, 1 Leach, 217), it was not within the statute then in force, which was not intended to protect property which might be in a house from the owner of the house, but from the depredations of others; but these cases appear to be overruled by *R.* v. *Bowden*, 1 C. & K. 147; 2 Mood. 285, where all the judges agreed that stealing in a dwelling-house to the value of 5*l.*, by the owner of the house, was within 7 & 8 G. 4, c. 29, s. 12 (*rep.*). *Cf. R.* v. *Taylor*, R. & R. 418.

If the goods are under the protection of the *person* of the prosecutor at the time they are stolen, the case will not be within the statute. As, for instance, where the defendant procured money to be delivered to him for a particular purpose and then ran away with it: *R.* v. *Campbell*, 2 Leach, 564; 2 East, P. C. 644; and where the prosecutor, by the trick of ring dropping, was induced to lay down his money upon a table, and the defendant took it up and carried it away: *R.* v. *Owen*, 2 Leach, 572; 2 East, P. C. 645; these cases were held not to be within the statute. For a case to be within the meaning of the statute, it is necessary that the goods should be under the protection of the house, and be deposited in it for safe custody. But property left at a house for a person supposed to reside there, will be under the protection of the house, and the stealing of it will be within the statute. Two boxes belonging to A., who resided at 38, Rupert Street, were delivered by a porter (whether by mistake or design did not appear) at No. 33 in the same street; the owner of the house, imagining that they were for the defendant, who lodged there, delivered them to him; the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the statute, but the judges held that they were, and that the conviction for the capital offence was therefore correct. *R.* v. *Carroll*, 1 Mood. 89. If one, on going to bed, put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. *R.* v. *Thomas*, Car. Supp. 295. So, where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in the dwelling-house and not a stealing from the person. *R.* v. *Hamilton*, 8 C. & P. 49. It is a question for the Court and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *R.* v. *Thomas*, *supra*.

Indictment for Breaking and entering a Dwelling-house, etc., with intent to commit any Felony therein. (6 & 7 *Geo.* 5, *c.* 50, *s.* 27) (2), ante, p. 654.)

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

Housebreaking with intent, contrary to section 27 (2) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, broke and entered the dwelling-house of J. N. ("*any dwelling-house, place of divine worship, or any building within the curtilage, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty, or to any Government Department, or to any municipal or other public authority*") with intent to commit a felony, namely, to steal therein.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour—6 & 7 Geo. 5, c. 50, ss. 27, 37 (4) (ante, p. 501). *As to recognizances and sureties for keeping the peace*, see Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

Prove that the prisoner broke and entered the dwelling-house in question, and that it was at the time in the occupation of J. N., and also the prisoner's intent to steal. Lastly, prove that the dwelling-house is situate as described in the indictment. The intent to steal may no doubt often be reasonably inferred from the mere fact of breaking and entering.

Where the prisoner was indicted under 24 & 25 Vict. c. 96, s. 27, for breaking and entering a shop with intent to commit a felony, viz., to steal, and it appeared that the prisoner broke in the roof, intending to enter and steal, and was then disturbed, but there was no evidence that he ever actually entered the shop, he was held to have been rightly convicted of the misdemeanor of attempting to commit a felony. *R.* v. *Bain*, L. & C. 129; 31 L. J. (M. C.) 88; 9 Cox, 98.

Where the accused opened a door of a house and entered the hall and gave no satisfactory account of his presence there, it was held that there was sufficient evidence to justify the jury in finding a felonious intent. *R.* v. *Wood*, 76 J. P. 103; 7 Cr. App. R. 56.

Indictment for breaking into a Building within the curtilage of a Dwelling-house, etc. (6 & 7 *Geo.* 5, *c.* 50, *s.* 26 (1), ante, p. 654); and see s. 46 (2) (ante, p. 655).

Commencement as ante, p. 646.

STATEMENT OF OFFENCE.

First Count.

Housebreaking and larceny, contrary to section 26 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, broke and ntered a certain building within the curtilage of the dwelling-house of J. N., nd occupied therewith, and stole, in the said building, a silver watch, the roperty of the said J. N.

STATEMENT OF OFFENCE.

Second Count.

Housebreaking with intent, contrary to section 27 (2) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the said county, broke and ntered the said building with intent to steal therein. *This count may be added o an indictment for burglary, housebreaking, or stealing in a dwelling-house to he amount of five pounds, and should be added whenever it is doubtful whether he building is in strictness a dwelling-house. If the evidence fails to prove the ctual stealing, but the breaking, entry, and intent to steal is proved, the risoner may be convicted under this indictment of the felony described in* 6 & 7 Geo. 5, c. 50, s. 27 (2) (ante, p. 654).

Felony: penal servitude on first count for not more than fourteen, on second ount for not more than seven, nor less than three years, or imprisonment for ot more than two years, with or without hard labour—6 & 7 Geo. 5, c. 50, s. 26, 27, 37 (4) (ante, pp. 654, 501). *As to recognizances and sureties for eeping the peace*, see Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

Prove that the defendant broke and entered the building in question; that he building so broken and entered was occupied, at the time when the offence was committed, by J. N., together with his dwelling-house, and was within he curtilage thereof; and that the defendant there stole the goods, etc., enumerated in the indictment.

The breaking and entering must be proved in the same manner as in burglary (*ante*, p. 664), except that it is immaterial whether it be done in the day or night. If this proof fails, the defendant may be convicted of simple larceny.

Within the curtilage.]—The building described in the statute is "any building within the *curtilage* of a dwelling-house, and occupied therewith, not being part of the dwelling-house," that is, "not communicating with the dwelling-house, either immediately or by means of a covered and enclosed passage leading from the one to the other." In Termes de la Ley, curtilage is defined as "garden, yard, or piece of void ground lying near to or belonging to the messuage;" so also Sheppard Touchstone, 94, with the further explanation, "something which would pass by conveyance of the messuage." To break

and enter a building within the curtilage was, before the present statute, burglary, or housebreaking. If the barn, stable, or warehouse is parcel of the mansion-house, and within the same common fence, though not under the same roof and contiguous, a burglary may be committed therein; 4 Bl. Com. 224; but if the buildings are at any distance from the house, "it has not been usual of late to proceed against offences therein as burglaries;" 1 Hawk. c. 38, s. 22: *see* 28 L. J. Newsp. 858; and although the present enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, excludes many buildings which were formerly deemed parcel of the dwelling-house, from their adjoining to the dwelling-house, and being occupied therewith, although not within any common enclosure or curtilage; yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goosehouse, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was held to be part of the dwelling-house. *R.* v. *Clayburn*, R. & R. 360. Where the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house, the workshop was held to be parcel of the dwelling-house. *R.* v. *Chalking*, R. & R. 334. So, a warehouse, which had a separate entrance from the street, and had no internal communication with the dwelling-house, with which it was occupied, but was under the same roof, and had a back door opening into the yard into which the house also opened, and which enclosed both, was held to be part of the dwelling-house. *R.* v. *Lithgo*, R. & R. 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor; and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard; it was held that the warehouse was parcel of the dwelling-house of the prosecutor before the division of the house, and remained so afterwards. *R.* v. *Walters*, 1 Mood. C. C. 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor, who used the factory, partly for his own business and partly in a business in which he had a partner; and the factory opened into an open passage, into which the outer door of the dwelling-house also opened; it was held that the factory was properly described as the dwelling-house of the prosecutor. *R.* v. *Hancock*, R. & R. 170. *See R.* v. *Eggington*, 2 Leach, 913; 2 B. & P. 508: *R.* v. *Sefton*, R. & R. 202 (*ante*, p. 664). But a building separated from the dwelling-house by a public thoroughfare cannot

be deemed to be part of the dwelling-house. *R.* v. *Westwood*, R. & R. 495; nor, *semble*, to be within the curtilage. So, neither is a wall, gate, or other fence, being part of the outward fence of the curtilage, and opening into no building, but into the yard only, part of the dwelling-house. *R.* v. *Bennett*, R. & R. 289; nor is a gate of an area, which opens into the area only, if there is a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at the time. *R.* v. *Davis*, R. & R. 322. Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard, into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high, in which there was a gate, and the fold-yard being bounded on all sides by the farm buildings, a wall from the house, a hedge and gates; it was held that the building was within the curtilage. *R.* v. *Gilbert*, 1 C. & K. 84. As to the meaning of "curtilage" in connection with a will or conveyance of lands: *see Wright* v. *Wallasey Local Board*, 18 Q. B. D. 783; 56 L. J. (Q. B.) 259; *Marson* v. *L. C. & D. R. Co.*, L. R. 6 Eq. 101; 37 L. J. (Ch.) 483 *and* Stroud Jud. Dict.

Under ss. 26 and 27 of the Larceny Act, 1916 (6 & 7 Geo. 5. c. 50), it is an offence to break and enter, etc., a garage or pavilion, whether such buildings are or are not within the curtilage of a dwelling-house. *See ante*, p. 654.

The larceny in the building must be proved in the same manner as upon an indictment for housebreaking (*ante*, p. 672), or stealing in a dwelling-house (*ante*, p. 675)

DEMANDING WITH MENACES, ETC.

Statute.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 29.—*Demanding money, etc., with menaces.*]—(1) Every person who—(i.) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing; (ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person; (iii.) with intent to extort or gain any property or valuable thing from any person accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime; shall be guilty of felony, and on conviction thereof liable to penal servitude for life, and, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable. (2) Every person who with intent to defraud or injure any other person—(*a*) by any unlawful violence to or restraint of the person of another, or (*b*) by accusing or threaten-

ing to accuse any person (whether living or dead) of any such crime or of any felony, compels or induces any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix the name of any person, company, firm or co-partnership, or the seal of any body corporate, company or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of felony and on conviction thereof liable to penal servitude for life. (3) This section applies to any crime punishable with death, or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal. (4) For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person. [*This section consolidates* 24 & 25 Vict. c. 96, ss. 44, 46, 47, 48, 49. *The words "whether living or dead" are taken from* 4 & 5 Geo. 5, c. 58, s. 35 (*rep.*).]

Sect. 30.—*Demanding with menaces, with intent to steal.*]—Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years. [*This section re-enacts* 24 & 25 Vict. c. 96, s. 45.]

Sect. 31.—*Threatening to publish, with intent to extort.*]—Every person who with intent—(*a*) to extort any valuable thing from any person, or (*b*) to induce any person to confer or procure for any person any appointment or office of profit or trust, (1) publishes or threatens to publish any libel upon any other person (whether living or dead); or (2) directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead); shall be guilty of a misdemeanor and on conviction thereof liable to imprisonment, with or without hard labour, for any term not exceeding two years. [*This section re-enacts* 6 & 7 Vict. c. 96, s. 3. *The words "whether living or dead" are taken from* 4 & 5 Geo. 5, c. 58, s. 35 (*rep.*) *There is no power to arrest without warrant for an offence against this section.* See 6 & 7 Geo. 5, c. 50, s. 41 (1), ante, p. 504.]

Indictment for uttering a Letter demanding Money, etc. (6 & 7 *Geo.* 5, *c.* 50, *s.* 29 (1) (i), ante, p. 681.)

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Uttering threatening letter, contrary to section 29 (1) (i) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, uttered, knowing the contents thereof, a letter or writing demanding money ("*any property or valuable thing*") from J. N. with menaces and without any reasonable or probable cause.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, and if a male under sixteen, with or without whipping—6 & 7 Geo. 5, c. 50, ss. 29 (1), 37 (4) (ante, p. 681, 501). *As to recognizances and sureties for keeping the peace*, ibid. s. 37 (5) (b) (ante, p. 501).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Give the letter in evidence, and prove it to have been uttered by the defendant, as charged in the indictment.

Uttered.]—Proof that the defendant dropped the letter in a place where he knew the prosecutor would come, and that it was picked up by another person, and by him delivered to the prosecutor: *R.* v. *Lloyd*, 2 East, P. C. 1122: *R.* v. *Vagstaff*, R. & R. 398; or that the letter is in the handwriting of the defendant, and that it came to the prosecutor by the post: *R.* v. *Heming*, 2 East, P. C. 1116: *and see R.* v. *Jepson*, *Id.* 1115: was held (upon the repealed statutes) sufficient evidence of a *sending* by the defendant, and would clearly warrant a conviction for uttering under the present law. So, where the prosecutor, having received such a letter, traced it to a woman who was in the habit of going errands for the prisoners in Newgate, and she proved that she received it from the defendant, then a prisoner in Newgate, to put in the post office, and the servant of the post office proved that the letter in question was brought to the office by the last witness, and forwarded in the regular course; this was held sufficient evidence, not only of the sending by the defendant, but that he also knew its contents. *R.* v. *Girdwood*, 2 East, P. C. 1120; 1 Leach, 142. And sending the letter to A. in order that he may deliver it to B., is a sending to B., if the letter is delivered by A. to B. *R.* v. *Paddle*, R. & R. 484.

A letter, etc.]—The words in this statute are "any letter *or writing*," and therefore the decisions upon the earlier statutes as to what constitutes a "letter" are inapplicable to the present.

In *R.* v. *Harris*, 6 C. & P. 105, Bolland, B., ordered the letter to be deposited in the hands of the clerk of the peace, in order that the defendant's witnesses might inspect it before the trial.

Demanding money.]—"Any 'property,' or valuable thing." *See* 6 & 7 Geo. 5, c. 50, s. 46 (1) (*ante*, p. 508). If there be any doubt, which of two or three things was demanded, it may be stated in the alternative in the same count. 5 & 6 Geo. 5, c. 90. Where the letter contained a request only, but intimated that, if it were not complied with, the writer would publish a certain libel then in his possession, accusing the prosecutor of murder; this was held to amount to a demand. *R.* v. *Robinson*, 2 Leach, 749; 2 East, P. C. 1110. As to threatening to publish a libel, *see* 6 & 7 Geo. 5, c. 50, s. 31 (*ante*, p. 682). A mere request, such as asking charity or the like without imposing any conditions, would not come within the meaning of the word "demand" in the statute. *Per* Buller, J., in *R.* v. *Robinson*, 2 East, P. C. 1114.

With menaces.]—The demand must be with menaces. The word "menaces" includes "not merely threats of injury to persons or property, but menaces which would involve injury to a third person intended to be injured, and would induce the person to whom the menaces are addressed to part with money or valuable property," such as threats to accuse of misconduct not amounting to crime. *R.* v. *Tomlinson* [1895] 1 Q. B. 706; 64 L. J. (M. C.) 97; 18 Cox, 75: *R.* v. *Boyle*, 83 L. J. (K. B.) 1801; 24 Cox, 406; 30 T. L. R. 521; 10 Cr. App. R. 180: *cf. R.* v. *Chalmers*, 10 Cox, 450: *R.* v. *Smith*, 1 Den. 510; 2 C. & K. 882; 19 L. J. (M. C.) 80; 4 Cox, 42; *and see* 6 & 7 Geo. 5, c. 50, s. 29 (4) (*ante*, p. 682). The question of the meaning is for the jury; and it is the duty of the Court not to direct as matters of law that a threat is a menace within the statute, but merely to lay down the principle on which the jury should proceed in considering whether the letter amounts to a menace within the statute. *R.* v. *Walton*, 32 L. J. (N. S.) M. C. 79; L. & C. 288; 9 Cox, 268: *R.* v. *Tomlinson*, *supra*: *R.* v. *Carruthers*, 1 Cox, 138: *R.* v. *Boyle*, *supra*. The prosecutor may be asked what he thought the letter meant. *R.* v. *Hendy*, 4 Cox, 243.

Without reasonable or probable cause.]—The demand must also be without reasonable or probable cause. It is for the jury to decide whether there was reasonable or probable cause for making the demand. But it is not for them to decide whether the accused believed that he had reasonable and probable cause for making it. The belief of the accused affords no defence. *R.* v. *Dymond* [1920] 2 K. B. 260; 84 J. P. 103; 36 T. L. R. 421; 15 Cr. App. R. 1; overruling *R.* v. *Miard*, 1 Cox, 22. *Cf. R.* v. *Wheat and Stocks* [1921] 2 K. B. 119; 37 T. L. R. 417; 15 Cr. App. R. 134. Where the evidence completely negatived any circumstance on which the prisoner could found any just demand of money, and there was no foundation for any such belief on his part, Kelly, C.B., "left it to the jury to consider whether there was any reasonable or probable cause for the demand of the money." *R.* v. *Chalmers*, 10 Cox, 45 (C. C. R.). The words apply to the money demanded, and not to the accusation threatened, the truth or falsity of which is immaterial. *R.* v. *Hamilton*, 1 C. & K. 212 (*under* 7 & 8 G. 4, c. 29, s. 8 (*rep.*)). Evidence of the contents of similar letters, the subject of other indictments, appears to be admissible to show the intent of the accused. *R.* v. *Graham*, 3 Cr. App. R. 252.

Indictment for sending a Letter threatening to accuse, with Intent, etc.
(6 & 7 *Geo.* 5, *c.* 50, *s.* 29 (1) (ii), ante, p. 681.)

Commencement as ante, p. 682.

STATEMENT OF OFFENCE.

Uttering threatening letter with intent, contrary to section 29 (1) (ii) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, uttered, knowing the contents thereof, a letter or writing threatening to accuse ("*accusing or threatening to accuse*") J. N. ("*any other person whether living or dead*") of a certain crime, to wit, of having attempted and endeavoured to commit the abominable crime of buggery with the said A. B. ("*any crime punishable with death or penal servitude for not less than seven years, or any assault with intent to commit any rape or any attempt to commit any rape or any solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal*") with intent to extort or gain money ("*any property or valuable thing*") from the said J. N. ("*from any person*").

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour, and if a male under sixteen, with or without whipping—6 & 7 Geo. 5, c. 50, ss. 29 (1), 37 (4) ante, pp. 681, 501). *As to recognizances and sureties for keeping the peace*, d. s. 37 (5) (b) (ante, p. 501).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, . 106).

Evidence.

Prove that the defendant uttered the letter, as directed, *ante*, p. 683. Whether the letter amounts to a threat to accuse the prosecutor of the offence mentioned is a fact to be determined by the jury. *See R.* v. *Girdwood*, 2 East, '. C. 1120; 1 Leach, 142. If it does not appear from the letter itself of what offence the defendant threatened to accuse the prosecutor, the defendant's declaration of meaning of the letter may be given in evidence to explain it. : .v. *Tucker*, 1 Mood. 134. The threat need not be to accuse before a court f justice. *R.* v. *Robinson*, 2 M. & Rob. 14; 2 Lew. 273.

The intent must also be proved, as in the last case: and in order to prove it, ther letters received by the prosecutor from the defendant upon the same ubject may be given in evidence (*see R.* v. *Graham*, *ante*, p. 684), or it may be nferred from the previous, contemporaneous, or even subsequent conduct and xpressions to third persons. *R.* v. *Menage*, 3 F. & F. 310; *cf. R.* v. *Cooper*, Cox, 547.

Punishable with penal servitude for not less than seven years.]—*See* observaons on evidence under s. 29 (1) (iii), post, p. 686.

Indictment for threatening to accuse a Man of a Crime with Intent, etc. (6 & 7 *Geo.* 5, *c.* 50, *s.* 29 (1) (iii), ante, p. 681.)

Commencement as ante, p. 682.

STATEMENT OF OFFENCE.

Threatening to accuse of crime with intent, contrary to section 29 (1) (iii) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, with intent to extort or gain money ("*any property or valuable thing*") from J. N. ("*any person*") threatened to accuse ("*accuses or threatens to accuse*") him the said J. N. ("*either that person or any other person whether living or dead*") of a crime, to wit, of having attempted and endeavoured to commit the abominable crime of buggery with one J. S. ("*any crime punishable with death or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt or endeavour to commit any rape, or any solicitation, persuasion, promise or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal*").

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen, with or without whipping.—6 & 7 Geo. 5, c. 50, s. 29 (1) (ante, p. 681; Id. s. 37 (4) (ante, p. 501). *As to recognizances and sureties for keeping the peace*, Id. s. 37 (5) (b) (ante, p. 501).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the threat or accusation, and the intent. It is for the jury to decide what the defendant meant by the threatened accusation: *R.* v. *Cooper*, 3 Cox, 547: *R.* v. *Braynell*, 4 Cox, 402. It is submitted that the meaning of the words in 6 & 7 Geo. 5, c. 50, s. 29 (3) "any crime punishable by law with penal servitude for not less than seven years" is any crime for which a sentence of seven years or more may be awarded; and therefore that where the threatened accusation is one of indecent assault upon a male person such an accusation is within the above statute, the maximum punishment for an indecent assault upon a male person being penal servitude for ten years by virtue of 24 & 25 Vict. c. 100, s. 62. Before the passing of 24 & 25 Vict. c. 96 (*rep.* as to the above offences) it was held that where the threatened accusation was one of indecent assault (upon a male person) it was for the jury to determine whether such an accusation might not amount to an "infamous crime" within 7 & 8 G. 4, c. 29, s. 8, as being "a solicitation to permit or commit such crime." *R.* v. *Cooper*, *supra*, Cresswell, J.: *cf. R.* v. *Braynell*, *supra*: *R.* v. *Middleditch*, 1 Den. 92; 2 Cox, 313. The offence of gross indecency between mal

persons created by 48 & 49 Vict. c. 69, s. 11, is not within the sub-section : *see R.* v. *Gilgannon*, 63 J. P. 457.

The words " whether living or dead " were first introduced by 4 & 5 Geo. 5, c. 58 s. 35 (*rep.*).

The threat must be a threat to accuse, or an accusation : if A. B. is indicted, or in custody for an offence, and the defendant threatens to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute. *R.* v. *Gill*, 1 Lew. 305. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient. *R.* v. *Robinson*, 2 M. & Rob. 14. And it is immaterial whether the prosecutor be innocent or guilty of the offence imputed to him; *R.* v. *Gardner*, 1 C. & P. 479; if the prisoner intended to extort money by the accusation, *R.* v. *Richards*, 11 Cox, 43. And therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor was guilty of such offence. *R.* v. *Cracknell*, 10 Cox, 408. If the prisoner makes the accusation believing it to be true and without any purpose at that time to extort money thereby, and afterwards endeavours to compromise it by payment of money, he may be guilty of the offence of compounding a felony, but not of an offence under s. 29 (1) (iii). *R.* v. *Richards*, 11 Cox, 43, Blackburn, J. The last-named case appears to be hardly reconcileable with the above cases of *R.* v. *Gardner* and *R.* v. *Cracknell*, but the facts in *R.* v. *Richards* were exceptional. Proof that the prisoner went to the prosecutor and threatened to accuse his son of an unnatural offence with a mare unless the prosecutor would buy the mare for 3*l.*, was held to sustain an indictment under 24 & 25 Vict. c. 96, s. 47 (*rep.*). *R.* v. *Redman*, L. R. 1 C. C. R. 12; 35 L. J. (M. C.) 89; 10 Cox, 159.

If the intent does not appear sufficiently from the accusation or threat itself, it must be proved by circumstances from which the jury may fairly presume it (*see ante*, p. 352): as by subsequent expressions of the defendant. *R.* v. *Kain*, 8 C. & P. 187. Evidence of an exactly similar act committed by the prisoner on a previous occasion has been held admissible as evidence of intent. *R.* v. *Cooper*, 3 Cox. 547, Cresswell, J.; *and see R.* v. *Graham*, 3 Cr. App. R. 252, *and ante*, pp. 355 *et seq.*

Indictment for demanding Property, etc., with Menaces or by Force, with Intent to steal the same. (6 & 7 *Geo.* 5, *c.* 50, *s.* 30, *ante*, p. 682.)

Commencement as ante, p. 682.

STATEMENT OF OFFENCE.

Demanding with menaces, contrary to section 30 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, with menaces or by force demanded a watch ("*anything capable of being stolen*," *see s.* 1 (3), *ante*, p. 500) of J. N. with intent to steal the same.

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour—6 & 7 Geo. 5, c. 50, s. 30 (ante, p. 682; Id. s. 37 (4) (ante, p. 501). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, Id. s. 37 (5) (b) (ante, p. 501).

Evidence.

To support this indictment, the prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment, "by menaces or force," with intent to steal it. As to what constitute menaces *see ante*, p. 684. It is not necessary to prove an express demand in words; the statute says, "if any person shall, with menaces or by force demand," etc.; and menaces are of two kinds—by words or by gestures; so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment. *See R.* v. *Jackson*, 1 Leach, 269. The offence may be committed although the language used may be only a request and not an explicit demand. A request imposing conditions may be evidence of a demand. *R.* v. *Studer*, 85 L. J. (K. B.) 1017; 114 L. T. 424; 25 Cox 312; 11 Cr. App. R. 307.

Where the defendant demanded a shilling, and on being refused threatened to burn up the prosecutor, and actually tried to fire one of his stacks, it was held that he had demanded money by menaces. *R.* v. *Taylor*, 1 F. & F. 511, Pollock, C.B.

If a person, with menaces, demands money of another, who does not give it him, because he has it not with him, this is a felony within the statute.

In order to bring a case within this section, the demand, if successful, must amount to stealing, and to constitute a menace within that section it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent; it must therefore be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor. *R.* v. *Walton*, L. & C. 288; 32 L. J. (M. C.) 79; 9 Cox, 268. Where a policeman, professing to act under legal authority, threatens to imprison a person on a charge not amounting to an offence in law, unless money be given him, and the person believing him gives him money, the policeman may be indicted under that section, although he might also have been indicted for stealing the money. *R.* v. *Robertson*, L. & C. 483; 34 L. J. (M. C.) 35; 10 Cox, 9.

Indictment for threatening to publish a Libel, etc., with Intent to extort.
(6 & 7 *Geo.* 5, *c.* 50, *s.* 31, ante, p. 682.)

Commencement as ante, p. 682.

STATEMENT OF OFFENCE.

Threatening to publish a libel with intent, contrary to section 31 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, threatened to publish a libel upon J. N. ("*any other person, whether living or dead*") with intent to extort money from the said J. N. ("*with intent to extort any valuable thing, from any person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust*"). *If it is doubtful whether the matter threatened to be published be libellous, add a count charging that the defendant* " proposed to the said J. N. to abstain from printing or publishing a certain matter or thing touching the said J. N. [*or* one E. F.], with intent," etc.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years—6 & 7 Geo. 5, c. 50, s. 31 (ante, p. 682).

Evidence.

Prove the threat by the defendant to publish libellous or other matter concerning the prosecutor. Or, if the indictment is for proposing to the prosecutor to abstain from publishing matter concerning him, prove the proposal, and the nature of the matter proposed to be suppressed. Prove the intent as directed (*ante*, pp. 352, 357). The intent to extort money may be implied from the circumstances, and does not require an express demand for money. *R.* v. *Menage*, 3 F. & F. 310. But, if it appears that the object is to compel the delivery of accounts of moneys honestly believed to be due and owing, there is no evidence of the intent to extort money. *Id.* There is no power to arrest without warrant for this offence. 6 & 7 Geo. 5, c. 50, s. 41 (1), *ante*, p. 504.

SECT. 2.

FALSE PRETENCES AND CHEATING.

Statutes.

9 *G.* 2, *c.* 5 (*Witchcraft Act*, 1736), *s.* 4.—*Undertaking to tell fortunes punishable on indictment.*]—See R. *v.* Stephenson, 68 J. P. 524.

8 *&* 9 *Vict. c.* 109 (*Gaming Act*, 1845), *s.* 17.—*Cheating at play punishable as obtaining money by false pretences.*]—Every person who shall by any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other games, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly. [*See R.* v. *Hudson*, Bell, 263; 29 L. J. (M. C.) 145; 8 Cox, 305; *and for indictment*, see post, p. 720.] To come within this section, there must be cheating during the playing of the game. *R.* v. *Governor of Brixton Prison, Ex parte Sjoland* [1912] 3 K. B. 568; 82 L. J. (K. B.) 5; 29 T. L. R. 10: *R.* v. *Moore*, 10 Cr. App. R. 54.

22 *&* 23 *Vict. c.* 35, *ss.* 24, 25; 23 *&* 24 *Vict. c.* 38, *s.* 8.—*Concealment of documents affecting title and falsifying pedigrees.*]—Ante, pp. 571, 572.

22 *&* 23 *Vict. c.* 17, *s.* 1.—*False pretences within the Vexatious Indictments Acts.*]—See ante, p. 67.

32 *&* 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 13 (1).—*Obtaining credit under false pretences, or by means of any other fraud.*]—See post, p. 705.

62 *&* 63 *Vict. c.* 22.—*Summary trial of adults by consent for obtaining property by false pretences.*]—See post, p. 695.

63 *&* 64 *Vict. c.* 51 (*Money Lenders Act*, 1900), *s.* 4.—*False statements and representations by money lenders.*]—If any money lender, or any manager agent, or clerk of a money lender, or if any person being a director, manager or officer of any corporation carrying on the business of a money lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanor, and shall be liable on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding 500*l.* or to both.

Sect. 6.—*Definition of money lender.*]—*Includes persons whose business is that of money lending, or who advertise or announce themselves as carrying on that business, but excepts pawnbrokers, registered friendly societies, bonâ fide banks, and insurance offices, etc.*

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 32.—*False Pretences.*]—Every person who by any false pretence—(1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person; or (2) with intent to defraud or injure any other person, fraudulently causes or induces any other person—(*a*) to execute, make, accept, endorse, or destroy, the whole or any part of any valuable security; or (*b*) to write, impress, or affix his name or the name of any other person, or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security; shall be guilty of a misdemeanor and on conviction thereof liable to penal servitude for any term not exceeding five years. [*This section consolidates* 24 & 25 Vict. c. 96, ss. 88, 89, 90.]

Sect. 40.—*Procedure.*]—(1) On the trial of an indictment for obtaining or attempting to obtain any chattel, money, or valuable security by any false pretence, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the person accused did the act charged with intent to defraud. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 88.]

(2) An allegation in an indictment that money or bank-notes have been embezzled or obtained by false pretences can, so far as regards the description of the property, be sustained by proof that the offender embezzled or obtained any piece of coin or any bank-note or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly. [*This sub-section is taken from* 14 & 15 Vict. c. 100, s. 18.]

Sect. 44.—*Verdict.*].—(3) If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly. [*This sub-section re-enacts* 4 & 5 Geo. 5, c. 58, s. 39 (2).]

(4) If on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences it is proved that the defendant stole the property in question, he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 88.]

Sect. 46 (1).—*Definition of valuable security.*]—See ante, p. 508.

8 & 9 *Geo.* 5, *c.* 55 (*School Teachers* (*Superannuation*) *Act*, 1918), *s.* 11.—*False representation and fraud.*]—(1) If any person (*a*) for the purpose of obtaining for himself or any other person any superannuation allowance or gratuity, personates any person or makes any false certificate, false representation, or false statement, or makes use of any false certificate or document, false representation, or false statement, knowing the same to be false; or (*b*) by means of any false certificate, false document, false representation, or false statement, or by personation or other fraudulent means obtains or attempts to obtain for himself or any other person any superannuation allowance or gratuity, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, and on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding twenty-five pounds.

(2) Any penalty for any offence under this section may be in addition to any refusal, reduction or suspension of the allowance or gratuity.

(3) Any reference in this section to the obtaining of a superannuation allowance or gratuity, shall include a reference to the obtaining of an increase of a superannuation allowance or gratuity, and to the preventing, or the obtaining the rescission of, the suspension of a superannuation allowance, and the obtaining of any sum in respect of a superannuation allowance or gratuity.

11 & 12 *Geo.* 5. *c.* 31 (*Police Pensions Act*, 1921), *s.* 16.—*Obtaining police pensions, &c., by fraud.*]—(1) If a person obtains or attempts to obtain for himself or for any other person—(*a*) any pension, gratuity or allowance under this Act, or any payment on account thereof; or (*b*) the return of any rateable deductions from pay under this Act; by means of any false declaration, false certificate, false representation, false evidence, or personation, or by malingering or feigning disease or infirmity, or by maiming or injuring himself, or causing himself to be maimed or injured, or otherwise producing disease or infirmity, or by any other fraudulent conduct, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding twenty-five pounds, and in either case to forfeit any pension, gratuity, allowance or other sum so obtained. (2) Any fine imposed or sum forfeited for an offence under this section shall be paid to the police fund of the force from which the pension, gratuity, allowance or other sum was obtained or attempted to be obtained.

Indictment for obtaining Goods, etc., by false Pretences.

THE KING *v.* A. B.

Kent Quarter Sessions
held at Maidstone.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Obtaining goods by false pretences, contrary to section 32 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of Kent, with intent to defraud, obtained from S. P. five yards of cloth by falsely pretending that he the said A. B. was a servant to J. S., and that he the said A. B. had then been sent by the said J. S. to S. P. for the said cloth, and that he the said A. B. was then authorised by the said J. S. to receive the said cloth on behalf of the said J. S.

It is common practice to include a count for obtaining credit under false pretences or by means of fraud other than false pretences, where there is any doubt as to which offence has been committed: but where this is done care should be taken that the verdict shows on which count the accused is found guilty, as he cannot be guilty on more than one count in respect of the same transaction, and the punishment is different. Where there is a general verdict on such an indictment the Court of Criminal Appeal on appeal may in a proper case treat the conviction as if it had been upon the lesser of the charges. See R. *v.* Johnston, 9 Cr. App. R. 262 : R. *v.* Smith, 11 Cr. App. R. 81. *The rule laid down in* R. *v.* Norman [1915] 1 K. B. 341, 11 Cr. App. R. 58, *that all the counts of such an indictment should not be tried together but that the prosecution should be called upon to proceed on one count at a time is not a rule of general application but is to be confined to the particular facts of that case.* R. *v.* Pickering, 15 Cr. App. R. 175.

Indictment for obtaining Goods or Money by means of a Cheque which the defendant knows will not be paid.

[*Commencement as in the last precedent*]—by falsely pretending that a certain cheque which he the said A. B. then produced and delivered to the said S. P., then was a good and valid order for the payment of 5*l.*, and that he the said A. B. then had authority to draw a cheque for the payment of 5*l.* upon the . . . Bank situate at . . . [*See R.* v. *Hazelton*, L. R. 2 C. C. R. 134; 43 L. J. (M. C.) 11 (*post*, p. 703).

Indictment for obtaining Goods by means of Representations contained in a letter calculated to induce the prosecutor to believe that the writer was a dealer in a large way of business.

Commencement as in the last precedent but one]—with intent to defraud, obtained from C. D. forty sacks of potatoes by falsely pretending that he the said A. B. then was a dealer in potatoes, and that as such dealer in potatoes he then was in a large way of business, and that he then was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him. *See* R. *v.* Cooper, 2 Q. B. D. 510; 46 L. J. (M. C.) 219 (*post*, p. 705); 13 Cox, 617 : R. *v.* King [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87 (*post*, p. 703); 18 Cox, 447 : R. *v.* Rhodes [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83; 19 Cox, 182, *and cf.* R. *v.* Bates, 3 Cox, 201. *The indictment must state to whom the pretences were made, and from whom the goods, etc., were obtained.* R. *v.* Sowerby [1894] 2 Q. B. 173; 63 L. J. (M. C.) 136; 17 Cox, 767, *where the form of indictment in* R. *v.* Hunter, 10 Cox, 642, *was held bad, and that in* R. *v.* Douglass, 1 Camp. 212, *was approved. But an indictment is good which states that the pretence was made to all the King's subjects by an advertisement in a newspaper.* R. *v.* Silverlock [1894] 2 Q. B. 766; 64 L. J. (M. C.) 233; 18 Cox, 104.

In indictments for a conspiracy to obtain money by false pretences, or receiving property obtained by false pretences, it is unnecessary to specify the false pretences. R. *v.* Gill, 2 B. & Ald. 204 : Taylor *v.* R. [1895] 1 Q. B. 25; 64 L. J. (M. C.) 11.

The pretences must be set forth with sufficient certainty. But where the pretence alleged was a wager made "with a colonel in the army, then at Bath," without naming him—the Court held it to be sufficient; for probably the defendant at the time did not mention the name of the colonel. Young *v.* R., 3 T. R. 98; 2 East, P. C. 828, 837, 838; 1 Leach, 505.

Ownership of the goods need not be alleged, nor intent to defraud any particular person. 5 & 6 Geo. 5, c. 90, rr. 6, 10 (ante, pp. 47, 52). *All persons who have concurred and assisted in the fraud may be indicted and convicted as principals, though not present at the time of making the pretence and obtaining the money or goods.* R. *v.* Moland, 2 Mood. 276; 6 & 7 Geo. 5, c. 50, s. 35. *If the goods, etc., are not obtained, or are not obtained through the false pretence, the accused can be convicted of the attempt.* 14 & 15 Vict. c. 100 s. 9 (ante, p. 215). See R. *v.* Hensler, 11 Cox, 570 (C. C. R.).

Venue.]—Prior to the *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), it was held *that one who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained.* R. *v.* Stanbury, L. & C. 128; 31 L. J. (M. C. 88; see post, p. 708. *But by s.* 39 (1) *of that Act, a uniform venue has been created for all offences against the Act* (see ante, p. 502). *As to false pretence made in England to a person abroad, or* vice versâ, *see* R. *v.* Holmes, 1

) B. D. 23; 53 L. J. (M. C.) 37 : R. *v.* Ellis [1899] 1 Q. B. 230; 68 L. J. Q. B.) 103 : R. *v.* Stoddart, 2 Cr. App. R. 217; 25 T. L. R. 612 : R. *v.* Waugh 1909] Vict. L. R. 379 : 1 Russ. Cr. (7th ed.) 52.

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years. 6 & 7 Geo. 5, c. 50, ss. 32, 37 (4) (ante, pp. 691, 501). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour,* d. s. 37 (5) (a) (c) (ante, p. 501).

An indictment for obtaining money or other property by false pretences is subject to the Vexatious Indictments Act, 1859 (23 & 24 Vict. c. 17), *as amended by* 30 & 31 Vict. c. 35, s. 1 (ante, p. 67). *But an indictment for* attempting *to obtain money or other property by false pretences is not.* R. *v.* Burton, 3 Cox, 71 (C. C. R.). *It seems probable that the protection of the* Vexatious Indictments Acts *will be, to some extent, removed in consequence of* 4 & 5 Geo. 5, c. 58, s. 39 (2) (*repealed and re-enacted by* 6 & 7 Geo. 5, c. 50, s. 44 (3), ante, p. 691), *as a conviction for false pretences can be sustained on an indictment for larceny.*

False pretences within the Act.]—The first statute on this subject, 33 H. 8, c. 1, extended only to cases where the money, etc., was obtained by means of a *false token* or counterfeit letter in the name of another; but this provision not being deemed sufficiently extensive, 30 G. 2, c. 24, was passed for the purpose of including all false pretences whatsoever. *See* 3 Chitty, Cr. L. 1000. These two statutes, the former entirely, and the latter so far " as relates to obtaining by false pretence or pretences any property therein mentioned " : and also the whole of 52 G. 3, c. 64, which extended the provisions of 30 G. 2, c. 24; and also so much of 3 G. 4, c. 114, as relates to the punishment for obtaining any property as therein mentioned by false pretences—were repealed by 7 & 8 G. 4, c. 27, and consolidated and amended by 7 & 8 G. 4, c. 29, s. 53, which substituted the words " by any false pretence " for the words " by false pretence or pretences," which were in 30 G. 2, c. 24, s. 1. The same words were repeated in 24 & 25 Vict. c. 96, s. 88, and again in the present statute, 6 & 7 G. 5, c. 50, s. 32 (*ante*, p. 691). The phrases in all these Acts are in substance the same, and consequently most of the decisions upon the repealed statutes are applicable to cases arising under the Larceny Act, 1916.

As to existing fact.]—It may be laid down as a general rule for the interpretation of the statute, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the Act. *See R.* v. *Woolley*, 1 Den. 559; 3 C. & K. 98; 19 L. J. (M. C.) 165; 4 Cox, 193. This rule has been recognized by the legislature in 62 & 63 Vict. c. 22 (*Summary Jurisdiction Act*, 1899), which enacts (s. 3), that " Where a court of summary jurisdiction proposes to deal summarily in pursuance of this Act with a charge of obtaining by false pretences from any person any chattel, money, or valuable security, with intent to defraud the court shall, after the charge has been reduced to writing and read to the person charged, state in effect that a *false pretence means a false representation by words, writing, or conduct, that some fact or facts existed, and that a promise*

as to future conduct not intended to be kept is not by itself a false pretence. . . ." *And see R.* v. *Carpenter*, 22 Cox, 618; 76 J. P. 158, Channell, J. Where a carrier falsely pretending that he had carried certain goods to A. B., demanded, and thereupon obtained from the consignor sixteen shillings for the carriage of them, it was held to be within the statute. *R.* v. *Coleman*, 2 East, P. C. 672 · *R.* v. *Airey*, *Id.* 831; 2 East, 30. The defendant, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service, the defendant knowingly and fraudulently delivered up to an officer of the company, as part of his own uniform, a great-coat belonging to a fellow-servant, and so obtained the wages due to him. It was held that he was properly convicted of obtaining by false pretences the money so paid to him as wages. *R.* v. *Bull*, 13 Cox, 608 (C. C. R.). Where the defendant falsely pretended to J. N. that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds that his money was all spent, by means of which representation he induced J. N. to advance him money; this was held to be within the Act. *R.* v. *Villeneuve*, 2 East, P. C. 830; 3 T. R. 104. So, where the defendant, who had actually taken premises and was doing a small business in coal, obtained forty coal bags on credit from the prosecutor by falsely pretending that he had a lot of trucks of coal at a railway station on demurrage and that he required forty coal bags, this was held to be a false pretence within the statute. *R.* v. *Willot*, 12 Cox, 68 (C. C. R.). So, where the defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him twenty guineas as his share in it; the judges held this to be within the statute, notwithstanding the pretence was probably one against which common prudence might have guarded. *Young* v. *R.*, 3 T. R. 98; 1 Leach, 505. *Cf. R.* v. *Asterley*, 7 C. & P. 191. Where a servant, who had authority to buy goods, and was to be repaid on producing a ticket containing a statement of the purchase, produced such a ticket and obtained the amount stated therein, no purchase having in fact been made, this was held to be not larceny, but obtaining money by false pretences. *R.* v. *Barnes*, 2 Den. 59; 20 L. J. (M. C.) 34. *And see R.* v. *Green*, Dears. 323; 6 Cox, 296 : *R.* v. *Prince* (*post*, p. 705). Where the foreman of a manufacturer, who was in the habit of receiving from his master money to pay the workmen, obtained from him by means of false written accounts of the wages earned by the men, more than the men had earned or he had paid them, the judges held it to be within the Act; they said that all cases where the false pretence creates the credit are within the statute; and here the defendant would not have obtained the excess above what was really due to the workmen, were it not for the false account he had delivered to his master. *R.* v. *Witchell*, 2 East, P. C. 830. It was the prisoner's duty to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues. On one occasion, by

epresenting falsely to the cashier that the amount was larger than it really vas, as he knew, the prisoner obtained from the cashier the sum he stated it o be, and then paid the real amount due, and appropriated the difference to is own use. This was held to be not larceny, but obtaining money by false retences. *R.* v. *Thompson*, L. & C. 233; 32 L. J. (M. C.) 57; 9 Cox, 222. t is difficult to distinguish the essential facts of this case from those in *R.* v. *Cooke*, L. R. 1 C. C. R. 295; 40 L. J. (M. C.) 68 (*ante*, p. 530), where the risoner was held to be guilty of larceny. *R.* v. *Thompson* was cited and bserved upon in *R.* v. *Cooke*, although not overruled. Bovill, C.J., saying that he decision in *R.* v. *Thompson* went entirely on the question whether there vas a larceny in the obtaining of the money in the first instance, and that the oint was not considered whether the subsequent misappropriation was larceny. So, where the defendant obtained goods by falsely stating that he wanted hem for J. S., who lived at N., and was a person whom he would trust with 1000*l*., and who went out to New Orleans twice a year to take goods to his ons, this was held to be a sufficient false pretence within the statute. *R.* v. *Archer*, Dears. 449; 6 Cox, 515. So, where the false pretence alleged was. hat a person who lived in a large house down the street, and had had a laughter married some time back, had been to him (the defendant) about some arpet, and had asked him to procure a piece of carpet, whereby the defendant btained from the prosecutor twenty yards of carpet: this was held sufficient. R. v. *Burnsides*, Bell, 282; 30 L. J. (M. C.) 42; 8 Cox, 370. Receipt of a heque by a clerk to a savings bank from the manager on a false representation hat a depositor had given notice of withdrawal, and for the purpose of handing he cheque to the depositor, was held to be obtaining by false pretences and ot larceny. *R.* v. *Essex*, Dears. & B. 371; 27 L. J. (M. C.) 20; 7 Cox, 384.

Where the secretary of an Odd Fellows' Lodge told a member that he owed he lodge 13*s*. 6*d*., and thereby obtained that sum from him fraudulently, whereas the member owed 2*s*. 2*d*. only, he was held to be rightly convicted of obtaining money by false pretences. *R.* v. *Woolley*, 1 Den. 559; 3 C. & K. 98; 19 L. J. (M. C.) 165; 4 Cox, 193. A creditor who wilfully and fraudulently represents to a third person who holds money of his debtor that a larger sum is due to him from the debtor than is really the case, and thus obtains from such third person payment of the larger sum, is guilty of a false pretence within he statute, and that too although he may have obtained a judgment by default, not set aside, against his debtor for the larger sum. *R.* v. *Taylor*, 5 Cox, 265, 268 (Q. B. D.). Obtaining a gift of money by means of false statements of the name and circumstances of the defendant or any other person, in a *begging letter*, is within the statute. *R.* v. *Jones*, 1 Den. 551; 19 L. J. M. C.) 162; 4 Cox, 198.

An indictment charging the prisoner with obtaining money from a wife, whose husband had run away, by falsely pretending to her that she, the prisoner, had power to bring him back, is good, and sufficiently states an indictable offence. *R.* v. *Giles*, L. & C. 502; 34 L. J. (M. C.) 50; 10 Cox, 44.

Mere promise of future conduct insufficient.]—A pretence that the party *would do* an act which he did not mean to do (*e.g.*, a promise to pay for goods

on delivery) is not a false pretence within the Act, but merely a promise for future conduct. *R.* v. *Goodhall*, R. & R. 461; *R.* v. *Burrows*, 11 Cox, 258 (C. C. R.); 62 & 63 Vict. c. 22, s. 3, *ante*, p. 695. So, where the defendant obtained money from the prosecutor by the false pretence that he *was going* to pay his rent, whereas he had no intention of paying his rent, this was held to be no false pretence within the statute. *R.* v. *Lee*, L. & C. 309; 9 Cox, 304. So, also, a false pretence that the defendant wanted a loan of 30*l.* to enable him to take a public-house is not within the statute. *R.* v. *Woodman*, 14 Cox, 179, Mellor, J. And a pretence to a parish officer, as an excuse for not working, that the party had not clothes, when he really had, though it induced the officer to give him clothes, is not a pretence within the statute, the statement being rather a false excuse for not working than a false pretence to obtain goods. *R.* v. *Wakeling*, R. & R. 504. An indictment for obtaining money from A., under the false pretence that the defendant intended to marry A., and wanted the money to pay for a wedding suit he had bought, was held not sufficient to sustain a conviction. *R.* v. *Johnston*, 2 Mood. 254. And where the false pretence averred in the indictment was that there was a certain sum due and owing to the defendant on account of certain work executed by him, whereas only a smaller sum was due to him; this was held bad, as not sufficiently averring a false pretence of an existing fact, and being provable by evidence of a mere wrongful overcharge. *R.* v. *Oates*, Dears. 459; 24 L. J. (M. C.) 123; 6 Cox, 540. Where an indictment alleged that the defendant falsely pretended to P., who lived at one T.'s that the said P. was to give the defendant 10*s.*, and that T. was going to allow him 10*s.* a week, it was held (Blackburn, J., and Piggot, B., *dub.*) that the indictment did not allege with sufficient certainty any false pretence respecting any existing fact. *R.* v. *Henshaw*, L. & C. 444; 33 L. J. (M. C.) 132.

False pretence as to existing fact, coupled with promise, sufficient.]—But where the statement consists partly of a fraudulent misrepresentation of an existing fact, and partly of a promise to do something *in futuro*—as, that the defendant kept a shop, and that the prosecutrix might go and live with her at the said shop until she obtained a situation; whereas the defendant kept no shop; and the jury find that the prosecutrix parts with her money or goods, relying wholly or in part upon the misrepresentation of fact; this is a sufficient false pretence within the Act. *R.* v. *Fry*, Dears. & B. 449; 27 L. J. (M. C.) 68; 7 Cox, 394. *R.* v. *Bates*, 3 Cox, 201. So, where the false representation was that the defendant *had* bought certain skins, and *would* sell them to the prosecutor. *R.* v. *West*, Dears. & B. 575; 24 L. J. (M. C.) 227; 8 Cox, 12. And where a married man induced a woman to give him money by representing himself to be unmarried, and by promising that with the money he would furnish a house and return and marry her, he was held indictable for obtaining money by false pretences. *R.* v. *Jennison*, L. & C. 157; 31 L. J. (M. C.) 146; 9 Cox, 158: *cf. Anon.*, Lofft, 146: *R.* v. *Johnston*, 2 Mood. 254: *R.* v. *Williams*, 62 J. P. 311. Where the defendant obtained money from a woman under the threat of an action for breach of promise of marriage, he being in fact a married man already, an indictment, laying as the false pretence that

was entitled to maintain an action against her for the breach of promise, as held to be good, for that this was a false pretence within the statute. v. *Copeland*, C. & Mar. 516. "A promise to do a thing *in futuro* may volve a false pretence that the promissor has the power to do that thing, for hich false pretence the promissor may be indictable." *R.* v. *Giles*, L. & C. 2; 34 L. J. (M. C.) 50; 10 Cox, 44: adopted in *R.* v. *Bancroft*, 26 T. L. R. ; 3 Cr. App. R. 16, 20. And where the false pretence charged was at the defendant said he had got a carriage and pair and expected it down, ther that day or the next, this was held to be proved by evidence of his ving said that he expected his carriage and pair down. *R.* v. *Howarth*, Cox, 588 (C. C. R.). Where money was obtained by the defendant by the lse representation that W. was about to publish a new directory, and that e defendant was collecting information for it, this was held to be a false retence of an existing fact. *R.* v. *Speed*, 15 Cox, 24 (C. C. R.). *And see* v. *Bancroft* (*supra*). A false pretence by a prisoner of power to communite with the spirits of deceased and other persons not present where he then as, and that he had power to cause such spirits to be present, was held a lse pretence of an existing fact. *R.* v. *Lawrence*, 36 L. T. (N. S.) 404: *cf.* enny v. *Hanson*, 18 Q. B. D. 478; 56 L. J. (Q. B.) 41; 16 Cox, 173: *R.* v. ntwistle [1899] 1 Q. B. 846: 68 L. J. (Q. B.) 580; 19 Cox, 317: *R.* v. *Giles* upra): *R.* v. *Stephenson*, 68 J. P. 524.

As to business.]—Where the defendant pretended that he was carrying on an xtensive business as a surveyor and house agent, and thereby induced the rosecutor to deposit with him 25*l.*, as a security for his (the prosecutor's) delity as a clerk, whereas the defendant was not carrying on *any* business as surveyor or house agent, this was held to be a false pretence within the atute. *R.* v. *Crab*, 11 Cox, 85 (C. C. R.). But where the defendant prended (1) that he was doing a good business, and (2) that he had recently old a good business, and thereby induced the prosecutor to deposit with him *l.*, as a security for the prosecutor's fidelity as an assistant, whereas in truth efendant's business was worthless and the defendant was a bankrupt, it was eld that neither of the false pretences alleged came within the statute, because he first pretence was a mere exaggerated representation of value (*see post*, p. 701, 702), upon which, though fraudulent, an indictment would not lie, and ecause the second was too remote. *R.* v. *Williamson*, 11 Cox, 328. Byles, J. n the former of these two cases there was no existing business at all, whereas the latter there appears to have been an existing, although a worthless, usiness. *See also R.* v. *Watson*, Dears. & B. 348; 27 L. J. (M. C.) 18, in hich, although it was not necessary to decide the point, Erle, J., said:—"I ish not to be supposed to assent to the proposition that an indictment [for lse pretences] can be sustained by proof of *mere* exaggeration of the prosperity a business, where there is an original business. It is difficult to draw a ecided line; but I think it has been decided that exaggerated praise does not nder a person liable within the statute." As to the general doctrine that aggerated praise does not render a prisoner liable within the statute, and the nitations of that doctrine, *see R.* v. *Bryan*, and other cases, *post*, pp. 701, 702.

For instances of indictments for obtaining money by false pretences where the business carried on by the defendant was a "bogus" business, *see R.* v. *Cooper*, 2 Q. B. D. 510; 13 Cox, 617: *R.* v. *King* [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87; 18 Cox, 447 (C. C. R.); *R.* v. *Rhodes* [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83; 19 Cox, 182: and indictments charging defendants with obtaining money by falsely pretending that they "were then carrying on a genuine business as —— at ——" are constantly preferred at the Central Criminal Court against persons publishing fraudulent advertisements and the like. Upon the trial of such an indictment, receipts given to a defendant by firms which have sold him goods, and entries in his bank pass-books showing payments made by him, are relevant to the issue and admissible in evidence on his behalf. *R.* v. *Sagar* [1914] 3 K. B. 1112; 84 L. J. (K. B.) 303; 112 L. T. 135; 24 Cox, 500; 79 J. P. 32.

Existence of contract.]—In *R.* v. *Codrington*, 1 C. & P. 661, where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, Littledale, J., ruled that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as a false pretence. In *R.* v. *Kenrick*, 5 Q. B. 49; 12 L. J. (N. S.) M. C. 135; 1 Dav. & M. 208, that decision was much questioned; and it was strongly intimated that the execution of a *contract* between the same parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. And in *R.* v. *Abbott*, 1 Den. 273; 2 C. & K. 630; 2 Cox, 430, it was decided unanimously by the judges, upon a case reserved, that the law was so. *See R.* v. *Burgon*, Dears. & B. 11; 25 L. J. (M. C.) 105; 7 Cox, 131: *R.* v. *Dark*, 1 Den. 276; and *R.* v. *Goss*, Bell, 208; 29 L. J. (M. C.) 86 in which, upon the authority of *R.* v. *Abbott*, the same law was laid down. See also *R.* v. *Sanders* [1919] 1 K. B. 550; 14 Cr. App. R. 9, citing with approval *R.* v. *Kenrick*, *supra*, and explaining *R.* v. *Pywell*, Stark. 402. In *R.* v. *Meakin*, 17 W. R. 683; 11 Cox, 270 (C. C. R.), where the defendant induced the prosecutor to lend him money on a bill of sale of furniture, and the joint and several promissory note of the defendant and another person, by representing that the furniture was unincumbered, whereas the defendant had previously given a bill of sale of the same furniture to another person, although not to its full value, this was held to be an indictable false pretence.

Quantity or weight.]—Where the defendant, having contracted to sell and deliver to the prosecutrix a load of coal at 7*d.* per cwt. delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and produced a ticket, showing 18 cwt. to be the weight which he said he had himself made out when the coals were weighed; and she thereupon paid him the price as for 18 cwt., which was 2*s.* 4*d.* more than was really due; it was held that the defendant was indictable for obtaining the 2*s.* 4*d.* by false pretences. *R.* v. *Sherwood*, Dears. & B. 251; 26 L. J. (M. C.)

81; 7 Cox, 270. This decision was approved and followed in *R. v. Lee*, L. & C. 418; 33 L. J. (M. C.) 129; 9 Cox, 460; *and cf. R.* v. *Ridgway*, 3 F. & F. 838, Bramwell, B. So. where the prosecutor bought of the defendant and paid him for a quantity of coal on a false representation by him that there were 15 cwt., whereas in fact there were only 8 cwt., but so packed in the cart as to have the appearance of a larger quantity, this was held to be an indictable false pretence. *R.* v. *Ragg*, Bell. 214; 29 L. J. (M. C.) 86; 8 Cox, 262. *See also R.* v. *Eagleton* (*post*, p. 718).

Quality or value.]—A person who obtains from a pawnbroker, upon an article which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence within the statute; although the pawnbroker have the opportunity of testing the article at the time. *R.* v. *Ball*, 7. & Mar. 249: *see R.* v. *Roebuck*. Dears. & B. 24; 25 L. J. (M. C.) 101; Cox, 126: *R.* v. *Goss*, Bell. 208 (*infra*). And a false representation that a stamp on a watch is the hall-mark of the Goldsmiths' Company, and that the number 18, part thereof, indicates that it is made of eighteen carat gold, is a false pretence, and is not the less so because accompanied by the representation that the watch is a gold one, and some gold is proved to have been contained in its composition. *R.* v. *Suter*, 10 Cox, 577 (C. C. R.). But a false representation of what is mere matter of opinion, falling within the category of untrue praise in the course of a contract for sale, is not indictable. The defendant was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality, that they were equal to Elkington's A (meaning spoons made by Messrs. Elkington, and stamped by them with the letter A); that the foundations were of the best material, and that they had as much silver on them as Elkington's A. The representations were made to a pawnbroker for the purpose of obtaining, and the defendant did thereby obtain, advances of money on the spoons, which were in fact of inferior quality, and were of less value than the money advanced on them, and the pawnbroker stated that he was induced by the defendant's misrepresentations alone to advance the money, and that if he had known the real quality of the spoons he would have advanced no money on them. The jury found the defendant guilty of fraudulently and falsely representing that the spoons had as much silver on them as Elkington's A, and that the foundations were of the best material, etc., and that he thereby obtained the money. It was nevertheless held by a large majority of the judges, that the conviction could not be sustained. *R.* v. *Bryan*, Dears. & B. 265; 26 L. J. (M. C.) 84; Cox, 312. *See also R.* v. *Levine*, 10 Cox, 374. The decision in *R.* v. *Bryan* is said by Erle, C.J., to have gone "upon the sound principle, that indefinite praise upon a matter of indefinite opinion cannot be made the ground of an indictment for false pretences"; *R.* v. *Goss*, 29 L. J. (M. C.) 86, 90 (*infra*); and by Byles, J., to have been governed by the maxim *simplex commendatio non obligat*. *R.* v. *Ardley*, L. R. 1 C. C. R. 301, 306; 40 L. J. (M. C.) 88; 12 Cox, 23: *cf. R.* v. *Lee*, 8 Cox, 233: *R.* v. *Williamson*, 11 Cox, 328 (*ante*,

p. 699).. But a false representation respecting an alleged matter of definite fact knowingly made, is a false pretence within the statute, and that, too, although the representation is merely as to the *quality* of goods sold or pledged. Therefore, where the defendant induced the prosecutor to purchase a chain from him by fraudulently representing that it was fifteen carat gold, when, in fact, it was only of a quality a trifle better than six carats, knowing at the time that he was falsely representing the quality of the chain as fifteen carat gold, it was held that the statement that the chain was fifteen carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the defendant's knowledge, was a sufficient false pretence to sustain an indictment for obtaining money by false pretences. *R.* v. *Ardley, supra.* And where the defendant induced a purchaser to buy and pay for a cheese of a very inferior description by the wilfully false statement that a taster of a different and superior cheese produced as a sample had formed part of and been taken out of the cheese sold, it was held that he might be convicted of obtaining money by false pretences. *R.* v. *Goss*, 208; 29 L. J. (M. C.) 86; 8 Cox, 262. So, where the defendant sold spurious blacking as " Everett's Blacking," he was held to be indictable for the false pretences. *R.* v. *Dundas*, 6 Cox, 380, Erle, J., Where the defendant falsely represented to the prosecutrix that certain packages which he sold to her contained good tea, whereas, in fact, each package contained a mixture of which only one-fourth part was tea, the remaining three-fourths consisting of sand and other articles unfit for food or drink, and the jury found that the defendant knew of the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud, and the defendant was convicted, it was held that the conviction was right. *R.* v. *Foster*, 2 Q. B. D. 301; 46 L. J. (M. C.) 128; 13 Cox, 393. In *R.* v. *Spiro*, 64 J. P. 794, Darling, J., the prisoner was convicted of obtaining money by false pretences where he had held an auction and had induced persons to hand up sovereigns to him by a representation that they would get them back and also watches offered by him for sale.

Selling goods in wrappers which are a colourable imitation of those of another firm would, it seems, be a false pretence (*R.* v. *Smith*, Dears. & B. 566; 27 L. J. (M. C.) 225; 8 Cox, 32); but certainly falls within the *Merchandise Marks Act*, 1887 (50 & 51 Vict. c. 28).

As to false representations of the soundness of a horse, *see R.* v. *Keighley*, Dears. & B. 145; 7 Cox, 217.

The defendant and two other persons entered into articles of partnership, by the terms of which the profits were to be divided equally among them. By a subsequent verbal arrangement the defendant was to act as agent for the sale of the partnership goods, and was to receive a commission on all orders obtained by him, which commission was to be paid out of the partnership funds before any division of profits was made. The defendant, by falsely pretending that he had obtained some orders, got his partner to pay him a sum for commission. It was held that he was not indictable for false pretences, as his charges were payable out of the partnership funds, and his false state-

ment was a misrepresentation concerning a partnership matter, and would have to be investigated, and the sum paid duly considered, in taking the partnership accounts, in order to ascertain the profits. *R.* v. *Evans*, L. & C. 252; 32 L. J. (M. C.) 38; 9 Cox, 238.

Form of pretence.]—When the false pretences are by letter the prosecutor may be asked his opinion as to its meaning, and as to his belief when he received it with respect to the truth of the statements contained in it: but the proper inferences to be drawn from the letter are for the jury: *R.* v. *King* [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87; 18 Cox, 447; and not for the judge. *R.* v. *Rosenson*, 12 Cr. App. R. 235. It is not necessary that the pretence should be by words; the conduct and acts of the party will be sufficient, without any verbal or written representation: *R.* v. *Barnard*, 7 C. & P. 784; 62 & 63 Vict. c. 22, s. 3 (*ante*, p. 695): *R.* v. *Hunter*, *R.* v. *Carter*, 10 Cox, 642 (C. C. R.): *R.* v. *Giles*, L. & C. 502: 34 L. J. (M. C.) 50; 10 Cox, 44: *R.* v. *Cooper*, 2 Q. B. D. 510 (*post*, p. 705). Thus, if a person obtains goods from another upon giving him in payment his cheque upon a banker, with whom in fact he has no account, this (although not indictable as a fraud at common law, *R.* v. *Lara*, 6 T. R. 565 (*post*, p. 720): *see R.* v. *Flint*, R. & R. 460) is a false pretence within the meaning of the *Larceny Act*. *R.* v. *Jackson*, 3 Camp. 370: *cf. R.* v. *Martin*, 5 Q. B. D. 34; 49 L. J. (M. C.) 11; 14 Cox, 375: *R.* v. *Garratt*, 10 Times L. R. 167 (C. C. R.). But if the defendant, at the time he gives the cheque, believes, although he has no account at the banker's, that the cheque will be paid on presentation, he cannot be convicted of a false pretence. *R.* v. *Walne*, 11 Cox, 647 (C. C. R.). Thus, where the defendant bought a mare, and paid for her on Thursday by a cheque drawn on a banker with whom he had no account, but told the prosecutor not to present the cheque until Saturday, to which the prosecutor assented, but nevertheless did present it on Thursday, when it was dishonoured, and it appeared from the evidence that the defendant was on Thursday in daily expectation of having money paid to him which would have enabled him to place the banker in funds to meet the cheque on Saturday, this was held not to be criminal because the accused had no intent to defraud. *Id.* But a man who makes and gives a cheque for the amount of goods purchased in a ready-money transaction, makes a representation that the cheque is a good and valid order for the amount inserted in it: and if such person has only a colourable account at the bank on which the cheque is drawn without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonoured on presentation, and intends to defraud, he may be convicted of obtaining such goods by such false pretence. *R.* v. *Hazleton*, L. R. 2 C. C. R. 134; 44 L. J. (M. C.) 11: 13 Cox, 1. Where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain; and the jury found that, before the completion of the sale and delivery of the watch by the prosecutor to the prisoner he represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience.

all which was false; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, and that he had no funds to pay it; he was held to be properly convicted. *R.* v. *Parker*, 2 Mood. 1; 7 C. & P. 825. Where the defendant obtained goods in exchange for a cheque on a bank at which he falsely represented that he had an account, though he knew that the account was closed, and the cheque would not be honoured, it was held that he obtained the goods and not merely credit by false pretences. *R.* v. *Cosnett*, 20 Cox, 6; 65 J. P. 472 (C. C. R.). But where the indictment stated that the defendant falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note, which he then produced and delivered to A. B., was a valuable security for 21*l.*, by means of which false pretences he fraudulently obtained from A. B. 8*l.* 15*s.*; whereas the defendant was not a captain, etc., and the note was not a valuable security, etc., it was held (in error) that as it did not appear but that the note was the defendant's own promissory note, or that he *knew* it to be worthless, the falsification was not sufficient; and, as the two pretences were to be taken together, that the conviction was bad. *R.* v. *Wickham*, 10 A. & E. 34 (*a*). *See also R.* v. *Philpotts*, 1 C. & K. 112. Where the prisoner passed the note of a country bank, which he knew had stopped payment, it appearing that one of the partners was solvent, Gaselee, J., held that he could not be convicted for obtaining money under false pretences. *R.* v. *Spencer*, 3 C. & P. 420. It would seem, however, that an indictment which charged that the defendant obtained money by falsely pretending that a certain piece of paper was a bank note then current, and of the value for which it purported to be made, would be supported by evidence that it was the note of a bank which had stopped payment, and was no longer in existence, and that it had paid only a small dividend, and that these facts were known to the defendant. *R.* v. *Evans*, Bell, 187; 29 L. J. (M. C.) 20; 8 Cox, 257. But in that case an allegation that the note was *of no value whatever* was held not to be supported by the above evidence. *Cf. R.* v. *Williams*, 7 Cox, 351, Martin, B., where the indictment was for passing in 1857 as good a note of a bank which as the prisoner knew had in 1857 stopped payment; and *R.* v. *Flint*, R. & R. 460. Where an indictment charged the defendant with obtaining money, by falsely pretending that a piece of paper was a bank note then current and of the full value of 5*l.*, and the evidence was that the piece of paper was the note of a bank which had stopped payment forty years before, and had not been reopened, and that the defendant knew it, this evidence was held sufficient to justify a conviction, although it appeared from the cross-examination of a witness for the prosecution, that the bank had been made bankrupt, and the bankruptcy proceedings were not produced, and there was no evidence as to what dividend, if any, had been paid. *R.* v. *Dowey*, 37 L. J. (M. C.) 52; 11 Cox, 115: *cf. R.* v. *Smith*, 6 Cox, 314. Under 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 213), the prisoner can now be convicted of misdemeanor in cases where the facts given in evidence amount in law to a

(*a*) The report in 8 L. J. (M. C.) 87 differs in essentials from that in 10 A. & E., stating that the rule was refused and the indictment held good.

felony : *e.g.* to forgery, as in *R.* v. *Evans*, 5 C. & P. 553 : *cf. R.* v. *Anderson*, 2 M. & Rob. 469. And where the cashier of a bank, who had a general authority to conduct the business of the bank, and to part with its property on the presentation of a genuine order from a customer, was deceived by a forged order, and parted with the property of the bank to the person who presented the order, and who knew the order to be forged, it was held that the latter was guilty of obtaining by false pretences the money so paid on the order. *R.* v. *Prince*, 38 L. J. (M. C.) 8; L. R. 1 C. C. R. 150. Fraudulently offering a "flash note" in payment under the pretence that it is a bank note, is a false pretence within the statute. *R.* v. *Coulson*, 1 Den. 592; 19 L. J. (M. C.) 182; 4 Cox, 227. A person who fraudulently obtains goods by forwarding to the vendor the half of a bank note, having previously parted with the corresponding half to a third person, is guilty of obtaining goods by false pretences, as by forwarding the half-note he represents that he has the corresponding half ready for the vendor's satisfaction. *R.* v. *Murphy*, Ir. Rep., 10 C. L. 508; 13 Cox, 298 (C. C. R. Ir.) : *cf. R.* v. *Freeth*, R. & R. 127. So, where a person at Oxford, who was not a member of the university, went, for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods, this was held a sufficient false pretence to satisfy the statute, though nothing passed in words. *R.* v. *Barnard*, 7 C. & P. 784. So, where the prisoner, who had previously pledged ingots of silver with the prosecutor, brought bars of worthless metal similar in appearance, and laid them down, saying, "Eight ounces each at 4*s.* an ounce," the same as before. *R.* v. *Stevens*, 1 Cox, 83.

Ordering a meal at a restaurant without the means to pay may not amount to a false pretence within 6 & 7 Geo. 5, c. 50, s. 32 (1) (*ante*, p. 691), but amounts to fraud other than false pretences within s. 13 (1) of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62). *R.* v. *Jones* [1898] 1 Q. B. 119; 67 L. J. (Q. B.) 41; 19 Cox, 87.

Indeed, it may be laid down generally that, as it is not necessary that the statement of the existing facts should be in *words*, but it may be conveyed by the *conduct and acts* of the party (*ante*, p. 695), so also if made by words or writing it is not necessary that such statement should be made expressly, if the statement may be naturally and reasonably, although not necessarily, inferred from such words or writing, and the defendant intended the prosecutor to put upon them a construction supporting the pretences charged in the indictment. *R.* v. *Cooper*, 2 Q. B. D. 510; 46 L. J. (M. C.) 219; 13 Cox, 617 : *R.* v. *King* [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87; 18 Cox, 447. Thus, where C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he was then in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large quantities of potatoes as and when the same might be delivered to him, and the evidence that C. had so pretended was the following letter written by him to the prosecutor :—"Send me one truck of regents and one truck of rocks, as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. I may say if you use me well I shall be a good customer," it was held, affirming the conviction, that the words of the letter were fairly and reason-

ably capable of a construction supporting the pretences charged, and that it was a question for the jury whether the writer intended the prosecutor to put that construction upon them. *R.* v. *Cooper*, *ante*, p. 705. So, where the defendant was convicted of obtaining money from the prosecutor by falsely pretending that there was a person named A. Brient, living at Holt, Trowbridge, in the county of Wilts, who was a minister of religion, and that the said A. Brient had instituted a "*bonâ fide* competition for the production of the greatest number of words from the word 'Barnardo,' and that the said A. Brient had made arrangements to present prizes to the successful competitors, of the respective values of two pounds, one pound, and ten shillings, and had further arranged to give the proceeds derived from the entrance fees of competitors after deducting the said prizes, to a charitable institution known as Dr. Barnardo's Home for Destitute Children,—and the evidence that the defendant had so pretended was that he had inserted the following advertisement in a newspaper:—'Barnardo. 2*l.*, 1*l.*, 10*s.* for most words from Barnardo. Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists, with 1*s.* 3*d.* to Revd. A. Brient, Holt, Trowbridge, Wilts,'" it was held, affirming the conviction, that the words in the advertisement were reasonably capable of the construction put upon them in the indictment and that it was a question for the jury whether the defendant intended the prosecutor to put that construction upon them. *R.* v. *Randell*, 16 Cox, 335 (C. C. R.). *See also* *R.* v. *Rosenson*, 12 Cr. App. R. 235.

Obtaining as a loan (*see post*, p. 707), from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, was held to be an offence within the statute, the prisoner being shown not to be prepared, and not intending so to apply the money. *R.* v. *Crossley*, 2 M. & Rob. 17, Patteson, J. In like manner, where the defendant obtained goods by a false statement that a bill drawn on and accepted by himself, and purporting to be payable at the London and Westminster Bank, which he gave the prosecutor for the price of the goods, would be paid at the bank the next day, and that he had made arrangements for it, this was held a false pretence within the Act. *R.* v. *Hughes*, 1 F. & F. 355.

"Prepared to pay"—Intention.]—"A promise as to future conduct not intended to be kept is not by itself a false pretence." (62 & 63 Vict. c. 22, s. 3, *ante*, p. 695; 2 Russ. Cr. (7th ed.) 1551). On the special facts of *R.* v. *Gordon*, 23 Q. B. D. 354; 58 L. J. (M. C.) 117 (*post*, p. 719), an averment that the prisoner falsely pretended that he was "prepared to pay" money to the prosecutor was held to be a sufficient statement of an existing fact: *cf.* *R.* v. *Bates*, 3 Cox, 201, where the pretences that the prisoner "then had the means of paying," and "was able and willing to pay" were held sufficient by Platt, B. "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion," *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483; 55 L. J. (Ch.) 650, Bowen, L.J. The Court in *R.* v. *Gordon* (*supra*), however, specially refrained from deciding the question there raised by Wills, J., whether a statement of present intention is a

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charged; proof of part of the pretence and that the money was obtained by such part, is sufficient. *R.* v. *Hill*, R. & R. 190: *R.* v. *Lince*, 12 Cox, 451 (C. C. R.). It is sufficient if the actual substantial pretence which was the main inducement to part with the money, etc., is alleged in the indictment and proved, although it may be shown by the evidence that other matters not laid in the indictment in some measure operated as an inducement upon the prosecutor's mind. *R.* v. *Hewgill*, Dears. 315: *R.* v. *English*, 12 Cox, 171, Cockburn, J.: *R.* v. *Lince*, 12 Cox, 451 (C. C. R.). Where, however, two false pretences are laid as together conducing to the fraud, and the jury find a general verdict of guilty, and it afterwards appears that one of them is not a sufficient false pretence within the statute, it would seem that a conviction cannot be sustained. *See R.* v. *Wickham* (*ante*, p. 704.) If the false pretence is in writing, it may be proved by secondary evidence, if the paper is lost before the trial. *R.* v. *Chadwick*, 6 C. & P. 181. The opinion formed by the prosecutor as to the position or occupation of the prisoner upon the receipt of a letter from the prisoner respecting the goods the subject of the indictment (such letter being put into the prosecutor's hands at the trial) is admissible in evidence. *R.* v. *King* [1897] 1 Q. B. 214; 66 L. J. (Q. B.) 87 (*ante*, p. 703).

He must next prove that the goods, etc., stated in the indictment, or some part of them (for the rule in this respect is the same as in larceny: *see ante*, p. 541), were obtained from him by means of the pretences alleged. Proof that money was actually paid to the defendant by the wife of A. B. in her husband's absence, but by his authority, in consequence of false pretences made by the defendant to A. B., is sufficient to support an indictment charging the defendant with obtaining money by false pretences from A. B. *R.* v. *Moseley*, L. & C. 92; 31 L. J. (M. C.) 24; 9 Cox, 16 (C. C. R.). Where a false pretence was made to the secretary of a friendly society, and the secretary accompanied the prisoner to the treasurer, who paid over the money, it was held that the treasurer was merely a mechanical medium, and that the false pretence to and obtaining from the secretary was proved. *R.* v. *Rouse*, 4 Cox, 7, Erle, J.: *cf. R.* v. *Taylor*, 65 J. P. 547 (C. C. R.). The words in the statute are "any chattel, money, or valuable security."

Intent to defraud.]—This is an essential ingredient of the offence, though in many cases it may be inferred from the facts of the case. *R.* v. *Ferguson*, 9 Cr. App. R. 113. Where money is obtained by pretences that are false, *primâ facie* there is an intent to defraud. *R.* v. *Hammerson*, 10 Cr. App. R. 121. And use of false statements or documents to obtain the money, though the money might have been obtained without them, is evidence from which there may be inferred an intent to defraud. *R.* v. *Hopley*, 11 Cr. App. R. 248. But unless the intent is clear from the facts, the jury should be directed on the point, and told that an important element in the case is an intent to defraud. *R.* v. *Ferguson*, *supra*; though it is not essential in a clear case. *R.* v. *Carr*, 12 Cr. App. R. 140. Where A. owed B. a debt, of which he could not get payment, and C., B.'s servant, went to A.'s wife, and obtained from her two sacks of malt, saying that B. had bought them of A., and C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the

debt, it was ruled that C. could not be convicted of obtaining the malt by false pretences. *R.* v. *Williams*, 7 C. & P. 354, Coleridge, J. The fact that the defendant at the time he obtained goods by false pretences intended to pay for them when it should be in his power to do so affords no defence to an indictment for obtaining such goods by false pretences. *R.* v. *Naylor*, L. R. 1 C. C. R. 4; 35 L. J. (M. C.) 61; 10 Cox, 149. If a man makes statements of fact which he knows to be untrue, and makes them for the purpose of inducing persons to deposit with him money which he knows they would not deposit but for their belief in the truth of his statements, and if he intends to use the money thus obtained for purposes different from those for which he knows the depositors understand from his statements that he intends to use it—then, although he may intend to repay the money if he can, and although he may honestly believe, and may even have good reason to believe, that he will be able to repay it, he has an intent to defraud. *R.* v. *Carpenter*, 22 Cox, 618; 76 J. P. 158, Channell, J.: *and see R.* v. *Bennett*, 23 Cox, 560; 9 Cr. App. R. 146, approving the definition of Buckley, J., in *In re London & Globe Finance Corporation, Ltd.* [1903] 1 Ch. 728; 72 L. J. (Ch.) 368; 88 L. T. 194, *ante*, p. 630.

The position of a banker differs from that of an ordinary trader. The ordinary trader by the mere fact that his premises are open and that his business is being carried on does not represent that he is solvent; but in the case of a banker the mere fact of his keeping his doors open for business and carrying on business may afford some evidence from which a jury may find that he impliedly represents that he is solvent. *R.* v. *Parker and Bulteel*, 25 Cox, 145, Avory, J.

As to the effect of a verdict of guilty, to which the jury add that there is not sufficient evidence of an intent to defraud, and therefore recommend the prisoner to mercy, *see R.* v. *Gray*, 17 Cox, 299 (C. C. R.) (*ante*, p. 219). *And see R.* v. *Petch*, 2 Cr. App. R. 71; 25 T. L. R. 401.

As to where evidence of other obtainings is admissible in order to prove guilty knowledge, *see post*, p. 716.

It is sufficient to show that the pretence was made, that the money, etc., was obtained thereby, with intent to defraud, and that the pretence was false to the knowledge of the defendant. *Hamilton* v. *R.*, 9 Q. B. 271; 16 L. J. (N. S.) M. C. 9: *R.* v. *Dutt*, 8 Cr. App. R. 51.

Falsity.]—Lastly, it must be proved that the pretences made use of were false in fact: or, in other words, the averments negativing the pretences must be proved. But it does not seem to be essential that they should all be proved; if so many of them as show the falsity of the substance of the pretence are proved, it would seem to be sufficient. Thus, under the precedent (*ante*, p. 693), if it were to appear in evidence that the defendant was really the servant of J. S., yet if it were also to appear that he had no directions from him to get the cloth in question, and that, after he had obtained it, he converted it to his own use, it would be sufficient. Nor is it necessary that the falsity of the pretences should be shown by direct evidence. Thus, where the pretences charged were, that the defendant had a carriage and pair, and

expected it down in a few days, and that he had large property abroad, and there was no direct evidence to show that he had no carriage or no property abroad, but it was proved that three days before he made the pretence he was in another place assuming to be a man of position and wealth, but was in a destitute condition and unable to pay his hotel and other bills, this was held to be evidence from which the jury might well infer that the pretences were false. *R.* v. *Howarth*, 11 Cox, 588 (C. C. R.). Where the defendant, the agent of a life assurance company, had received from the prosecutor a premium for the renewal of a life policy for the year 1883, but had not paid over such premium to the company, and had represented to them that it had not been paid by the prosecutor, in consequence of which the company had treated the policy as lapsed, and the defendant afterwards represented to the prosecutor that the policy was still in existence, and so induced him to pay to him the premium for its renewal for the year 1884, it was held that he was guilty of obtaining such last-mentioned premium by false pretences. *R.* v. *Powell*, 54 L. J. (M. C.) 26; 15 Cox, 568. Where the defendants were charged with obtaining money by colour and pretence of their being collectors of the property-tax, and it appeared in evidence that they had in fact been appointed collectors by the commissioners, though in an informal manner; the pretence was held not to be false within the meaning of the Act. *R.* v. *Dobson*, 7 East, 218. Upon an indictment for obtaining money by a false pretence made by the defendant that he was an attorney, it is not necessary to prove the negative in any other way than by the production of the Law List in which the defendant's name does not appear. *R.* v. *Wenham*, 10 Cox, 222 (*ante*, p. 416).

Chattel.]—A railway ticket which enabled the defendant to travel free by the railway from B. to H., and was to be given back to the railway company at H., was held to be a "chattel" within this section. *R.* v. *Boulton*, 1 Den. 508; 2 C. & K. 917; 19 L. J. (M. C.) 67. This case seems to conflict with *R.* v. *Kilham* (*ante*, p. 708), as the defendant did not intend, nor was it necessary for his purpose to intend, wholly to deprive the railway company of their property in the ticket; but it is distinguishable from *R.* v. *Kilham*, in this respect, that the defendant by using the ticket for the purpose of travelling on the railway entirely converted it to his own use, for the only purpose for which it was capable of being applied. *See* the judgment in *R.* v. *Kilham* (*supra*). *R.* v. *Boulton* (*supra*) was approved and followed in *R.* v. *Chapman*, 4 Cr. App. R. 276. A dog, not being the subject of larceny at common law, is not a chattel within this Act. *R.* v. *Robinson*, Bell, 34 (*ante*, p. 550).

Valuable security.]—The defendant, who was the secretary to a burial society, had, by the false pretence of a death, obtained from the president of the society an order on the treasurer in the following form :—"B. United Burial Society, No. 23. Bolton, Sept. 1, 1853. Mr. A. E., treasurer :—Please to pay the bearer 2*l.* 10*s.*, Greenhalgh, and charge the same to the above society, R. L., president" : this was held to be a "valuable security" within 7 & 8 G. 4, c. 29, s. 53 (*rep.*), as explained by s. 5 of that Act (*see now* 6 & 7 Geo. 5, c. 50, s. 46 (1), *ante*, p. 508). *R.* v. *Greenhalgh*, Dears. 267; 6 Cox, 257 (C. C. R.).

Where, in order to induce his bankers to pay his cheques, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, it was held not to be within the Act, because he only obtained credit, not any specific sum on the bill. *R.* v. *Wavell*, 1 Mood. 224. *See R.* v. *Crosby*, 1 Cox, 10: *R.* v. *Garrett*, Dears. 232; 23 L. J. (M. C.) 20; 6 Cox, 260. This, however, would seem to come under s. 13, sub-s. 1 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), which is expressly aimed at the obtaining of credit under false pretences, or by other fraud. (*See post*, p. 714).

Conviction for attempt where prosecutor not deceived.]—It is not an essential element in the offence of *attempting* to obtain goods by false pretences that the mind of the prosecutor shall have been affected by the false pretences. *R.* v. *Light*, 84 L. J. (K. B.) 865; 112 L. T. 1144; 24 Cox, 718; 31 T. L. R. 257; 11 Cr. App. R. 111. Where the defendant offered a chain in pledge to a pawnbroker, which he falsely stated to be silver, but the pawnbroker stated that he advanced money on it, not in consequence of the defendant's statement, but in reliance on its withstanding a test which he himself applied to it, it was held that the defendant could not be convicted of obtaining the money by means of the false pretence, but that he was properly convicted of *attempting* to obtain money by false pretences. *R.* v. *Roebuck*, Dears. & B. 24; 25 L. J. (M. C.) 101; 7 Cox, 126. So, also, wherever the prosecutor himself knows the falsehood of the pretence, but parts with his money or goods notwithstanding, the defendant cannot be convicted of *obtaining* by false pretences. *R.* v. *Mills*, Dears. & B. 205; 26 L. J. (M. C.) 79; 7 Cox, 263. In *R.* v. *Ady*, 7 C. & P. 140, the head note is to the effect that "if the defendant obtained the money by a false pretence, knowing it to be false, it is no answer to show that the party from whom he obtained it laid a plan to entrap him into the commission of the offence." In *R.* v. *Mills*, *R.* v. *Ady* was cited, and it was pointed out that Patteson, J., left to the jury the question whether the prosecutor parted with his money in belief in the pretence. And a defendant in such a case as *R.* v. *Ady* may be convicted of *attempting* to obtain by false pretences, even where the indictment charges him with *obtaining*; 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215: *R.* v. *Roebuck*, *supra*); or he may, under such a state of facts, be indicted for the *attempt* simply. *R.* v. *Hensler*, 11 Cox, 570 (C. C. R.). But the fact of the prosecutor having the *means* of such knowledge will not of itself excuse the defendant from being convicted of obtaining by false pretences; for example, where the defendant falsely represented a 1*l.* Irish bank note to be a 5*l.* note, and thereby obtained the full value of a 5*l.* note: though the prosecutor could read, and the note on the face of it furnished obvious means of detecting the fraud, the defendant was held to be properly convicted. *R.* v. *Jessop*, Dears. & B. 442; 27 L. J. (M. C.) 70; 7 Cox, 399. Where the defendant was indicted for conspiring with others to obtain money by false pretences, it was held to be no bar to his conviction that the prosecutor had the intention of cheating the defendant if he could. *R.* v. *Hudson*, Bell, 263; 29 L. J. (M. C.) 145; 8 Cox, 305.

Obtaining board and lodging.]—Where the prisoner was received as a lodger into a house without making any false pretence, but afterwards falsely stated to his landlady that he had come directly from the house of a person whom she knew, and that he had left clothes there, and at the time of making this statement requested to be provided with board as well as lodging, and the landlady knowing the person to whom the prisoner referred, and believing his statement that he had come from that person's house and had clothes there, supplied him with meat and drink as a boarder, it was held that on these facts he was rightly convicted of obtaining goods—the meat and drink supplied to him as board—by false pretences. *R.* v. *Burton*, 16 Cox, 62 (C. C. R.). The defendant, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to board and lodge him at a guinea a week, under which contract he was lodged and supplied with various articles of food. It was held that a conviction for obtaining the articles of food by false pretences could not be supported, for that the obtaining of the food was too remotely the result of the false pretence. *R.* v. *Gardner*, Dears. & B. 40; 25 L. J. (M. C.) 100; 7 Cox, 136 (C. C. R.): *R.* v. *Bryan*, 2 F. & F. 567. See, however, the comments on *R.* v. *Gardner* and *R.* v. *Bryan*, in *R.* v. *Martin*, L. R. 1 C. C. R. 56; 36 L. J. (M. C.) 20, followed in *R.* v. *Moreton*, 109 L. T. 416; 23 Cox, 560; 8 Cr. App R. 214. These cases can now be dealt with as obtaining credit by means of fraud within s. 13 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62). *See R.* v. *Jones* [1898] 1 Q. B. 119; 67 L. J. (Q. B.) 41; 19 Cox, 87, where the defendant went to a restaurant and ordered and ate a meal knowing that he could not pay for it. *See also R.* v. *Wyatt* [1904] 1 K. B. 188; 73 L. J. (K. B.) 15 : *and ante*, p. 361.

Continuing false pretence.]—In *R.* v. *Martin*, *supra*, it was held, that in order to support an indictment for obtaining a chattel by false pretences, it is not necessary that the chattel should have been in existence when the false pretence was made, but that the obtaining is within the statute, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence, and that the question whether the pretence is or is not a continuing one, is one of fact for the jury. This case was approved and followed in *R.* v. *Moreton*, 23 Cox, 560; 109 L. T. 416; 8 Cr. App. R. 214. Another instance of a continuing false pretence is where the defendant by a false pretence obtained a cheque from the prosecutor, which the banker upon whom it was drawn refused to pay, owing to there being a material omission in the body of it. The defendant thereupon returned the cheque to the prosecutor, who immediately tore it up, drew another for the same amount, and gave it to the defendant, who got it cashed and appropriated the money to his own use. It was held that the false pretence which induced the prosecutor to give the first cheque continued in force, and induced him to give the second cheque, and that therefore the money which the defendant obtained by getting it cashed was obtained by him by false pretences. *R.* v. *Greathead*, 14 Cox, 108 (C. C. R.).

On an indictment for attempting to obtain property by false pretences, it was proved that entries for two handicap races in athletic sports were sent to the secretary of the sports in the name of S., containing statements as to the last

four races in which S. had run. The prisoner personated S. at the sports and came first in both races. The entries sent in were not in the writing either of S. or the prisoner. After the first race the prisoner was asked whether he was S., and whether the performances specified in the entry were really prisoner's. He answered both questions falsely in the affirmative. Held that the attempt to obtain the prizes was not too remote from the pretence, and that the prisoner was rightly convicted. *R.* v. *Button* [1900] 2 Q. B. 597; 69 L. J. (Q. B.) 901; 19 Cox, 568, disapproving *R.* v. *Larner*, 14 Cox, 497; and following *R.* v. *Dickenson*, 2 Russ. Cr. (7th ed.) 1551 : Roscoe, Cr. Ev. (13th ed.), 408. Where the defendant, by false and fraudulent representations as to the value and profits of his business, induced the prosecutor to enter into partnership with him, and to advance 500*l.* as part of the capital of the concern, and the prosecutor, after such advance, recognized and acted in the partnership; it was held that this was not obtaining money by false pretences within the meaning of the statute, for the prosecutor, as partner, continued to be interested in the money. *R.* v. *Watson*, Dears. & B. 348; 27 L. J. (M. C.) 18; 7 Cox, 364. Parol evidence may be given of the false pretences laid in the indictment, though a deed between the parties, stating a different consideration for parting with the money, be put in evidence for the prosecution; such deed having been made for the purpose of the fraud. *R.* v. *Adamson*, 2 Mood. 286; 1 C. & K. 192.

Conviction for false pretences where offence is larceny.]—The distinction between larceny and obtaining by false pretences is often obscure and difficult to ascertain (*ante*, p. 525). Formerly, if the evidence proved not only an intent to cheat or defraud, but also established a pre-existing *animus furandi*, and a constructive taking, such as to constitute larceny, the misdemeanor being merged in the felony, the defendant was entitled to his acquittal. *R.* v. *Pear*, 2 East, P. C. 685; 1 Leach, 212. But under 6 & 7 Geo. 5, c. 50, s. 44 (4) (*ante*, p. 506), the defendant may be convicted upon an indictment for false pretences, although it appear at the trial the offence amounts to larceny, and not merely to obtaining money, etc., by false pretences. And by s. 44 (3) (*ante*, p. 506) the defendant upon an indictment for larceny may be convicted of false pretences, where the evidence establishes the latter offence. These two offences are especially difficult to distinguish, in cases where there has been a constructive taking. *R.* v. *Essex*, Dears. & B. 371; 27 L. J. (M. C.) 20; 7 Cox, 384. *R.* v. *Solomons*, 17 Cox, 93 (*ante*, p. 520); but the difficulties arising from this circumstance appear to be obviated by the above-mentioned statutory provisions. It is not, however, sufficient under 6 & 7 Geo. 5, c. 50, s. 44 (4) to prove *any* larceny. The true meaning of the provision is, that if the misdemeanor is proved as it is laid in the indictment, the defendant is not to be acquitted of the misdemeanor simply because the case amounts to larceny. *R.* v. *Bulmer*, L. & C. 476; 33 L. J. (M. C.) 171; 9 Cox, 492. Where the indictment averred an obtaining of a particular sum of money, with intent to defraud the prosecutor of *the same*, and it appeared that the intent was to defraud him of a part only of that sum, the rest being really due, it was held that the prisoner might nevertheless be convicted. *R.* v. *Leonard*, 1 Den. 304; 2 C. & K. 514; 3 Cox, 284. Where goods are obtained on a contract induced by the false pretences

of the prisoner that he is another person, it would seem that the contract is null (*Cundy* v. *Lindsay*, 3 App. Cas. 459; 47 L. J. (Q. B.) 581), and that the offence might be treated as larceny by a trick, *see R.* v. *George*, 65 J. P. 729. It is only necessary to allege in the indictment, and to prove, an intent to defraud generally, without alleging or proving an intent to defraud any particular person. 5 & 6 Geo. 5, c. 90, r. 10 (*ante*, p. 52); 6 & 7 Geo. 5, c. 50, s. 40 (1) (*ante*, p. 502).

Guilty knowledge—Evidence of other obtainings.]—On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals, evidence is admissible of a false pretence by the defendant on a *prior occasion* to another person that a chain was gold, whereas it was plated, and on another distinct occasion that a ring was of diamonds, which it was not, on the ground that these previous transactions are evidence of the guilty knowledge of the prisoner at the time he made the false pretence charged in the indictment. *R.* v. *Francis*, L. R. 2 C. C. R. 128; 43 L. J. (M. C.) 97; 12 Cox, 612. And where the prisoner was indicted for obtaining eggs by false pretences, he having falsely represented by advertisements in newspapers that he was carrying on a *bonâ fide* dairyman's business, whereas in truth and in fact the business was a "bogus" one, evidence that on occasions *subsequent to the transactions the subject of the charge* he had obtained eggs from other persons by means of similar advertisements was held admissible. *R.* v. *Rhodes* [1899] 1 Q. B. 77; 68 L. J. (Q. B.) 83; 19 Cox, 182, where *R.* v. *Holt*, Bell. 280; 30 L. J. (M. C.) 11; 8 Cox, 411, is distinguished. *See* the remarks on *R.* v. *Holt*, made by Blackburn, J., in *R.* v. *Francis*, and the general rules as to admission of such evidence (*ante*, pp. 355, 361). In *R.* v. *Fisher* [1910] 1 K. B. 149; 79 L. J. (K. B.) 187; 22 Cox, 270; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122, the law was stated as follows: "The falsity of [particular] statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to show that the prisoner was a swindler. But there is no rule of law that swindling is as regards proof different from any other offence, and if a man is charged with swindling in a particular manner his guilt cannot be proved by showing that he has also swindled in some other manner." This direction was approved and followed in *R.* v. *Ellis* [1910] 2 K. B. 746; 79 L. J. (K. B.) 841; 22 Cox, 330; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535.

The prisoner, having been acquitted on an indictment charging him with obtaining from A. a cheque by falsely pretending that another cheque which he then gave to A. was a good and valid order for the payment of money, was tried on a second indictment charging him with obtaining money from B. and C. by similar false pretences as to three other cheques: it was held that the evidence of A. which had been given on the first indictment, upon which the prisoner had been tried and acquitted, was admissible upon the trial of the second indictment. *R.* v. *Ollis* [1900] 2 Q. B. 758; 69 L. J. (Q. B.) 918; 19 Cox, 555. "The evidence was relevant *as showing a course of conduct on the part of the accused*, and a belief on his part that the cheques would not be met," *Id per* Russell, C.J. It "tended to show that the conduct of the prisoner was not

inadvertent or accidental, but was *part of a systematic fraud:*" *Id. per* Wright, J. On the same principle, where the prisoner was charged with obtaining credit by fraud under s. 13 (1) of the *Debtors Act*, 1869, in respect of food and lodging obtained by him from A., evidence of similar obtainings from B., C., and D. immediately preceding the commission of the alleged offence was held admissible. *R.* v. *Wyatt* [1904] 1 K. B. 188; 73 L. J. (K. B.) 15; 68 J. P. 34. *See R.* v. *Smith*, 20 Cox, 804; 69 J. P. 51: *R.* v. *Charlesworth*, 4 Cr. App. R. 167.

The prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the four statements alleged being the same in all these counts; in a fifth count, for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts, and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1*s.*," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eight-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but, having been stopped by the post-office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post office before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence. It was held that, under the circumstances, the letters were rightly received in evidence. *R.* v. *Cooper*, 1 Q. B. D. 19; 45 L. J. (M. C.) 15; 13 Cox, 123. In *Re Pinter*, 17 Cox, 497, an extradition case, it was held that dealing in 1890 under a false name with bonds stolen in 1883 and stopped, was some evidence to support a charge of falsely representing that they were current bonds, and honestly held. For other decisions on this subject, *see ante*, p. 361.

Attempt.]—As every attempt to commit a crime is itself an indictable misdemeanor at common law (*see ante*, p. 3), wherever the intention to obtain money or goods by false pretences is manifested by any overt act, the party may be indicted for the attempt to commit the statutable misdemeanor. *R.* v. *Hensler*, 11 Cox, 570 (C. C. R.). And he may be convicted of the *attempt* to obtain, although the indictment changes an actual obtaining. *See R.* v. *Roebuck*, Dears. & B. 24 (*ante*, p. 713). 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215). But where the indictment charges an attempt only the nature of the attempt must be set forth in the indictment with reasonable certainty. And where the indictment stated that the defendant "did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully, to obtain from an insurance company a large sum of money, to wit, the sum of 22*l.* 10*s.*, with

intent thereby then and there to cheat and defraud the said company," etc.; this was held insufficient. *R.* v. *Marsh*, 1 Den. 505; 19 L. J. (M. C.) 12. The defendant had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor person bringing a ticket from the relieving officer. The tickets were to be returned by the defendant at the end of each week, together with a statement of the number of tickets sent back, whereupon he would be credited for the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the certified weight, returned the tickets with a note of the number sent, and obtained credit in account for the loaves so delivered, but before the time for payment had arrived the fraud was discovered. It was held that the mere delivery of a less quantity of bread than that contracted for was a mere private fraud, no false weights or tokens having been used, and therefore not an indictable offence; but that the defendant was properly convicted of attempting to obtain money by false pretences; for although he had only obtained credit in account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt; and that this was a case within 7 & 8 G. 4, c. 29, s. 53 (*rep.*), because it was an attempt to obtain money by a false and fraudulent representation of an antecedent fact; it was not a mere sale of goods by a false pretence of their weight; *R.* v. *Eagleton*, Dears. 376, 515; 24 L. J. (M. C.) 158; 6 Cox, 559; and *semble*, that he could now be convicted of obtaining credit under false pretences under s. 13 (1) of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62). Mere preparation to commit an offence is not an attempt. A jeweller, with the intention of defrauding underwriters with whom he was insured against burglary, represented to a police sergeant that a burglary had taken place upon his premises, and that he had been robbed of a large quantity of jewellery. For the purpose of carrying out his scheme he had secreted the jewellery on his premises, and was found by the police sergeant tied up in his shop as if by burglars. He had made no application for the insurance money. It was held by the Court of Criminal Appeal that this did not amount to an attempt to commit the offence, but was only preparation for the commission thereof. The police were not agents of the underwriters. *R.* v. *Robinson* [1915] 2 K. B. 342; 84 L. J. (K. B.) 1149; 113 L. T. 379; 24 Cox, 726; 79 J. P. 303; 31 T. L. R. 313; 11 Cr. App. R. 124. It is not an essential element in the offence of attempting to obtain goods by false pretences that the mind of the prosecutor shall have been affected by the false pretences. *R.* v. *Light*, 84 L. J. (K. B.) 865; 112 L. T. 1144; 24 Cox, 500; 79 J. P. 32; 11 Cr. App. R. 111.

Indictment for obtaining the Acceptance to a Bill of Exchange by False Pretences. (6 & 7 *Geo.* 5, *c.* 50, *s.* 32 (2) (a), ante, p. 691.)

Commencement as ante, p. 693.

STATEMENT OF OFFENCE.

Obtaining the acceptance to a bill of exchange by false pretences, contrary to section 32 (2) (a) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the first day of June, A.D. ——, in the county of ——, with intent to defraud or injure, induced C. D. to accept a bill of exchange for £100 by falsely pretending that [*state the false pretence used, as in the last precedents*].

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 6 & 7 Geo. 5, c. 50, ss. 32, 37 (4), ante, pp. 691, 501. *As to fine and recognizances and sureties for keeping the peace and being of good behaviour*, see Id. s. 37 (5) (a) (c), ante, p. 501.

Evidence.

The evidence will be governed by the like rules as would apply to an indictment under 6 & 7 Geo. 5, c. 50, s. 32 (1) (*see ante*, pp. 695 *et seq.*). The prosecutor must prove the pretences as stated in the indictment: that by means of them or some of them he was induced to accept the bill of exchange; their falsehood; and the intent to defraud, which of course will generally be implied from the circumstances of the case.

Where the prisoner was convicted on an indictment charging that by the false pretence to the prosecutor that he "was prepared to pay him" 100*l.*, he did then unlawfully and fraudulently induce the prosecutor to "make a certain valuable security," to wit, a promissory note for 100*l.*, with intent thereby to defraud the prosecutor, it was held that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner of an existing fact, viz., that he was prepared to pay the prosecutor 100*l.*, and had the money ready for him on his signing the promissory note: and that the indictment showed an offence within 24 & 25 Vict. c. 96, s. 90 (*rep.*), of fraudulently causing a person to "make a valuable security," although the promissory note in question might not be of value until it had been delivered into the prisoner's hands. *R.* v. *Gordon*, 23 Q. B. D. 354; 58 L. J. (M. C.) 117; 16 Cox, 622. The facts of this case would bring it within the *Money Lenders Act*, 1900 (63 & 64 Vict. c. 51), s. 4, *ante*, p. 690. Where the signature is obtained to a piece of paper which is intended to be used as a valuable security, a conviction under this section may be good though there is some defect in the document which might have rendered it invalid if an attempt to use it had been made. *R.* v. *Graham*, 8 Cr. App. R. 149.

Indictment for winning Money at Cards, etc., by Fraud. (8 & 9 *Vict.* c. 109, *s.* 17, ante, p. 690.)

Commencement as ante, p. 693.

STATEMENT OF OFFENCE.

Cheating at cards, contrary to section 17 of the Gaming Act, 1845.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, by fraud or unlawful device or ill-practice in playing at or with cards won £50 from C. D. to himself ("*to himself or any other or others*") and thereby obtained £50 from C. D. by a false pretence. [*Where the offence was committed by two or more, and there is any doubt whether the game or fraud comes within* 8 & 9 Vict. c. 109, s. 17, *a count should be added as in* R. *v.* Hudson, Bell, 263; 29 L. J. (M. C.) 145; 8 Cox, 305, *charging a conspiracy to cheat.*]

Misdemeanor: punishable as obtaining money by false pretences. 8 & 9 Vict. c. 109, s. 17 (ante, p. 690).

Evidence.

To maintain the indictment, it is necessary not only to prove that A. B. won of C. D. the money, etc., laid in the indictment, or some part of it, *see* R. v. *Darley*, 1 Stark. (N. P.) 359, but also to prove that it was won by "fraud or unlawful device or ill-practice." *See* R. v. *Rogier*, 1 B. & C. 272; 2 D. & R. 431. A variance between the indictment and evidence as to the game played (if stated) would be fatal, unless amended. *See Cooke* v. *Stratford*, 13 M. & W. 379. It does not seem, however, to be necessary to state the name of the game. As to what frauds and games come within 8 & 9 Vict. c. 109, s. 17, *see* R. v. *Bailey*, 4 Cox, 390; followed in R. v. *Governor of Brixton Prison, Ex parte Sjoland* [1912] 3 K. B. 568; 82 L. J. (K. B.) 5: *and see* R. v. *Moore*, 10 Cr. App. R. 54: R. v. *Hudson*, *supra*: R. v. *O'Connor*, 15 Cox, 3, Lush, J., where a watch was obtained by tossing coins for a wager: R. v. *Governor of Brixton Prison, Ex parte Stallman* [1912] 3 K. B. 424; 82 L. J. (K. B.) 8.

Common Law Cheats.

It is a cheat punishable on indictment at common law to obtain money from another by a false message or token; 1 Hale, 506, *and see* 3 Chit. Cr. L. 994 *et seq.* For other cheats indictable at common law, *see Tremaine*, P. C. 85 to 110. They include wilful sale of unwholesome food: *Treeves' case* [1796] 2 East, P. C. 821, 822 (*not there correctly reported;* see R. v. *Brailsford* [1905] 2 K. B. 730, at p. 745); 75 L. J. (K. B.) 64: R. v. *Dixon*, 4 Camp. 12; 3 M. & Sel. 11; 15 R. R. 381: selling a forged picture, R. v. *Closs*, Dears. & B. 460; 27 L. J. (M. C.) 54: and the fraudulent use of devices or tokens to support a false and fraudulent statement. R. v. *Lara*, 6 T. R. 565; 2 Leach, 647, 652; 2 East, P. C. 819: R. v. *Ward*, 2 Str. 747; *and cf.* R. v. *Vreones* [1891] 1 Q. B. 360;

60 L. J. (M. C.) 62; 17 Cox, 267; *and post, tit. Perjury; and see also* 1 Hawk. c. 71; *Fabian's case* [1664] Kel. (J.) 39; 1 East, P. C. 194; *and* 2 East, P. C. 816. But it is not an offence at common law to make short delivery under a contract, unless false weights, measures or tokens are used as the general course of dealing or to all or many customers, or there is a conspiracy to cheat. *R.* v. *Wheatly*, 2 Burr. 1125, 1127, Lord Mansfield, C.J.

Indictment for Selling by False Scales (common law).

Commencement as ante, p. 693.

STATEMENT OF OFFENCE.

Cheating.

PARTICULARS OF OFFENCE.

J. S., on the first day of August, A.D. ——, and on divers other days between that day and the day of the taking of this inquisition, in the county of ——, kept in a shop wherein he carried on business as a grocer a false pair of scales, and fraudulently sold to divers persons divers goods weighed in and sold by the said false scales, which goods were short of the weight at which the same were sold by the said J. S.

Misdemeanor at common law, punishable by fine or imprisonment (with or without hard labour for the whole or any part of such imprisonment, 14 & 15 Vict. c. 100, s. 29), *or both. It is also summarily punishable under the* Weights and Measures Act, 1878 (41 & 42 Vict. c. 49).

Evidence.

Prove that the defendant carried on the business mentioned in the indictment; that the false scales described in the indictment were found in his shop or warehouse, etc., and that he has used them in weighing goods sold by him to his customers. If you have proof that the scales were used by his shopmen or servants, it will be sufficient, as it will be presumed that they were used by his orders (see *ante*, p. 26).

Where a cheat or fraud at common law against a private individual is charged, there are two conditions precedent to the offence: (1) that the act has been completed; (2) that there has been injury to the individual. *R.* v. *Vreones* [1891] 1 Q. B. 360; 60 L. J. (M. C.) 62, *per* Pollock, B.

If a man in the course of his trade or business publicly carried on, puts a false mark or token upon a spurious article, so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is indictable for a cheat at common law. *R.* v. *Closs*, Dears. & B. 460; 27 L. J. (M. C.) 54. *See R.* v. *Worrell*, Trem. 106; *R.* v. *Farmer*, *Id.*

197. The forgery of a trade-mark is also punishable as a misdemeanor under the *Merchandise Marks Act*, 1887 (50 & 51 Vict. c. 28). And the forgery of artists' initials and frauds in the sale of paintings, etc., are punishable in a summary way under 25 & 26 Vict. c. 68. As to frauds in the stamping and sale of chain cables and anchors, *see* 62 & 63 Vict. c. 23, ss. 13, 14, 15, 16, which supersedes previous enactments on the same subject.

SECT. 3.

RECEIVING STOLEN PROPERTY.

Common Law and Former Statutes.

At common law to receive stolen property with knowledge that it was stolen was a misdemeanor where the receiver did nothing which made him an accessory after the fact to the larceny. Fost. 370.

By 3 W. & M. c. 9, s. 4, persons buying or receiving stolen goods knowing them to have been stolen were to be deemed accessories after the fact, and punished accordingly.

By 6 Ann. c. 9 (5 Ann. c. 31, Ruffhead), s. 5, persons buying or receiving stolen goods knowing them to have been stolen were to be deemed accessory to the felony, and liable to suffer death, but with benefit of clergy. Under this Act, s. 6, if the principal could not be taken, so as to be prosecuted and convicted, the receiver might be tried and punished as for a misdemeanor. *R.* v. *Wild*, 1 Str. 57.

By 4 G. 1, c. 11, such persons were made liable to transportation for fourteen years.

All the enactments above referred to were repealed as to England by 7 & 8 G. 4, c. 27, s. 1, and their substance was re-enacted in 7 & 8 G. 4, c. 29, s. 54. In *R.* v. *Cross*, 1 Ld. Raym. 711, 712, Holt, C.J., held that the common law misdemeanor of receiving had merged in the felony created by 3 W. & M. c. 9, s. 4. This decision appears to be accepted as good law in respect of all cases of receiving which formerly fell within 24 & 25 Vict. c. 96, s. 91 (*rep.*), *see* *R.* v. *Payne* [1906] 1 K. B. 97, 102; 75 L. J. (K. B.) 15; 21 Cox, 121, Alverstone, C.J. But where the stealing was not a felony at common law, nor under 24 & 25 Vict. c. 96 (*rep.*), it has been held that a receiver of stolen goods may be punished as for a common law misdemeanor. *R.* v. *Payne*, *sup.*: *R.* v. *Smith*, L. R. 1 C. C. R. 266; 39 L. J. (Q. B.) 112.

Larceny both at common law and by statute has been consolidated by the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), and by s. 36 (*ante*, p. 500) the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12, 16), relating to thefts by a husband or wife from the other have been incorporated, so that in future there is unlikely to be any instance of larceny

which is not a felony under the Act of 1916. By s. 33 of that Act (*infra*) receiving stolen, etc., property is either a felony or a misdemeanor according to whether the property has been feloniously stolen or unlawfully obtained under circumstances amounting to misdemeanor. On an indictment for receiving as a common law misdemeanor where the evidence proved a felony within 24 & 25 Vict. c. 96, s. 91 (*rep.*), it has been held that a conviction for common law misdemeanor was good under 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 213). *R.* v. *Garland* [1910] 1 K. B. 154; 79 L. J. (K. B.) 239.

The punishment for the common law misdemeanor is imprisonment with or without hard labour (*ante*, pp. 239, 241) and (or) fine.

Statutes in force.

6 & 7 *Vict. c.* 40 (*Hosiery Act*, 1843), *ss.* 4, 5, 11.—*Summary proceedings for purchasing or receiving materials or tools embezzled by persons employed in the woollen, worsted, linen, cotton, flax, mohair or silk manufactures.*

34 & 35 *Vict. c.* 112 (*Prevention of Crimes Act*, 1871), *s.* 13.—*Penalty on dealers in old metals purchasing quantities less than stated in schedule.*]—Any dealer in old metals who either personally or by any servant or agent, purchases, receives, or bargains for any metal mentioned in the first column of the schedule annexed hereto, whether new or old, in any quantity at one time of less weight than the quantity set opposite each such metal in the second column of the schedule annexed hereto, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding five pounds. For the purposes of this section the term "dealer in old metals" shall mean any person dealing in, buying, and selling old metal, scrap metal, broken metal, or partly manufactured metal goods, or defaced or old metal goods, and whether such person deals in such articles only, or together with second-hand goods or marine stores. [The schedule enumerates lead 112 lbs.; copper, brass, tin, pewter, German silver and spelter, 56 lbs. The schedule extends to composites the chief ingredient of which is any of the metals above named. *See also* 24 & 25 Vict. c. 110, s. 4; 38 & 39 Vict. c. 25, ss. 9, 10; 7 Edw. 7, c. 53, s. 86; and as to Ireland, 3 Edw. 7, c. 44; *Toppin* v. *Marcus* [1908] 2 Ir. Rep. 423.]

35 & 36 *Vict. c.* 93 (*Pawnbrokers Act*, 1872), *s.* 38.—*Pawnbroker convicted of receiving stolen goods.*]—If a pawnbroker is convicted on indictment of any fraud in his business, or of receiving stolen goods knowing them to be stolen, the Court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly.

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 52.—*Receiving mail-bag or postal packet stolen, etc.*]—See ante, p. 581.

6 & 7 *Geo.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 33.—*Receiving.*]—(1) Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony

or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable—(*a*) in the case of felony, to penal servitude for any term not exceeding fourteen years; (*b*) in the case of misdemeanour, to penal servitude for any term not exceeding seven years; (*c*) in either case, if a male under the age of sixteen years, to be once privately whipped in addition to any punishment to which he may by law be liable. (2) Every person who receives any mail bag, or any postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof amounts to a felony under the Post Office Act, 1908 (8 Edw. 7, c. 48), or this Act, knowing the same to have been so feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by post, shall be guilty of felony and on conviction thereof liable to the same punishment as if he had stolen, taken, embezzled, or secreted the same. (3) Every such person may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice. (4) Every person who, without lawful excuse, knowing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside the United Kingdom, shall be guilty of the offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable to penal servitude for any term not exceeding seven years. [*This section consolidates* 24 & 25 Vict. c. 96, ss. 91, 95; 8 Edw. 7, c. 48, s. 52; 59 & 60 Vict. c. 52.]

Sect. 39.—*Venue.*]—(1) A person charged with any offence against this Act may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended or is in custody, as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place. [*This sub-section is new, and creates a wider venue in cases of receiving than existed formerly under* 24 & 25 Vict. c. 96, s. 96.]

(3) Every person who receives in any one part of the United Kingdom any property stolen or otherwise feloniously taken in any other part of the United Kingdom may be dealt with, indicted, tried, and punished in that part of the United Kingdom where he so receives the property in the same manner as if it had been originally stolen or taken in that part. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 114, *with regard to receiving.*]

Sect. 40.—*Procedure.*]—(3) In an indictment for feloniously receiving any property under this Act any number of persons who have at different times so received such property or any part thereof may be charged and tried together. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 93.]

Sect. 42.—*Search warrants.*]—(1) If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any property whatsoever, with respect to which any offence against this Act has been com-

mitted, the justice may grant a warrant to search for and seize the same. [*This sub-section is taken from* 24 & 25 Vict. c. 96, s. 103.]—(2)—(*a*) Any constable or peace officer may, if authorized in writing by a chief officer of police, enter any house, shop, warehouse, yard, or other premises, and search for and seize any property he believes to have been stolen, and, where any property is seized in pursuance of this section, the person on whose premises it was at the time of seizure or the person from whom it was taken shall, unless previously charged with receiving the same knowing it to have been stolen, be summoned before a court of summary jurisdiction to account for his possession of such property, and such court shall make such order respecting the disposal of such property and may award such costs as the justice of the case may require. (*b*) It shall be lawful for any chief officer of police to give such authority as aforesaid— (i.) when the premises to be searched are or within the preceding twelve months have been in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves; or (ii.) when the premises to be searched are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty and punishable with penal servitude or imprisonment. (*c*) It shall not be necessary for such chief officer of police on giving such authority to specify any particular property, but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods. [*This sub-section re-enacts* 34 & 35 Vict. c. 112, s. 16.]

Sect. 43.—*Evidence.*]—(1) Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—(*a*) the fact that other property stolen within the period of twelve months preceding *the date of the offence charged* was found *or had been* in his possession; (*b*) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last-mentioned fact may not be proved unless—(i.) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given; (ii.) evidence has been given that the property in respect of which the offender is being tried was found *or had been* in his possession. [*This sub-section re-enacts* 34 & 35 Vict. c. 112, s. 19, *with the addition of the words in italics.* See post, p. 730.]

Sect. 44.—*Verdict.*]—(5) If on the trial of any two or more persons indicted for jointly receiving any property it is proved that one or more of such persons separately received any part of such property, the jury may convict upon such indictment such of the said persons as are proved to have received any part of such property. [*This sub-section re-enacts* 24 & 25 Vict. c. 96, s. 94.]

Indictment against a Receiver of Stolen Goods.

Commencement as ante, p. 693.

STATEMENT OF OFFENCE.

Receiving stolen goods, contrary to section 33 (1) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, did receive a bag, the property of C. D., knowing the same to have been stolen.

The above count will usually be added to an indictment containing a count for larceny. See ante, p. 509.

Any number of receivers at different times of stolen property may now be charged with substantive felonies in the same indictment: 6 & 7 Geo. 5, c. 50, s. 40 (3) (ante, p. 503). *It is not necessary for the purposes of* 6 & 7 Geo. 5, c. 50, s. 43 (1) (b) (ante, p. 506), *to charge in the indictment the previous conviction of the prisoner.*

The defendant may be convicted both on a count charging him as accessory before the fact and on a count for receiving. R. *v.* Hughes, Bell, 242; 29 L. J. (M. C.) 71: R. *v.* Goodspeed, 75 J. P. 232; 27 T. L. R. 255; 55 S. J. 273. *And where the first count of the indictment charged the defendant with stealing certain goods, and the second with receiving "the goods and chattels aforesaid so as aforesaid feloniously stolen," it was held that a conviction on the latter count was good, the words "so as aforesaid feloniously stolen" being immaterial.* R. *v.* Huntley, Bell, 238; 29 L. J. (M. C.) 70. *Where the indictment charges the defendant both with stealing and receiving the defendant cannot, strictly speaking, on the same facts, be found guilty of both, but such a verdict may be treated as a general verdict of guilty on the indictment where it makes no difference as to the sentence.* R. *v.* Lockett [1914] 2 K. B. 720; 78 J. P. 196; 24 Cox, 114; 30 T. L. R. 233; 9 Cr. App. R. 268. *As to the venue*, see ante, pp. 43, 724.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour; if a male under sixteen years of age, with or without whipping. 6 & 7 Geo. 5, c. 50, ss. 33 (1) (a), (c); 37 (4) (ante, p. 501). *As to recognizances and sureties for keeping the peace*, see Id. s. 37 (5) (b) (ante, p. 501). *If a pawnbroker is convicted on indictment of receiving stolen goods, knowing them to be stolen, the Court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly.* 35 & 36 Vict. c. 93, s. 38 (ante, p. 723).

The receiver or receivers may be indicted and convicted whether the principal be or be not convicted, or be or be not amenable to justice. 6 & 7 Geo. 5, c. 50, s. 33 (3) (ante, p. 723).

Restitution.]—*The owner on prosecuting the receiver on conviction is entitled to restitution of his property, except in the case of a valuable security* bonâ

fide *paid or if a negotiable security transferred for a valuable consideration*, Id. s. 45 (ante, pp. 293 *et seq.*).

Evidence.

Prove a larceny of the goods mentioned in the indictment, as directed *ante*, pp. 511 *et seq.*, for which purpose the principal felon is a competent witness, and indeed to prove the whole case. *R.* v. *Haslam*, 1 Leach, 418. Where the only evidence, however, against the alleged receiver is that of the thief, the presiding judge will advise the jury to acquit. *R.* v. *Robinson*, 4 F. & F. 43. *Cf. R.* v. *Jennings*, 7 Cr. App. R. 242. And the mere fact that the stolen goods were found upon the alleged receiver's premises on the day of the theft, is not sufficient to confirm the evidence of the thief, so as to make it proper to convict. *R.* v. *Pratt*, 4 F. & F. 315. It is competent to the defendant to disprove the guilt of the principal. Fost. 365. But the circumstances in which the defendant received the goods may of themselves be sufficient to prove that the goods were stolen and also that at the time the defendant received them he knew they were stolen. It is not a rule of law that there must be other evidence of the theft. *R.* v. *Sbarra*, 82 J. P. 171; 13 Cr. App. R. 118; 26 Cox, 305. A conviction of the principal for *embezzlement* is sufficient to warrant a conviction of the receiver, by virtue of 6 & 7 Geo. 5, c. 50, s. 33 (1), and was held to be so before the passing of 24 & 25 Vict. c. 96, s. 91 (*rep.*). *See R.* v. *Frampton*, Dears. & B. 585; 27 L. J. (M. C.) 229. Where the prisoners were indicted and convicted of larceny of lead piping at common law, and the evidence disclosed no offence at common law, but an offence under s. 31 of the *Larceny Act*, 1861 (*repealed and replaced by s.* 8 (1) *of the* Larceny Act, 1916, *ante*, p. 572), the Court of Criminal Appeal held that the jury would upon the evidence, if their attention had been called to the particular point, have convicted the prisoners (on the second count) of receiving under s. 91 (*rep.*), and therefore under ss. 4 (1) and 5 (1) of the *Criminal Appeal Act*, 1907, held that the prisoners were properly convicted of receiving. *R.* v. *Cooper* [1908] 24 T. L. R. 867. (*a*) But the evidence must warrant such a substituted verdict or the conviction will be quashed. *R.* v. *Molloy*, 10 Cr. App. R. 75. It was not a felony punishable under s. 91 of 24 & 25 Vict. c. 96 (*rep.*) to receive stolen goods, knowing them to have been stolen, if the stealing was not a felony either at common law or under 24 & 25 Vict. c. 96, although the stealing was a felony under the *Larceny Act*, 1868 (31 & 32 Vict. c. 116), s. 1 (*rep.*). *R.* v. *Smith*, L. R. 1 C. C. R. 266; 39 L. J. (M. C.) 112: *R.* v. *Streeter*, *infra*. And therefore where A. and B were in partnership, and B. stole the partnership goods, and disposed of them to the prisoner, who received them knowing them to have been so stolen, and the prisoner was afterwards indicted and convicted as a receiver under 24 & 25 Vict.

(*a*) Where the prisoner was indicted at common law for stealing and receiving a detachable amalgam plate which was an essential part of an undoubted fixture, and convicted of receiving, the Supreme Court of Victoria held (*a*) that the plate was itself a fixture and therefore could not be the subject of larceny at common law; (*b*) that the conviction for receiving must be quashed. *R.* v. *Dowsey* [1904] 29 Vict. L. R. 453.

c. 96, s. 91, the conviction was quashed. *R.* v. *Smith*, *supra*. But by s. 33 (1) of the *Larceny Act*, 1916 (*ante*, p. 723), an offence is committed in receiving any property "knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanor," and the difficulties which sometimes arose under the Act of 1861 have therefore been got rid of. A wife, although she may have committed adultery, could not *at common law* steal her husband's goods; and therefore the adulterer, receiving from her the goods which she had taken from her husband, could not be guilty of receiving stolen goods. *R.* v. *Kenny*, 2 Q. B. D. 307; 46 L. J. (M. C.) 156. This case was decided before the passing of 45 & 46 Vict. c. 75, s. 16, by virtue of which a married woman may under certain circumstances be guilty of stealing her husband's goods (*see R.* v. *James* [1902] 1 K. B. 540, *and ante*, pp. 538, 540). The receiver from her with a guilty knowledge could not be indicted for receiving under 24 & 25 Vict. c. 96, s. 91; *R.* v. *Streeter* [1900] 2 Q. B. 601; 69 L. J. (Q. B.) 915; 19 Cox, 570; 64 J. P. 537, explaining statements in Roscoe, Cr. Ev. (12th ed.) 485: *and see* Steph. Dig. Cr. Law (6th ed.) 317-320: he could only be indicted and convicted of the receiving as a common law misdemeanor. *R.* v. *Payne* [1906] 1 K. B. 97; 75 L. J. (K. B.) 114; *and see R.* v. *Garland* [1910] 1 K. B. 154; 79 L. J. (K. B.) 239 (*ante*, p. 723). The provisions of 45 & 46 Vict. c. 75, s. 16, have, however, been reproduced in s. 36 of the *Larceny Act*, 1916, so that a receiver of goods stolen by a wife from her husband can be indicted under s. 33 (1) of the latter Act.

Having proved the larceny, you must prove the goods stolen to have been received by the defendant. Where stolen property is found in a man's house, it is a question of fact for the jury whether the property was found in his possession, that is to say, whether it was there with his knowledge and sanction. *R.* v. *Savage* [1906] 70 J. P. 36; *and see R.* v. *Lewis*, 4 Cr. App. R. 96. But finding the goods in a house of which the accused had been tenant, but which he had vacated more than a week before the theft, is not evidence of his having received them, though there may be other evidence to show association with the thieves. *R.* v. *Batty*, 76 J. P. 388. *See also R.* v. *Foreman*, 9 Cr. App. R. 216, where the goods were found in a flat occupied by the accused, but in a room in that flat which had been let by him to another man. And even if there is proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remains in the thief, a conviction for receiving cannot be sustained. *R.* v. *Wiley*, 2 Den. 37; 20 L. J. (M. C.) 4: *R.* v. *Crane*, 76 J. P. 261: *R.* v. *Ashworth*, 6 Cr. App. R. 112: *R.* v. *Cook*, 8 Cr. App. R. 91: *R.* v. *Berger*, 11 Cr. App. R. 72; 84 L. J. (K. B.) 541; *and see R.* v. *Hill*, 1 Den. 453; 2 C. & R. 978. So, a principal in the second degree, *particeps criminis*, cannot at the same time be treated as a receiver. *R.* v. *Perkins*, 2 Den. 459; 21 L. J. (M. C.) 152: *R.* v. *Coggins*, 12 Cox, 517 (C. C. R.). But a person having a *joint* possession with the thief may be convicted as a receiver. *R.* v. *Smith*, Dears. 494; 24 L. J. (M. C.) 135. Where A., knowing that goods had been stolen, directed B., his servant, to receive them into his premises, and B., in pursuance of that direction, afterwards received them in A.'s absence, B. also knowing that they had been stolen, they were

held to be indictable jointly. *R.* v. *Parr*, 2 M. & Rob. 346. Two or more persons may be indicted jointly for receiving stolen property, though each successively received the whole of the same at different times; and it makes no difference whether the receipt was direct from the thief or from an intermediate person. *R.* v. *Reardon*, L. R. 1 C. C. R. 31; 35 L. J. (M. C.) 171. Proof that the goods were found in the defendant's possession is good presumptive evidence of the fact; or it may be proved by the principal felon. On proof that the defendant not only received the articles, but also assisted in stealing them, he may still be convicted, provided some other person assisted in the theft; because the stealing and receiving are both felonious, and a theft by several is a theft by each. *See R.* v. *Dyer*, 2 East, P. C. 767 : *R.* v. *Attwell*, *Id.* 768. If a husband, knowing that his wife has stolen goods, receives them from her, he may be convicted of receiving. *R.* v. *M'Athey*, L. & C. 250; 32 L. J. (M. C.) 35. Husband and wife were indicted jointly for receiving. The jury found both guilty, and found also that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not necessarily mean that the husband took an active part in the matter and therefore did not warrant his conviction. *R.* v. *Dring*, Dears. & B. 329; 7 Cox, 382; *and see R.* v. *Pritchard*, 23 Cox, 682; 9 Cr. App. R. 210. A wife, in her husband's absence, and without his knowledge, received stolen goods, and paid money on account of them. The thief and the husband afterwards met, and the latter then learnt that the goods were stolen, and agreed on the price to be paid for them, and paid the balance to the thief. On these facts the husband was held to have been properly convicted of receiving. *R.* v. *Woodward*, L. & C. 122; 31 L. J. (M. C.) 91. A wife indicted jointly with her husband for receiving, may be convicted if there is evidence that she acted independently in receiving the stolen goods. *R.* v. *Baines*, 69 L. J. (Q. B.) 681; 19 Cox, 524. The question as to whether the accused was in possession of the thing stolen is a question for the jury, and where there are any circumstances of difficulty it calls for careful and clear direction on the part of the judge. *See R.* v. *Flatman*, 8 Cr. App. R. 256 : *R.* v. *Ashworth*, 6 Cr. App. R. 112 : *R.* v. *Crane*, 76 J. P. 261 : *R.* v. *Hagan*, 9 Cr. App. R. 25 : *R.* v. *Pritchard*, *supra*. Mere aiding and abetting in the disposal of stolen property will not make a man guilty of receiving, but may be sufficient to make him an accessory after the fact. *R.* v. *Watson* [1916] 2 K. B. 385; 85 L. J. (K. B.) 1142; 115 L. T. 159; 80 J. P. 391; 32 T. L. R. 580.

Constructive possession.]—The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it. *R.* v. *Smith*, Dears. 494; 24 L. J. (M. C.) 135 : *R.* v. *Gleed*, 12 Cr. App. R. 32; *cf. R.* v. *Miller*, 6 Cox, 353 (Ir.). (*a*) But a master cannot

(*a*) Where it was proved that stolen property was deposited in a lane (used by the accused as a yard) in the early morning following the night on which such property had been stolen, and there was evidence that the property had been intentionally placed in

be convicted of receiving on proof that the goods were received by his servant unless there is evidence that the servant received them with the authority and knowledge of the master. *R.* v. *Pearson* (No. 2), 72 J. P. 451. The possession proved need not be exclusive, but may be joint or several. *R.* v. *Payne*, 3 Cr. App. R. 259; *and see R.* v. *Cook*, 8 Cr. App. R. 91. The prisoner stole a watch at Liverpool, and sent it by rail to a confederate in London: it was held that the constructive possession still remained in the prisoner, and that he was triable in London. *R.* v. *Rogers*, L. R. 1 C. C. R. 136; 37 L. J. (M. C.) 83; 6 Cox, 38.

Evidence of guilty knowledge.]—And, lastly, it must be proved that the defendant, *at the time* he received, or bought the goods, knew them to be stolen. This is proved, either directly, by the evidence of the principal felon, or circumstantially, by proving that the defendant bought them very much under their value, 1 Hale, 619, or denied their being in his possession or the like. *See ante*, p. 401. Where knowledge at the time of receipt that the thing received was stolen is negatived, and the evidence is that such knowledge was obtained some days after the thing had come into the possession of the accused, the offence is not made out, though he still continues the possession, unless there is evidence of a fresh receipt. *R.* v. *Johnson*, 75 J. P. 464; 27 T. L. R. 489; 6 Cr. App. R. 218.

Under paragraph (a) of 6 & 7 Geo. 5, c. 50, s. 43 (1) (*ante*, p. 506), on the trial of an indictment for receiving stolen goods, evidence may be given that other property stolen within the period of twelve months *preceding the date of the offence charged* was found *or had been* in the possession of the prisoner, although such other property is the subject of another indictment against him, to be tried at the same assizes. *See R.* v. *Jones*, 14 Cox, 3, Lopes, J. The evidence which may be given under this section by the prosecution as to the finding of such other stolen property in the prisoner's possession is not limited to the fact of its having been so found, but includes evidence as to the circumstances in which it was found and as to statements made at the time by the prisoner in explanation of the property being found in his possession; and, further, the evidence as to its being stolen property need not be given before, but may be given after, the evidence as to its being found in the prisoner's possession, and, in the event of a failure by the prosecution to prove, with regard to a portion of it, that it was stolen property, such failure will not, if substantially all the property is proved to have been stolen, be a ground for quashing the conviction. *R.* v. *Smith* [1918] 2 K. B. 415; 13 Cr. App. R. 151; 34 T. L. R. 481. Such evidence ought not to be admitted if the real offence charged is stealing and not receiving. *R.* v. *Girod* [1906] 22 T. L. R. 720; 70 J. P. 514. (*a*) *R.* v. *Ballard*, 12 Cr. App. R. 1. "The mere fact of

the lane in pursuance of a pre-existing arrangement between the accused and the thieves that if stolen property were left there the accused would pay for it, but there was no evidence that the accused knew the property had been so deposited or had exercised any act of dominion over it, the Supreme Court of Victoria held that the accused was not guilty of receiving. *R.* v. *Merriman* [1907] Vict. L. R. 1.

(*a*) The headnote to this case in 70 J. P. 514 is incorrect. *R.* v. *Harding*, 3 Cr. App. R. 10.

putting a count for receiving in the indictment will not make such evidence admissible," Alverstone, C.J. *R.* v. *Bromhead* [1907] 71 J. P. 103. It is essential, in order to admit such evidence, that there must be evidence that the property which is found is stolen property; if the prosecution fails to prove this, then the evidence admitted under this section ought to be withdrawn by the judge from the consideration of the jury. *R.* v. *Girod*, *supra*. Formerly, under the analogous provision of 34 & 35 Vict. c. 112, s. 19 (*rep.*), in order to show guilty knowledge it was not sufficient merely to prove that " other property stolen within the preceding period of twelve months " had at some time previously been dealt with by the prisoner, but it was necessary to prove further that such " other property " was *found in the prisoner's possession* at the time when he was found in possession of the property which was the subject of the indictment. *R.* v. *Carter*, 12 Q. B. D. 522; 53 L. J. (M. C.) 96 : *R.* v. *Drage*, 14 Cox, 85, Bramwell, L.J. : *R.* v. *Hardy*, 74 J. P. 396. The above decisions, which had been somewhat whittled down by *R.* v. *Rowland* [1910] 1 K. B. 458; 79 L. J. (K. B.) 327; 3 Cr. App. R. 277, have been got rid of by 6 & 7 Geo. 5, c. 50, s. 43, (1), *ante*, p. 506, so that it is now sufficient to prove that other property stolen within the period of twelve months preceding the date of the offence charged *had been* in the prisoner's possession, although he may have disposed of it prior to his arrest. On a trial for receiving, evidence by the thief to prove that he had sold stolen property to the receiver at any previous time is admissible against the receiver, and is not excluded by the time limitation in the statute. *R.* v. *Powell*, 3 Cr. App. R. 1. Where evidence was tendered on behalf of the prosecution to prove receipt by the prisoner at different times *from the same person* of articles which were not those the subject of the charge and had been stolen on different occasions antecedent to the date of the receiving charged in the indictment, this was held to be admissible. *R.* v. *Dunn*, 1 Mood. 146. So, where evidence was tendered that on various former occasions portions of the commodity stolen had been missed by the prosecutor, and that the prisoners, the alleged thief and receiver, had after such occasions been found selling such a commodity, that which was sold on the last of these occasions being identified as part of the commodity missed by the prosecutor, this was held to be admissible as proof of guilty knowledge. *R.* v. *Nicholls*, 1 F. & F. 51, Cockburn, C.J. The prisoner was indicted for receiving certain jewellery knowing the same to have been stolen. No stolen jewellery was proved to have been found in his possession, but evidence that he had received large quantities of stolen jewellery *from the same person* (who had acted as intermediary between the thief and the receiver) on various occasions antecedent and on one occasion subsequent to the receiving charged in the indictment was held to be admissible on the authority of *R.* v. *Dunn*, *supra* : *R.* v. *Hobinstock* [1902] 135 Cent. Crim. Court, Sess. Pap. 169, Fulton, Recorder. *See* 37 Law Journ. Newsp. 106.

Upon paragraph (b) of the same section (6 & 7 Geo. 5, c. 50, s. 43 (1) : *ante*, p. 506) it would appear that on an indictment for receiving stolen goods, service of a notice under that paragraph, and proof of a previous conviction, do not relieve the prosecution from the necessity of proving that the prisoner knew that the goods had been stolen. *R.* v. *Davis*, L. R. 1 C. C. R. 272; 39 L. J.

(M. C.) 135. That case was, however, decided upon 32 & 33 Vict. c. 99, s. 11 (*rep.*), which is somewhat differently worded from 6 & 7 Geo. 5, c. 50, s. 43 (1). When evidence has been given that the stolen property was found *or had been* in the possession of the prisoner, and the conditions of the section have been complied with, evidence may be given of the previous conviction. *See R.* v. *Bromhead* [1907] 71 J. P. 103. On the question of what is sufficient proof of service upon the prisoner of the notice in writing as required by the section, *see R.* v. *Whitley* [1908] 72 J. P. 272.

Resumption of possession by owner.]—Where stolen goods were returned to the thief, who then on the owner's instructions sold them to D., it was held that D. was not liable to conviction under such circumstances, inasmuch as at the time of the receipt the goods were not *stolen goods*. *R.* v. *Dolan*, Dears. 436; 24 L. J. (M. C.) 59; overruling *R.* v. *Lyons*, C. & Mar. 217; *cf. R.* v. *Hancock*, 14 Cox, 119 (C. C. R.). Stolen goods were sent by the thief in a parcel by railway addressed to the prisoner. An officer of the railway company, from information he had received, examined the parcel at the railway station at the place of its destination, and stopped it. It was called for by the thief on the day of its arrival, and refused to him. Next day a porter of the company, by the officer's direction, took it to a house which the thief had designated, and it was there received by the prisoner. It was held that the prisoner could not be convicted of receiving, as the goods had ceased to be stolen goods at the time when he received them. *R.* v. *Schmidt*, L. R. 1 C. C. R. 15; 35 L. J. (M. C.) 94: *R.* v. *Villensky* [1892] 2 Q. B. 597; 61 L. J. (M. C.) 218.

Recent possession.]—Where the prisoner was found in the recent possession of stolen property, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he was not the thief, it was held that there was evidence for the jury that he received it knowing it to have been stolen. *R.* v. *Langmead*, L. & C. 427; 9 Cox, 464. So also where the prisoner was indicted for larceny, and also for receiving, and the evidence against her consisted of the fact of the stolen property having been found concealed on her person at about ten o'clock in the morning after the night on which it was stolen, and of her having made two contradictory statements as to how she became possessed of it, and the jury acquitted her on the count of larceny, but convicted her on the count for receiving, it was held that the evidence was sufficient to sustain the conviction. *R.* v. *McMahon*, 13 Cox, 275 (C. C. R. Ir.) *See also R.* v. *Deer*, L. & C. 240; 32 L. J. (M. C.) 33, *ante*, p. 539. The onus of proving guilty knowledge always remains upon the prosecution. The judge, in directing the jury, should tell them that, upon the prosecution establishing that the accused was in possession of goods recently stolen, they may, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, find him guilty; but that if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence, although they were not convinced of its truth, the prisoner was entitled to be acquitted, inasmuch as the prosecution would have failed to discharge the duty

cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. *R.* v. *Schama: R.* v. *Abramovitch*, 84 L. J. (K. B.) 396; 112 L. T. 480; 24 Cox, 591; 79 J. P. 184; 31 T. L. R. 88; 11 Cr. App. R. 45. *See also R.* v. *Norris*, 12 Cr. App. R. 156, *and R.* v. *Grinberg*, 33 T. L. R. 428; 12 Cr. App. R. 259; *R.* v. *Badash*, 13 Cr. App. R. 17 : *R.* v. *Bailey*, 13 Cr. App. R. 27 : *R.* v. *Brain*, 13 Cr. App. R. 197.

Indictment against a Receiver where the principal Offence is a Misdemeanor. (6 & 7 *Geo.* 5, *c.* 50, *s.* 33 (1) (b), ante, p. 724.)

Commencement as ante, p. 693.

STATEMENT OF OFFENCE.

Receiving goods obtained by false pretences, contrary to section 33 (1) (b) of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, in the county of ——, did receive a silver tankard, the property of C. D., knowing the same to have been obtained by false pretences.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping (Id.) —6 & 7 Geo. 5, c. 50, ss. 33 (1) (b), 37 (4) (ante, pp. 724, 501). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour*, see Id. s. 37 (5) (a) (c) (ante, p. 501).

The receiver may be indicted and convicted, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice. 5 & 6 Geo. 5, c. 50, s. 33 (3), ante, p. 724.

Evidence.

Prove the principal offence, and the receipt with guilty knowledge by the defendant, as in the last case.

SECT. 4.

FALSIFICATION OF ACCOUNTS BY CLERKS, ETC.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 82.]—*Officers of companies keeping fraudulent accounts* (*ante*, p. 623).

38 & 39 *Vict. c.* 24 (*Falsification of Accounts Act*, 1875), *s.* 1.]—If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account then in every such case the person so offending shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for a term not exceeding seven years . . . [NOTE.—*Falsification of accounts is not in all cases forgery, but it may take such a form as to amount to forgery within* 3 & 4 Geo. 5, c. 27 : see Re Arton, No. 2 [1896] 1 Q. B. 509, 517; 65 L. J. (M. C.) 50, per Russell, L.C.J.]

Sect. 2.—*Form of indictment.*]—Repealed by 5 & 6 Geo. 5, c. 90.

Sect. 3.—*Act to be read with* 24 & 25 Vict. c. 96.]—This Act shall be read as one with the *Larceny Act*, 1861 (24 & 25 Vict. c. 96).

8 *Edw.* 7, *c.* 69 (*Companies Consolidation Act*, 1908), *s.* 216.—*Falsification of books on winding-up of company.*]—See ante, p. 626.

Indictment.

Commencement as ante, p. 693.

STATEMENT OF OFFENCE.

First Count.

Falsification of accounts, contrary to section 1 of the Falsification of Accounts Act, 1875.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being clerk or servant to C. D., with intent to defraud, made or concurred in making a false entry in a cash book belonging to the said C. D., his employer, purporting to show that on the said day 100*l.* had been paid to L. M.

STATEMENT OF OFFENCE.

Second Count.

Same as first count.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being clerk or servant to C. D., with intent to defraud, omitted or concurred in omitting from or in a cash book belonging to the said C. D., his employer, a material particular, that is to say, the receipt on the said day of 50*l.* from H. S.

The "document or account" *mentioned in the latter part of the section must* "*belong to or be in the possession of the employer.*" R. *v.* Palin [1906] 1 K. B. 7; 75 L. J. (K. B.) 15; 69 J. P. 423.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour, 38 & 39 Vict. c. 24, s. 1; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace and being of good behaviour,* see 38 & 39 Vict. c. 24, s. 3; 24 & 25 Vict. c. 96, s. 117 (ante, p. 562).

Evidence.

Prove that the defendant at the time he committed the alleged offence was clerk or servant to C. D. The proof under this head will be the same as in cases of embezzlement, as to which *see ante*, p. 606. Prove that the book belonged to C. D. Prove, as to the first count, that the defendant made the entry and that it was false to the defendant's knowledge; and, as to the second count, that the defendant omitted to make the entry and that it was his duty to have made it. The intent to defraud would probably be implied by the jury if they were satisfied of the wilful false entry or omission (*ante*, pp. 352, 360). The proof of other facts, however, might render such implication irresistible, as that the defendant before he made the false entry as alleged had received 100*l.* from his master to pay over to L. M. and had not paid it over. The question of intent to defraud is essentially one for the jury; and where a chairman of quarter sessions summed up a case of falsification in such a way as to withdraw from the jury circumstances bearing upon that question and a conviction ensued, the conviction was quashed. *R.* v. *Drewett*, 69 J. P. 37; 21 T. L. R. 164. A person may be guilty of making a false entry under this Act, although he does not make such entry with his own hands, but fraudulently and wilfully procures it to be made by a third person acting innocently and without any knowledge that the entry is otherwise than true. *R.* v. *Butt*, 15 Cox, 564 (C. C. R.). The defendant was employed in Paris by a firm carrying on business in London, and it was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit these slips to them in London in order that the amounts might be entered up in a cash-book kept in London. He received three sums in Paris which he fraudulently appropriated to his own use,

and omitted to enter an account of them on the slips sent by him on that day to London, intending that the same should be omitted from the cash-book in London, as was the case. Held that he was rightly convicted in London of omitting material particulars from the cash-book. *R.* v. *Oliphant* [1905] 2 K. B. 67; 74 L. J. (K. B.) 591.

A poor-rate collector in the accounts kept by him for the overseers, *between them and the parish*, made the only balance in hand 131*l.* 10*s.* 5*d.* He did not account to the overseers for the sum. Held that the entry as between the overseers and the parish being true, he was not liable to be convicted. *R.* v. *Williams*, 19 Cox, 239; 63 J. P. 103 (C. C. R).

A taxicab was intrusted to the driver on the terms that he should comply with certain regulations and receive, in lieu of wages, a proportion of his takings, as indicated by the taximeter. He drove customers in the cab without setting the taximeter in motion, and made a false return of his takings when signing a sheet which was filled up from the automatic record of the taximeter. It was held that he was a servant within this Act, and that the taximeter sheet was an account within the meaning of the Act. *R.* v. *Solomons* [1909] 2 K. B. 980; 79 L. J. (K. B.) 8; 22 Cox, 178; 2 Cr. App. R. 288; 25 T. L. R. 747.

SECT. 5.

ARSON.

SETTING FIRE TO HOUSES AND OTHER BUILDINGS, ETC.

Common Law.

At common law, arson is the malicious and voluntary burning of the house of another by night or day: 1 Hale, 566; 1 Hawk. c. 39, ss. 1, 7-15. "House" includes not only the dwelling-house but all outhouses which are parcel thereof, though not contiguous nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, or mill-house. 1 Hale, 567. The common law has been supplemented by the enactments given below.

Statutes.

12 *G.* 3, *c.* 24, *s.* 1.—*Setting fire to Crown Dockyards, etc.* (see post, p. 748).

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 1.—*Setting fire to churches, etc.*]—Whosoever shall unlawfully and maliciously set fire to any church, chapel, *meeting-house, or other place of divine worship*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This*

section re-enacts 7 W. 4 & 1 Vict. c. 89, s. 3; *and* 9 & 10 Vict. c. 25, s. 9, *with the alterations italicized. For indictment*, see post, p. 745.]

Sect. 2.—*Setting fire to dwelling-houses, any person being therein.*]—Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, s. 2. *For indictment*, see post, p. 746.]

Sect. 3.—*Setting fire to houses, etc., etc., with intent to injure or defraud.*] —Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 W. 4 & 1 Vict. c. 89, s. 3; 7 & 8 Vict. c. 62, s. 1, *and* 9 & 10 Vict. c. 25, s. 9. *For indictment*, see post, p. 740.]

Sect. 4.—*Setting fire to railway station, etc.*]—Whosoever shall unlawfully and maliciously set fire to any station, engine house, warehouse, or other building belonging to or appertaining to any railway, *port*, dock, or *harbour*, or to any canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 14 & 15 Vict. c. 19, s. 8, *with the addition of the words italicized.*]

Sect. 5.—*Setting fire to public buildings.*]—Whosoever shall unlawfully and maliciously set fire to any building, other than such as are in this Act before mentioned, belonging to the King, or to any county, riding, division, city, borough, poor law union, parish or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was new law in* 1861: see R. *v.* Donnavan, 1 Leach, 69; 2 W. Bl. 683; 2 East, P. C. 1020.]

Sect. 6.—*Setting fire to other buildings.*]—Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under

the age of sixteen years, with or without whipping. [*This section was new law in* 1861.]

Sect. 7.—*Setting fire to goods in buildings.*]—Whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, *under such circumstances that if the building were thereby set fire to, the offence would amount to felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 & 8 Vict. c. 62, s. 2; *and* 14 & 15 Vict. c. 19, s. 8. *The words in italics were added to get rid of* R. *v.* Lyons, Bell, 38; 28 L. J. (M. C.) 33; 8 Cox, 84.

In indictments under this section it is not necessary to allege any intent to injure or defraud: R. *v.* Heseltine, 12 Cox, 404, Pollock, B.]

Sect. 8.—*Attempt to fire buildings.*]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, *under such circumstances that if the same were thereby set fire to the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be imprisoned . . . and, if a male, under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, s. 7, *with the addition in italics. For indictment*, see post, p. 746.]

Sect. 56.—*Accessories, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanour punishable under this Act, shall be liable to be proceeded against, indicted, and punished as a principal offender.

Sect. 57.—*Persons loitering at night, and suspected of felony against this Act may be apprehended.*]—Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard or other place, during the night, and whom he shall have good cause to suspect of having committed or being about to commit *any felony* against this Act, and shall take such person as *soon as reasonably may be* before a justice of the peace, to be dealt with according to law. [*This section is an extension of* 9 & 10 Vict. c. 25, ss. 13, 14.]

Sect. 58.—*Malice against owner of property unnecessary.*]—Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect

of which it shall be committed or otherwise. [*This section re-enacts* 7 & 8 Vict. c. 30, s. 25, *and* 8 & 9 Vict. c. 44, s. 2.]

Sect. 59.—*Act to apply to persons in possession of property injured.*]—Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done. [*This was new law in* 1861, *and intended to bring tenants and bailees within the Act. As to the former law*, see Mills *v.* Collett, 6 Bing. 85.]

Sect. 60.—*Indictment.—Intent to injure or defraud.*]—It shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege any intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be). [*This section was new law as to malicious damage in* 1861.]

Sect. 61.—*Apprehension of offenders.*]—Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 28.]

Sect. 67.—*Summary conviction a bar to other proceedings.*]—When any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the Crown, or the lord-lieutenant . . . of Ireland, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause. [*This section was framed from* 7 & 8 G. 4, c. 30, s. 36, *and* 22 & 23 Vict. c. 32.]

Sect. 72.—*Admiralty offences.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter

or affect any of the laws relating to the government of his Majesty's land or naval forces. (*See ante*, pp. 31 *et seq.*)

Sect. 73.—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanour punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the Court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. (*See ante*, pp. 246, 247.)

Sect. 75.—*Whipping.*]— . . . whenever whipping may be awarded for any indictable offence under this Act, the Court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the Court in the sentence. (*See ante*, p. 244.)

Sect. 77.—*Costs.*]—*Repealed as to England by* 8 Edw. 7, c. 15, s. 10 (ante, p. 267).

Indictment for setting Fire to a house, with Intent, etc. (24 & 25 *Vict. c.* 97, *s.* 3, ante, p. 737).

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Arson, contrary to section 3 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a house with intent to injure or defraud.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping. 24 & 25 Vict. c. 97, s. 3; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict .c. 97, s. 73 (supra).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Date, etc.]—The time here stated need not be proved as laid: if the offence is proved to have been committed at any time before or after, provided it is some day before the finding of the indictment, it is sufficient. (*See ante*, pp. 51, 350.)

Malice.]—The burning must be done wilfully and maliciously, in order to be an offence, either at common law or under the statute; and therefore no negligence or mischance amounts to it. 4 Bl. Com. 222; 3 Co. Inst. 67; 1 Hawk. c. 39, s. 19; 1 Hale, 566; unless the prisoner does the act recklessly, without caring whether the house is set on fire or not. *R.* v. *Child*, L. R. 1 C. C. R. 307; 40 L. J. (M. C.) 127: *R.* v. *Pembliton*, L. R. 2 C. C. R. 119; 43 L. J. (M. C.) 91: *R.* v. *Welch*, 1 Q. B. D. 23; 45 L. J. (M. C.) 17; 13 Cox, 121 (*and see post*, p. 800). Therefore, if an unqualified person, by shooting with a gun, happen to set fire to the thatch of a house, it is not felony according to Lord Hale, contrary to the opinion of former writers. 1 Hale, 569. *But see R.* v. *Dossett*, 2 C. & K. 306 (*post*, p. 743). But if a man, intending to commit a felony, by accident sets fire to another's house, this, it has been said, would be arson at common law, and also within the old statutes. *But see R.* v. *Faulkner*, 13 Cox, 550; Ir. Rep. 11 C. L. 8 (*post*, p. 749). If, intending to set fire to the house of A., he accidentally sets fire to that of B., it is felony. 1 Hale, 569. And if a man, by wilfully setting fire to his own house, burns also the house of one of his neighbours, it will be felony (*see R.* v. *Probert*, 2 East, P. C. 1030; *R.* v. *Isaac*, *Id.* 1031); for the law, in such a case, implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood; and generally, if the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary is proved. *Bromage* v. *Prosser*, 4 B. & C. 247, 255 (*ante*, p. 400). The absence of malice or spite against the owner or occupier is no answer to the charge. 24 & 25 Vict. c. 97, s. 58 (*ante*, p. 738); *see R.* v. *Salmon*, R. & R. 26; *R.* v. *Davies*, 1 F. & F. 69. At common law, where a man set fire to a house of which he was in possession, he was guilty only of misdemeanor. *R.* v. *Scofield*, Cald. 397.

Set fire to.]—The words in 24 & 25 Vict. c. 97, ss. 1-7, are "set fire to," merely; and therefore it is not necessary to aver in the indictment that the house, etc., was *burnt*; nor need it be proved that the house, etc., was actually consumed, nor that any flame was visible. *R.* v. *Salmon*, R. & R. 26: *R.* v. *Stallion*, 1 Mood. 398. But under these sections, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent, or attempt to do it, is not sufficient. Where, upon an indictment under 9 G. 1, c. 22 (*rep.*), for setting fire to a paper mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt; the judges held, that it did not amount to an offence within the Act. *R.* v. *Taylor*, 1 Leach, 49.

And where the defendant set fire to a parcel of unthreshed wheat it was held not to be within that statute. *R.* v. *Judd*, 2 T. R. 255. But the burning and consuming of any part of the house, however trifling, is sufficient, although the fire is afterwards extinguished. 1 Hawk. c. 39, s. 17; 3 Co. Inst. 66; 1 Hale, 569; Dalt. c. 159. Where, on an indictment under 7 W. 4 & 1 Vict. c. 89, s. 3 (*rep.*), it was proved that "the floor of a room was scorched; that it was charred in a trifling way; it had been at a red heat, but not in a blaze," this was held a sufficient burning to support the indictment. *R.* v. *Parker*, 9 C. & P. 45, Bosanquet, J., and Parke, B. But where, a small faggot having been set on fire on the boarded floor of a room, the boards were thereby "scorched black, but not burnt," and no part of the wood was consumed: this was held insufficient. *R.* v. *Russell*, C. & Mar. 541, Cresswell, J.

By 24 & 25 Vict. c. 97, s. 7 (*ante*, p. 738), the maliciously setting fire to "any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount of felony," is itself made a felony. In *R.* v. *Child*, L. R. 1 C. C. R. 307; 40 L. J. (M. C.) 127; 12 Cox, 64, the prisoner maliciously set fire to goods in a dwelling-house with intent to injure the owner of the goods, who was a lodger in the house, and not to injure the house or the landlord. The house, though endangered, was not set fire to. The prisoner was indicted for the offence described in s. 7, *supra*, and the jury found him "guilty, but not so that if the house had caught fire, the setting fire to the house would have been wilful and malicious." This was held to be equivalent to a finding that the prisoner was not aware that what he was doing would probably set the house on fire, and so necessarily injure the owner; and that he was not reckless as to whether it took fire or not; and that upon such finding the prisoner was not properly convicted. If a person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not amount to a felony under s. 7, even although the house catches fire, unless the circumstances are such as to show that the person setting fire to the goods knew that by so doing he would probably cause the house also to take fire, and was reckless whether it did so or not, in which case there would be abundant evidence that he intended to bring about the probable consequence of his act, namely, the burning of the house. *R.* v. *Nattrass*, 15 Cox, 73; *R.* v. *Harris*, *Id.* 75; 95 Cen. Cr. Ct. Sess. Pap. 523, Hawkins, J. It is not necessary in an indictment under s. 7 to allege an intent to defraud, and it is sufficient to follow the words of the section without setting forth the particular "circumstances" relied on as constituting the offence. *R.* v. *Heseltine*, 12 Cox, 404, Pollock, B., *after consulting with* Archibald, J. Wilfully throwing a light into a post-office letter-box in a house with intent to burn the letters, but not the house, is not a felony within s. 7. *R.* v. *Balstone*, 10 Cox, 20.

It is seldom that a wilful burning by the defendant can be made out by direct proof; the jury, in general, have to presume the defendant's guilt from circumstantial evidence. (*See ante*, p. 396.) Where a house was robbed and burnt, evidence that the defendant was found in possession of some of the goods which were in the house at the time it was burnt, was admitted as

tending to prove him guilty of the arson. *R.* v. *Rickman*, 2 East, P. C. 1035. So, where the question is whether the burning was accidental or wilful, evidence is admissible to show that on another occasion the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property. *R.* v. *Dossett*, 2 C. & K. 306; 2 Cox, 243, Maule, J. *And see R.* v. *Taylor*, 5 Cox, 138: *R.* v. *Harris*, 4 F. & F. 342, Willes, J..: *R.* v. *Gray*, 4 F. & F. 1102, Willes, J. (*ante*, p. 359). But on a charge of arson, where the question was as to the identity of the prisoner, evidence that a few days previous to the fire in question another building of the prosecutor's was on fire, and that the prisoner was then standing by with a demeanor which showed indifference or gratification, was rejected. *R.* v. *Harris*, *supra*. As to the admisibility of evidence of the commission of other offences in support of a charge of arson, *see ante*, p. 359.

Evidence of experiments made after a fire is admissible to show how the building was set on fire. *R.* v. *Heseltine*, 12 Cox, 404, Pollock, B.

The thing set fire to.]—As to the common law, *see ante*, p. 736. The present statute extends to the burning of any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or of any farm-building, or any building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof. Upon an indictment for burning a dwelling-house, either at common law or under the statute, it would, perhaps, be sufficient to prove a burning of a building, parcel of the dwelling-house. (*See ante*, p. 657.) Outhouse seems to mean some building annexed or accessory to a dwelling-house. *R.* v. *Hammond*, 1 Cox, 60, Alderson, B. Where an outhouse was burnt, and an indictment under 9 G. 1, c. 22 (*rep.*), described it as a "certain outhouse," an objection, that the offence should have been described as a burning of the dwelling-house (the word "outhouse" in the statute meaning, as it was suggested, an outhouse which is not parcel of the dwelling-house), was overruled by the judges. *R.* v. *North*, 2 East, P. C. 1021. So, where the indictment described the house, in some of the counts, as "a certain outhouse," in others as a "certain house," and the evidence was of a burning of a school-room, separated from the dwelling-house by a small passage, but the roof of one extending over the roof of the other; it was held that the evidence satisfied the description in both sets of counts. *R.* v. *Winter*, R. & R. 295. Where the indictment under 9 G. 1, c. 22 (*rep.*), charged the burning of "a certain house" of the corporation of Liverpool, and the proof was of a burning of a gaol belonging to the corporation, the judges held it to be sufficient. *R.* v. *Donnavan*, 1 Leach, 69; 2 East, P. C. 1020: 2 W. Bl. 683. But in *R.* v. *Connor*, 2 Cox, 65, a gaol was held by Parke, B., not to be a dwelling-house, and it falls rather within 24 & 25 Vict. c. 97, s. 5 (*ante*, p. 737). An unfinished building intended, when finished, to be used as a house, is not a "house" within 24 & 25 Vict. c. 97, s. 3 (*ante*, p. 737). *R.* v. *Edgell*, 11 Cox, 132. But an unfinished house, of which all the walls, external and internal, are built and finished, the roof on and finished, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, is a "building"

within 24 & 25 Vict. c. 97, s. 6 (*ante*, p. 737); *R.* v. *Manning*, L. R. 1 C. C. R. 338; 41 L. J. (M. C.) 11; *quære*, however, whether an unfinished house, the walls of which had only been raised a short distance from the ground, would be a "building" within s. 6. *Id.* Many of the distinctions raised in the older cases were rendered immaterial by 7 & 8 Vict. c. 62, s. 1 (*rep.*) (of which 24 & 25 Vict. c. 97, s. 3, is in this respect a re-enactment), which extends to "any hovel, shed, or fold, or any farm building, or any building or erection used in farming land:" and arson in respect of "any building other than such as are in this Act before mentioned" is specifically dealt with in s. 6 of the present statute. A building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called the workshop, used as a storehouse for seasoned timber, as a place for the deposit of tools, and for the working up of timber, was held to be well described as a "shed" under 7 & 8 Vict. c. 62, s. 1 (*rep.*), *supra*. *R.* v. *Amos*, 2 Den. 65; 20 L. J. (M. C.) 103; 5 Cox, 222; *cf. R.* v. *Munson*, 2 Cox, 186, Coleridge, J.

It is unnecessary, in an indictment under s. 3 of 24 & 25 Vict. c. 97, to allege the ownership of the house, nor need the ownership be proved. *R.* v. *Newboult*, L. R. 1 C. C. R. 344; 41 L. J. (M. C.) 63; 12 Cox, 148. In that case the house was described in the indictment as "of and belonging to" the prisoner, and he was charged with setting fire to it "with intent thereby to injure," without mentioning the person intended to be injured; it was held that he might be convicted of setting fire to the house, of which he was proved to be merely the tenant, with intent to injure the landlord. *R.* v. *Newboult* renders of little practical value the following decisions under former statutes: *R* v. *Glandfield*, 2 East, P. C. 1034: *R.* v. *Rickman*, *Id.*: *R.* v. *Ball*, 1 Mood. 30: and *R.* v. *Wallis*, *Id.* 344. At common law, and under 9 G. 1, c. 22 (*rep.*), it was necessary to describe and prove the house to be the house of another; as a man could not commit arson by firing his own house. *See R.* v. *Gowen*, 1 Leach, 246 n.; 2 East, P. C. 1027: *R.* v. *Harris*, 2 East, P. C. 1023.

With intent, etc.]—It is not necessary to allege or prove an intent to injure or defraud any particular person, but it is sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be). 24 & 25 Vict. c. 97, s. 60 (*ante*, p. 739). Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the necessary consequences of his own act; and therefore where the defendant was indicted for setting fire to a certain mill, with intent to injure the occupiers thereof, it was held that he was properly convicted, although it appeared at the trial that he was a harmless, inoffensive man, and had no motive to induce him to commit the act. *R.* v. *Farrington*, R. & R. 2007. (*See ante*, p. 400.) But this doctrine can only arise where the act is wilful; and therefore, if the fire appears to be the result of accident, the party who is the cause of it will not be liable. (*Ante*, p. 741, *and see* 14 G. 3, c. 78, s. 86.) On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved

by other evidence. Therefore, upon an indictment for arson with intent to defraud an insurance company, the policy must be produced, or secondary evidence of it given after a proper notice to produce. It is now immaterial whether the policy is or is not stamped: 54 & 55 Vict. c. 39, s. 14, sub-s. 4 (*ante*, p. 447). Where a sufficient notice to produce the policy had not been given, it was held that secondary evidence of it could not be given, and there being no other evidence of the insurance, that the defendant must be acquitted. *R.* v. *Kitson*, Dears. 187; 22 L. J. (M. C.) 118; 6 Cox, 159: *R.* v. *Doran*, 1 Esp. 127. As to the length of notice necessary, *see R.* v. *Ellicombe*, 1 M. & Rob. 260; 5 C. & P. 522: *R.* v. *Barker*, 1 F. & F. 326. Where on a trial for arson, with intent to defraud an insurance office, no policy of insurance was produced, and the only evidence of its existence was that of the agent of the insurance company, who stated that the prisoner came to him in May, 1867, about effecting an insurance on the premises, the subject of the alleged arson, and that on the 30th of August, 1871 (about a month before the alleged arson), the prisoner came again to him, and said he wished to *renew* his policy, and then paid 10*s.*, this was held to be sufficient evidence of the existence of an insurance, as being an admission by the prisoner that there was a policy. *R.* v. *Newboult* (*ante*, p. 744). Where, on an indictment for arson, the counsel for the prosecution, in opening the case, suggested as a motive for the act the desire to realize the sum insured by the prisoner upon her goods, evidence was admitted to show that she was in easy circumstances, so as to negative the motive suggested. *R.* v. *Grant*, 4 F. & F. 322, Pollock, C.B.

Indictment for setting Fire to a Church or Chapel. (24 & 25 *Vict. c.* 97, *s.* 1, ante, p. 736.)

Heading as on p. 740.

STATEMENT OF OFFENCE.

Arson, contrary to section 1 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a [*church, chapel, meeting house, or other place of divine worship, as the case may be*].

Felony: 24 & 25 Vict. c. 97, s. 1. See *the precedent*, ante, p. 740.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Indictment for setting Fire to a Dwelling-house, some Person being therein. (24 & 25 *Vict. c.* 97, *s.* 2, ante, p. 737.)

STATEMENT OF OFFENCE.

Arson, contrary to section 2 of the Malicious Damage Act.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a dwelling-house, one F. G. being therein.

The defendant cannot, upon this indictment, be convicted under s. 3 (ante, p. 737), *because under that section an intent to injure or defraud must be alleged and proved.* R. *v.* Paice, 1 C. & K. 73.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 2 (ante, p. 737); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 237, 238). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant wilfully set fire to the dwelling-house (*see ante*, pp. 741, 742); and that at the time F. G. was in the house. It is not sufficient to prove that he was in the house at the time when the defendant set fire to an adjoining building, from which the flames communicated to the house, he having then left it. *R.* v. *Fletcher*, 2 C. & K. 215: *R.* v. *Warren*, 1 Cox, 68. The offence is committed even if the prisoner was the only person in the house when he set fire to it. *R.* v. *Pardoe*, 17 Cox, 715, Coleridge, C.J. If any one in the house is burnt to death as the result of an offence within this section the incendiary is indictable for murder. *R.* v. *Serné*, 16 Cox, 311, Stephen, J.

Indictment for attempting to set Fire to a Building. (24 & 25 *Vict. c.* 97, *s.* 8, ante, p. 738.)

STATEMENT OF OFFENCE.

Attempting to set fire to a building, contrary to section 8 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously attempted to set fire to a building [*or a matter or thing within section* 7, *naming it in ordinary language, as the case may be.*]

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 8; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace, see* 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Wilfully throwing a light into a post-office letter-box in a house with intent to burn the letters, but not the house, is not a felony within this enactment. R. *v.* Batstone, 10 Cox, 20.

SETTING FIRE TO COAL MINES, ETC.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 26.]—Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, *anthracite, or other mineral fuel* shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 W. 4 & 1 Vict. c. 89, s. 9, *and* 9 & 10 Vict. c. 25, s. 9, *with the additions italicized.*]

Sect. 27.—*Attempting to set fire to mines.*]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, *under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, s. 7, *with the additions italicized.*]

Indictment for setting Fire to a Coal Mine. (24 *& 25 Vict. c.* 97, *s.* 26.)

STATEMENT OF OFFENCE.

Arson, contrary to section 26 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a mine of coal [*or of cannel coal, anthracite, or other mineral fuel, naming it, as the case may be*].

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male

under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 26; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

SETTING FIRE TO OR DESTROYING SHIPS, ETC.

Statutes.

12 *G.* 3, *c.* 24 (*Dockyards, etc., Protection Act*, 1772), *s* .1.]—If any person or persons shall either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid and procure, abet, or assist in the setting on fire, or burning, or otherwise destroying any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty's dockyards, or building or repairing in any private yards, for the use of his Majesty, or any of his Majesty's arsenals, magazines, dockyards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto, or any timber or materials therein placed for building or repairing, or fitting out of ships or vessels; or any part of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where such military, naval, or victualling stores, or other ammunition of war is or shall be kept, or deposited; that then the person or persons guilty of any such offence being thereof convicted in due form of law shall be guilty of felony, and shall suffer death as in cases of felony. . . . [*For indictment*, see post, p. 751.]

Sect. 2.—*Venue.*]—See ante, pp. 31 et seq.

29 & 30 *Vict. c.* 109 (*Naval Discipline Act*), *s.* 34.]—Every person subject to this Act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft, or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as hereinafter mentioned.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 42.]—Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, ss. 4, 6. *In* R. *v.* Guy, *Hants assizes, July*, 1902, *G. was indicted under s.* 42 *for unlawfully and maliciously setting*

fire to a yacht of which he was captain. He did so in conjunction with the owner in order as he knew to defraud underwriters. Held by Bigham, J., *that though s. 43 dealt with this offence specifically, G. could be convicted under s. 42.*]

Sect. 43.]—Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, s. 6.]

Sect. 44.—*Attempting to set fire to ships.*]—Whosoever shall unlawfully and maliciously, by an overt act, attempt to set fire to, *cast away, or destroy* any ship *or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict c. 25, *s. 7, with the additions italicized.*]

Indictment for setting Fire to a Ship. (24 & 25 *Vict. c. 97. s.* 42, supra.)

STATEMENT OF OFFENCE.

Arson, contrary to section 42 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of —— [*or on the high seas, as the case may be*], maliciously set fire to a ship or vessel called the *Rattler*.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 42; 54 & 55 Vict. c. 69, s. 8, sub-ss. 1, 2 (ante, pp. 237, 238). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant set fire to the ship. (*See ante*, p. 741). Where a sailor on board a ship entered a part of the vessel where spirits were kept, for the purpose of stealing rum, and, while tapping a cask of rum, a lighted match,

held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a fire ensued which destroyed the vessel, it was held that a conviction for arson of the ship could not be upheld. *R.* v. *Faulkner*, Ir. Rep. 11 C. L. 8; 13 Cox, 550. It is immaterial whether the ship were complete or in an unfinished state. 24 & 25 Vict. c. 97, s. 42. Where a pleasure boat, eighteen feet long, was set fire to, Patteson, J., inclined to think that it was a vessel within the meaning of 7 & 8 G. 4, c. 30, s. 10 (*rep.*), but the prisoner was acquitted on the merits, and no decided opinion was given. *R.* v. *Bowyer*, 4 C. & P. 559, Patteson, J. Upon an indictment for firing a barge, Alderson, B., said, that if the prisoner was convicted he would take the opinion of the judges as to whether a barge was within the meaning of that statute: the prisoner was acquitted. *R.* v. *Smith*, 4 C. & P. 569. The burning of a ship, of which the defendant was a part-owner, was held to be within 7 & 8 G. 4, c. 30, s. 10: *R.* v. *Wallace*, C. & Mar. 200; 2 Mood. 200. (*See* s. 59, *ante*, p. 739.)

Prove that it was done maliciously (*see ante*, p. 741.) Where, upon an indictment against P. for setting fire to a ship with intent to prejudice E. and G. his part-owners, it appeared that the defendant had declared that E. and G. were part-owners, and a bill of sale was produced, by which forty-three sixty-fourths of the vessel were transferred by the defendant, the sole owner to E. and G.; and also an entry in the books of registry, in the following form: "Custom House, Padstow, 11th August, 1829. P., of etc., has sold, by bill of sale, dated, etc., forty-three sixty-fourth shares, to G., of etc., and E., of etc. Signed," etc.,—and it was objected that the bill of sale was not valid, because by 6 G. 4, c. 110, s. 37 (*rep.*), the entry must contain not only the date of the bill of sale, but also the date of the production of it, the judge thought that the date, 11th August, in the commencement of the entry, might be considered as the date of the production of it, particularly as the entry followed the form given by the statute; and it was held that the defendant was properly convicted. *R.* v. *Philp*, 1 Mood. 263. Indeed, it would seem that acts of ownership would of themselves be sufficient to prove this allegation, subject to contradiction by the entry in the register. Registry of a British ship is now proved under 57 & 58 Vict. c. 60, s. 64 (*ante*, p. 415).

Indictment for setting Fire to a Ship, with Intent, etc. (24 & 25 *Vict. c.* 97, *s.* 43, ante, p. 749.)

Statement of Offence.

Arson with intent, contrary to section 43 of the Malicious Damage Act, 1861.

Particulars of Offence.

A. B., on the —— day of ——, on the high seas, maliciously set fire to a ship or vessel called the *Rattler* with intent to prejudice C. D., the owner [*or part-owner, as the case may be*] of the ship or vessel [*or E. F. the owner of*

goods on board the same, or E. F. who has underwritten a policy of insurance on the said ship or vessel or on certain goods on board the same, as the case may be.]

Felony: 24 & 25 Vict. c. 97, s. 43.—*The punishments are the same as under the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

If the intent is laid to be to prejudice the owner of the ship or goods, prove the case as directed under the last form; and in the latter case prove the shipment of the goods. In *R.* v. *Philp*, 1 Mood. 263 (*supra*), there was no proof of malice against the owners, and the ship was insured for more than its value; but it was ruled at the trial that the defendant must be understood to contemplate the consequence of this act; and on a case reserved the judges held that, as to this point, the conviction was right. *See R.* v. *Newill*, 1 Mood. 458. The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners shall have the benefit thereof. *Id. See R.* v. *Wallace*, C. & Mar. 200 (*ante*, p. 750). The underwriters on a policy of goods fraudulently made are within the statute, though no goods are put on board. *S. C.* 2 Mood. 200.

If the intent is laid to prejudice the underwriters. then, in addition to this evidence, prove the policy, (*see ante*, p. 745), and that the ship sailed on her voyage.

If the intent is not proved as laid, but the wilful and malicious setting fire is proved, it appears that the accused may be convicted of an offence under 24 & 25 Vict. c. 97, s. 42, and that section seems to render it unnecessary to indict under s. 43.

Indictment for setting Fire to Ships of War, etc.
(12 *G.* 3, *c.* 24, *s.* 1, ante, p. 748.)

Statement of Offence.

Arson, contrary to section 1 of the Dockyards Protection Act, 1772.

Particulars of Offence.

A. B., on the —— day of ——, in the county of ——, maliciously set on fire or burned or otherwise destroyed [*or as the case may be*, see the section] His Majesty's ship or vessel of war called the *Hawk*.

Felony: punishment, death.—12 G. 3, c. 24, s. 1. *The sentence of death may be recorded.* (See ante, p. 235.)

And see 29 & 30 Vict. c. 109, s. 34 (ante, p. 748).

This offence is not triable at quarter sessions. See 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

For an instance of the offence, see R. *v.* Hill, 20 St. Trials, 1318.

SETTING FIRE TO CROPS, STACKS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), s. 16.—*Setting fire to crops, etc.*]—Whosoever shall unlawfully and maliciously set fire to any crops of *hay, grass*, corn, grain, or pulse, *or of any cultivated vegetable produce*, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 17, *with the addition of the words italicized.*]

Sect. 17.—*Setting fire to stacks, etc.*]—Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, *or of any cultivated vegetable produce*, or of furze, *gorse*, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood *or bark*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [7 W. 4 & 1 Vict. c. 89, s. 10, *with the addition of the words italicized. The words "haulm" and "stubble" appear to have been added in the repealed statute to get rid of* R. *v.* Reader and Turner, 4 C. & P. 245; 1 Mood. 239, *decided on* 7 & 8 G. 4, c. 30, s. 17.]

Sect. 18.]—*Attempting to set fire to crops or stacks.*]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, *under such circumstances that if the same was thereby set fire to the offender would be, under either of such sections, guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven . . . years or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, s. 7, *with the addition of the words italicized. It is a sufficient overt act to constitute an attempt if the prisoner went to a stack and lit a match to fire the stack, but desisted on finding that he was watched.* R. *v.* Taylor, 1 F. & F. 511, Pollock, C.B.]

Indictment for setting Fire to Stacks of Corn, etc.
(24 & 25 Vict. c. 97, s. 17.)

STATEMENT OF OFFENCE.

Arson, contrary to section 17 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a stack of wheat [*or as the case may be*, see the words of the statute].

No intent need be stated. R. *v.* Newill, 1 Mood. 458. *No local description of the position of the stack is necessary.* R. *v.* Woodward, Id. 323.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 17; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant wilfully set fire to the stack of wheat, etc., as stated in the indictment (see *ante*, pp. 741, 742). Indictments for setting fire to a stack of beans (*R.* v. *Woodward*, 1 Mood. 323); or barley (*R.* v. *Swatkins*, 4 C. & P. 548), have been held good, the Court taking judicial notice that beans are pulse, and that barley is corn. A stack composed of the flax-plant with the seed or grain in it (the jury finding that the flax-seed is a grain) was held to be a stack of grain within 7 W. 4 & 1 Vict. c. 89, s. 10 (*rep.*). *R.* v. *Spencer*, Dears. & B. 131; 26 L. J. (M. C.) 16; 7 Cox, 189. A haycock has been held not to be a stack within the statute. *R.* v. *McKeever* [1871] Ir. Rep. 5 C. L. 86; and a stack of sedge and rushes was held not to be within 7 W. 4 & 1 Vict. c. 89; *R.* v. *Baldock*, 2 Cox, 55. *Qu.* whether it is "cultivated vegetable produce" within the present Act. A quantity of straw, packed on a lorry, in course of transmission to market, and left for the night in an inn yard, is not a stack of straw within s. 17 of 24 & 25 Vict. c. 97. *R.* v. *Satchwell*, L. R. 2 C. C. R. 21; 42 L. J. (M. C.) 63; 12 Cox, 449. Upon 7 & 8 G. 4, c. 30, s. 17 (*rep.*), which did not contain the word "haulm," *or the words* "*any cultivated vegetable produce*," it was held that an indictment for setting fire to a stack of straw was not supported by proof that the stack was composed partly of stubble and partly of cole-seed straw. *R.* v. *Tottenham*, 7 C. & P. 237; 1 Mood. 461, *cit.* The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on each other in a temporary loft over the gateway: Parke, J., held this not to be a stack of wood. *R.* v. *Aris*, 6 C. & P. 348.

Indictment for setting Fire to Crops of Corn, etc. (24 & 25 *Vict. c.* 97, *s.* 16, *ante*, p. 752.)

STATEMENT OF OFFENCE.

Arson, contrary to section 16 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a crop of wheat [*or as the case may be*, see the section].

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s 16; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze or fern, is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106). *That statute, however, does not exclude from the jurisdiction of sessions the setting fire to crops of hay or grass, or to crops of any cultivated vegetable produce, other than of corn, grain, or pulse.*

Evidence.

Prove that the defendant set fire to the crop of wheat, etc., as stated in the indictment. Proof of setting fire to a single detached tree will not, it seems, support the indictment. *R.* v. *Davy*, 1 Cox, 60, Alderson, B.

Where the defendant set fire to a summer-house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood. *R.* v. *Price*, 9 C. & P. 729 *and see ante*, p. 741. Where the prisoner was indicted for setting fire to growing furze, Lopes, J., directed the jury that if she set fire to the furze thinking, although erroneously, that she had a right to do so, they ought not to convict. *R.* v. *Twose*, 14 Cox, 327.

SECT. 6.

MALICIOUS DAMAGE.

ENDANGERING LIFE OR PROPERTY BY USE OF EXPLOSIVES.

Statutes.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 9.—*Attempting to blow up dwelling-houses, etc.*]—Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, ss. 1, 2. *For indictments*, see post, p. 761.]

Sect. 10.—*Putting explosives near building with intent, etc.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building, any gunpowder, or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working-tools, fixtures, goods or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, s. 6. *For indictment*, see post, p. 762.]

Sects 45, 46.—*Damaging ships by explosives.*]—See post, p. 774.

Sect. 54.—*Manufacturing, etc., explosive substances, etc., for the purpose of committing offences.*]—Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, *any of the felonies* in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, s. 8, *with the alterations italicized.* Cf. 24 & 25 Vict. c. 100, s. 64, post, tit. Attempts to Murder, p. 915.]

Sect. 55.—*Power to justices to issue search warrants for such explosives.*]—Cf. 24 & 25 Vict. c. 100, s. 65; 38 & 39 Vict. c. 17, ss. 73-75, 86.]

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 28.—*Personal injuries by use of explosives.*]—Post, p. 947.

Sect. 29.—*Use of explosives with intent to cause grievous bodily harm.*]—Post, p. 947.

Sect. 30.—*Setting explosives against buildings or shops with intent to cause personal injury.*]—Post, p. 948.

46 & 47 *Vict. c.* 3 (*Explosives Substances Act*, 1883), *s.* 2.—*Causing explosion likely to endanger life or property.*]—Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life, or for any less term (not less than the minimum term allowed by law (*see* 54 & 55 Vict. c. 69, s. 1, sub-s. 1, *ante*, p. 238,)), or to imprisonment with or without hard labour for a term not exceeding two years. (*For indictment, see* post, p. 763.)

Sect. 3.—*Attempts to cause explosions, or making or keeping explosives with intent to endanger life or property.*]—Any person who, within or (being a subject of his Majesty) without his Majesty's dominions, unlawfully and maliciously—

(a) Does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property; or

(*b*) Makes, or has in his possession, or under his control, any explosive substance, with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom;

shall, whether any explosion does or does not take place, and whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years [*nor less than three years*, 54 & 55 Vict. c. 69, s. 1, sub-s. 1, ante, p. 238], or to imprisonment with or without hard labour for a term not exceeding two years, and the explosive substance shall be forfeited.

Sect. 4.—*Making or possessing explosives under suspicious circumstances.—Competency of defendant and his or her wife or husband as witness.*]—(1) Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years [*nor less than three years*, 54 & 55 Vict. c. 69, s. 1, sub-s. 1, ante, p. 238], or to imprisonment for a term not exceeding two years, with or without hard labour, and the explosive substance shall be forfeited.

(2) In any proceeding against any person for a crime under this section, such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case. [*This enactment seems to be superseded as to England by the* Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), ante, pp. 458 et seq.]

Sect. 5.—*Accessories.*]—Any person who, within or (being a subject of his Majesty) without his Majesty's dominions, by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under this Act, shall be guilty of felony, and shall be liable to be tried and punished for that crime, as if he had been guilty as a principal.

Sect. 6.—*Inquiry by the Attorney-General.*]—(1) Where the Attorney-General has reasonable ground to believe that any crime under this Act has been committed, he may order an inquiry under this section, and thereupon any justice for the county, borough, or place in which the crime was committed, or is suspected to have been committed, who is authorized in that behalf by the Attorney-General, may, although no person may be charged before him with the commission of such crime, sit at a police-court, or petty sessional or occasional court-house or police-station in the said county, borough, or place, and examine an oath concerning such crime any witness appearing before him, and may take the deposition of such witness, and, if he see cause, may bind such witness by recognizance to appear and give evidence at the next petty sessions, or when called upon within three months from the date of such recognizance; and the law relating to the compelling of the attendance of a witness before a justice, and to a witness attending before a justice and required to give evidence concerning the matter of an information or complaint, shall apply to compelling the attendance of a witness for examination and to a witness attending under this section.

(2) A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate, or tend to criminate, himself; but any statement made by any person in answer to any question put to him on any examination under this section shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence against him in any proceeding, civil or criminal.

(3) A justice who conducts the examination under this section of a person concerning any crime shall not take part in the committing for trial of such person for such crime.

(4) Whenever any person is bound by recognizance to give evidence before justices, or any criminal court, in respect of any crime under this Act, any justice, if he sees fit, upon information being made in writing, and on oath, that such person is about to abscond or has absconded, may issue his warrant for the arrest of such person, and if such person is arrested any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties: Provided that any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was granted.

Sect. 7.—*No prosecution except by leave of Attorney-General.—Local jurisdiction.—Saving for common law and other Acts.*]—(1) If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such person without the consent

of the Attorney-General, except such as the justice may think necessary by remand, or otherwise, to secure the safe custody of such person. [*The absence of such consent invalidates the proceedings.* R. *v.* Bates [1911] 1 K. B. 964; 80 L. J. (K. B.) 507; 104 L. T. 688; 75 J. P. 271; 27 T. L. R. 314.]

(3) For all purposes of and incidental to arrest, trial, and punishment a crime for which a person is liable to be punished under this Act, when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody.

(4) This Act shall not exempt any person from any indictment or proceeding for a crime or offence which is punishable at common law, or by any Act of Parliament other than this Act, but no person shall be punished twice for the same criminal act (*cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160).

Sect. 8.—*Application of provisions of Explosives Act*, 1875 (38 & 39 Vict. c. 17), *as to search warrants, etc.*

Sect. 9.—*Definitions.*—"*Explosive substance.*"—"*Attorney-General.*"]—(1) In this Act, unless the context otherwise requires—

The expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement.

The expression "Attorney-General" means his Majesty's Attorney-General for England or Ireland, as the case may be, and in case of his inability, or of a vacancy in the office, his Majesty's Solicitor-General for England or Ireland, as the case requires.

(2) *Application of Act to Scotland.*

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 61.—*Placing Explosive Substances in or against post-office letter boxes.*]—See post, p. 801.

Sect. 63 (1).—*Sending explosives by post.*]—See ante, p. 583.

10 & 11 *Geo.* 5, *c.* 43 (*Firearms Act*, 1920), *s.* 6.—*Prohibition of manufacture, etc., of weapons discharging noxious liquids, etc.*]—(1) It shall not be lawful for any person without the authority of the Admiralty or the Army Council or the Air Council to manufacture, sell, purchase, carry, or have in his possession any weapon, of whatever description, designed for the discharge of any noxious liquid, gas, or other thing, or any ammunition containing or designed or adapted to contain any such noxious thing, and such a weapon is in this Act referred to as a prohibited weapon.

(2) If any person contravenes the provisions of this section, he shall be guilty of a misdemeanor, and be liable on conviction on indictment to imprisonment with or without hard labour for a term not exceeding two years, or on summary conviction to imprisonment with or without hard labour for a term not exceeding three months, or to a fine not exceeding twenty pounds, or to both such imprisonment and fine.

Sect. 7.—*Penalty on possession of firearms with intent to injure.*]—Any person who has in his possession or under his control any firearm or ammunition with intent by means thereof to endanger life or cause

serious injury to property, or to enable any other person by means thereof to endanger life or cause serious injury to property, shall whether any injury to person or property has been caused or not, be deemed to have been guilty of an offence under section three of the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), and the provisions of that Act shall apply accordingly.

Sect. 11.—*Provisions to forfeiture of firearms, cancellation of certificates, and search warrants.*]—(1) Where any person is convicted of an offence under this Act, or is convicted of any crime for which he is sentenced to penal servitude or imprisonment, or where a person has been ordered to be subject to police supervision or to enter into a recognizance to keep the peace or to be of good behaviour, a condition of which is that the offender shall not possess, use, or carry a firearm, the court before whom he is convicted or by whom the order is made may make such order as to the forfeiture or disposal of any firearm, prohibited weapon, or ammunition found in his possession, or used or carried by him, as the court think fit, and may cancel any firearm certificate held by the person convicted.

Where the court cancel a firearm certificate under this section, they shall cause notice to be sent to the chief officer of police by whom the certificate was granted.

(2) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been, is being, or is about to be committed, he may grant a search warrant authorising any constable named therein to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found therein, and to seize and detain any firearm, prohibited weapon, or ammunition which he may find on the premises or place, or on any such person, in respect of which or in connection with which he has reasonable grounds for suspecting that an offence under this Act has been, is being, or is about to be committed, and, if the premises are those of a registered firearms dealer, to examine any books relating to the business.

(3) The constable making the search may arrest without warrant any person found on the premises whom he has reason to believe to be guilty of an offence against this Act.

(4) A court of summary jurisdiction may, on the application of the chief officer of police, order any firearm, prohibited weapon, or ammunition seized and detained by a police constable under this Act to be destroyed or otherwise disposed of.

Sect. 12.—*Interpretation.*]—(1) In this Act, unless the context otherwise requires—

The expression "firearm" means any lethal firearm or other weapon of any description from which any shot, bullet, or other missile can be discharged, or any part thereof, and the expression "ammunition" means ammunition for any such firearms, and includes grenades, bombs, and other similar missiles, whether such missiles are capable of use with a firearm or not, and ingredients and components thereof:

Provided that a smooth bore shot-gun or air-gun or air-rifle (other than air-guns and air-rifles of a type declared by rules made by a Secretary

of State under this Act to be specially dangerous) and ammunition therefor shall not in Great Britain be deemed to be a firearm and ammunition for the purpose of the provisions of this Act other than those relating to the removal of firearms and ammunition from one place to another or for export :

The expression " offence under this Act " includes any act, omission, or other thing which is punishable under this Act :

The expression " gun licence " means a licence to use or carry a gun granted under the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), and any reference to a gun licence shall include a reference to a licence or certificate to kill game taken out under the law with respect to such a licence or certificate :

The expression " police district " means any district for which there is a separate police force, and the expression " the chief officer of police " has the meaning assigned to it by the Police Act, 1890 (53 & 54 Vict. c. 45), and with respect to the City of London means the Commissioner of the City Police.

(2) The provisions of this Act as to selling and purchasing shall apply to letting on hire, giving, lending, transferring and parting with possession, and to hiring, accepting and borrowing, in the same manner as they apply to selling and to purchasing, and the expressions " seller " and " purchaser " shall be construed accordingly.

Sect. 13.—*Savings.* —(1) Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, bought, carried, or possessed as a curiosity or ornament.

(2) The provisions of this Act as to the possession of firearms without a firearm certificate shall not apply to firearms which are possessed as trophies of the present or any former war, if the owner thereof has given notice of the fact in the prescribed form to the chief officer of police of the district in which he resides, and the chief officer has signified that a certificate in respect thereof can be dispensed with, which dispensation shall be granted unless the chief officer is of opinion that the owner is not a person to whom a firearm certificate would be granted :

Provided that such firearms possessed as trophies shall not be used or carried, and that no ammunition therefor may be purchased.

(3) The provisions of this Act relating to ammunition shall be in addition to and not in derogation of any enactment relating to the keeping and sale of explosives.

Sect. 14.—*Saving for the Mystery of Gunmakers.*]—Nothing in this Act contained shall apply to the proof houses of the Master, Wardens, and Society of the Mystery of Gunmakers of the City of London and the guardians of the Birmingham proof house or the rifle range at Small Heath, near Birmingham, where firearms are sighted and tested, so as to interfere in any way with the operations of those two companies in proving firearms under the provisions of the Gun Barrel Proof Act, 1868 (31 & 32 Vict. c. cxiii.), or any other Acts for the time being in force, or to any person carrying firearms to or from any such proof house when being taken to such proof house for the purposes of proof or being removed therefrom after proof.

Indictment for destroying by Explosion part of a Dwelling-house, some Person being therein. (24 & 25 *Vict. c.* 97, *s.* 9, ante, *p.* 755.)

STATEMENT OF OFFENCE.

Commencement as ante, p. 740.

Attempting to blow up a dwelling-house, contrary to section 9 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by the explosion of gunpowder or other explosive substance maliciously destroyed, threw down, or damaged the whole or part of a dwelling-house, C. D. being therein [*or a building whereby the life of C. D. was endangered, as the case may be*].

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 9; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances* and sureties for keeping the peace, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant, by himself or with others, destroyed or was present aiding and abetting in the destruction of, some part of the dwelling-house in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. It is submitted that a destruction, etc., of some part of the *freehold* must be shown, by analogy to the decisions under 7 & 8 G. 4, c. 30, s. 8 (*rep.*) (*see post*, p. 765). It has been held that firing a gun loaded with powder through the key-hole of the door of a house, in which were several persons, and by which the lock of the door was blown to pieces, was not within 24 & 25 Vict. c. 97, s. 9. *R.* v. *Brown*, 3 F. & F. 821. Prove that the act was done maliciously, *i.e.*, wilfully. (*See ante*, p. 741, *post*, p. 800.) Prove also that C. D. was in the house at the time of the setting fire to it. (*See ante*, p. 746.) No particular intent need be laid or proved.

Where the indictment is for destroying any building, whereby the life of any person is endangered, prove that the defendant destroyed or damaged the building in question, or was present aiding and abetting the destruction, or damaging of it by the explosion of gunpowder or other explosive substance mentioned in the indictment. Prove that the act was done maliciously. (*See ante*, p. 741, *post*, p. 800). And prove that the life of C. D. was endangered by the defendant's act. This will depend, in almost all cases, on medical evidence. The endangering of life, to be within the mischief of 24 & 25 Vict. c. 97, s. 9, must result from the damage to the house: but the persons put in danger need not be within the house, and it is not necessary to prove

actual injury, but sufficient to show such exposure to risk or chance of injury as will satisfy the jury that actual danger to life was caused. *R.* v. *McGrath*, 14 Cox, 598.

Indictment for throwing Gunpowder into a Building with Intent, etc.
(24 & 25 *Vict. c.* 97, *s.* 10, *ante*, p. 755.)

STATEMENT OF OFFENCE.

Putting explosive near a building, contrary to section 10 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously placed in or threw into [*upon, under, against, or near, as the case may be*] a building gunpowder or other explosive substance with intent to destroy or damage the said building [*or an engine, machinery, working tools, fixtures, goods, or chattels, as the case may be.*]

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under the age of sixteen, with or without whipping.—24 & 25 Vict. c. 97, s. 10; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (*ante*, p. 740).

Evidence.

Prove the act done by the defendant, as alleged in the indictment; that it was done maliciously (*see ante*, p. 741, *post*, p. 800); and prove circumstances from which the jury may infer the intent to destroy or damage the house, as stated in the indictment. Where the prisoner was indicted under 24 & 25 Vict. c. 97, s. 10, for throwing gunpowder against a house, and the evidence was that the prisoner had thrown a bottle containing gunpowder against the house, and that there was a fuse in the neck of the bottle, Kelly, C.B., ruled that unless the fuse was lighted at the time the bottle was thrown against the house the offence was not made out, and said that, "if anybody merely threw a bottle containing gunpowder, that would not comply with the conditions of the statute. If the fuse was not lighted it could not cause an explosion, and it would be merely throwing a bottle against a house." *R.* v. *Sheppard*, 11 Cox, 302.

Indictment for causing Explosion likely to endanger Life or Property.
(46 & 47 *Vict.* c. 3, *s.* 2, *ante*, p. 756.)

STATEMENT OF OFFENCE.

Causing an explosion, contrary to section 2 of the Explosive Substances Act, 1883.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously caused by gunpowder or other explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years with or without hard labour.—46 & 47 Vict. c. 3, s. 2 (ante, p. 238); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 239).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant by himself or with others, caused or was present aiding and abetting in the causing of the explosion in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. Prove that the act was done maliciously, *i.e.* wilfully and not by accident (*see ante*, p 741, *post*, p. 800). Prove that the explosion was of a nature likely to endanger life, etc.; it is not necessary (as it is under 24 & 25 Vict. c. 97, s. 9) to prove that life was actually endangered. No *intent* need be laid or proved. Any part of a vessel which when filled with an explosive substance is adapted for causing an explosion is an explosive substance within the Act. *R.* v. *Charles*, 17 Cox, 499, Hawkins, J. If several persons are connected in a common design to have articles amounting to an explosive substance within the Act made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design. *Id.*

RIOTIOUSLY DEMOLISHING HOUSES, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 11.—*Riotously demolishing houses, etc.*]—If any persons, riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house,

hop-oast, barn, granary, *shed, hovel, or fold*, or any building or erection used *in farming land*, or in carrying on any trade or manufacture, or any branch thereof, *or any building, other than such as are in this section before mentioned, belonging to the King, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution*, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, working, *ventilating*, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 8, *with the additions in italics.*]

Sect. 12.—*Riotously damaging houses, etc.*]—If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggon-way, or trunk, as in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . : Provided that, if, upon the trial of any person for any felony in the last preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly. [*This section was new law in* 1861, *and was framed to get rid of the decisions in* R. *v.* Thomas, 4 C. & P. 237 : R. *v.* Price, 5 C. & P. 510; R. *v.* Batt, 6 C. & P. 329; R. *v.* Howell, 9 C. & P. 437; 3 St. Tr. (N. S.) 1087; and R. *v.* Adams, C. & Mar. 299, *in which it was held that to justify a conviction under* 7 & 8 G 4, c. 30, s. 8 (rep.) *it was necessary to prove an intent to demolish the whole building.*]

Indictment. (24 & 25 *Vict. c.* 97, *s.* 11, supra.)

STATEMENT OF OFFENCE.

Riotous damage, contrary to section 11 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., on the —— day of ——, in the county of ——, being riotously assembled together demolished, pulled down, or destroyed [*or began to demolish, pull down, or destroy*] a church [*or as the case may be*, see the section, p. 763.]

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 97, s. 11; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, p. 238, 239). *As to recognizances and sureties for keeping the peace, see* 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p 106).

Evidence.

Prove a riotous assembly, as stated *post*, tit. Riot. The number of persons composing it is not material, provided they were three at the least. Prove that the assembly began with force to demolish the building in question. It must appear that they began to demolish some part of the *freehold:* for instance, the demolition of moveable shop shutters is not sufficient. *R.* v. *Howell*, 9 C. & P. 437; 3 St. Tr. (N. S.) 1087. A demolition *by fire* is within the statute. *Id.: R.* v. *Christian*, 12 L. J. (M. C.) 26 : *R.* v. *Harris*, C. & Mar. 661; 4 St. Tr. (N. S.) 1387. Prove that the defendants were either active in demolishing the house, or present aiding and abetting. *R.* v. *Harris*, *supra: R.* v. *Simpson*, C. & Mar. 669; 4 St. Tr. (N. S.) 1387. To convict under s. 11 the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away, as having completed their purpose, it is not a beginning to demolish within s. 11, though it may be an offence within s. 12. *See* cases in note to that section *supra;* and *Drake* v. *Footitt*, 7 Q. B. D. 201; 50 L. J. (M. C.) 141 : *Drake* v. *Hankin*, *Id.* But on an indictment under 7 & 8 G. 4, c. 30, s. 8 (*rep.*), containing a count for riotously, etc., demolishing a dwelling-house, it was held that it was not necessary to prove a total demolition, though the parties were not interrupted : it was enough if the house was destroyed *as a dwelling*. Therefore, the fact that the rioters left a chimney remaining would not prevent the statute from applying. *R.* v. *Phillips*, 2 Mood. 252; *S. C. as R.* v. *Langford*, C. & Mar. 602, Patteson, J.

Where a mob, after the obnoxious person had escaped, continued to attack a house until the police interfered, Gurney, B., left it to the jury to say whether they had not the intention to demolish the house as well as to injure the person; and the jury, being of that opinion, found the defendants guilty. *R.* v. *Batt*, 6 C. & P. 329.

If the house, etc., is riotously demolished, etc., in the *bonâ fide* assertion of a supposed, though unfounded, claim of right, no offence within s. 11 is committed. *R.* v. *Phillips* (*supra*); *and see notes to s.* 51 (*post*, p. 800) : *R.* v. *Clemens* [1898] 1 Q. B. 556; 67 L. J. (Q. B.) 482; 19 Cox, 18 : *Heaven* v. *Crutchley*, 68 J. P. 53.

If the jury are not satisfied that the evidence establishes the felony charged, but are satisfied that it proves riotous, unlawful, and forcible damage within s. 12, they may find the accused guilty of a misdemeanor under that section.

DAMAGE TO HOUSES, ETC., BY TENANTS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 13.]—Whosoever being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor. [*This section was framed on* 9 G. 4, c. 56, s. 24 (Ir.).]

Indictment.

STATEMENT OF OFFENCE.

Damage to building by tenant, contrary to section 13 of Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being possessed of a dwelling-house [*or other building, describing it, as the case may be*] for a term of years [*or as the case may be*], maliciously pulled down or demolished [*or began to pull down or demolish*] the said dwelling-house or a part thereof.

Misdemeanor (24 & 25 Vict. c. 97, s. 13) : *imprisonment with or without hard labour* (see ante, pp. 239, 241), *or fine* (24 & 25 Vict. c. 97, s. 73, ante, p. 740), *or both*. *As to recognizances*, see s. 73 (ante, p. 740).

Evidence.

Prove that the defendant was possessed of the dwelling-house for a subsisting term of years, or other less term, or at will, or that he was holding it over after the determination of his tenancy therein. If the tenancy was created by a lease or agreement in writing, the terms of it must be proved by the written instrument itself, or its non-production must be accounted for in order to let in other evidence of its contents. (*See ante*, pp. 367, 368.) Prove that the dwelling-house was situate as described in the indictment. Then prove that the defendant, or some other person or persons by his direction, demolished or began to demolish the house, or some part thereof. (*See ante*, p. 765). Lastly, prove that the act was done maliciously; that is, wilfully, and without any claim or pretence of right to do it. (*See ante*, p. 741, *and post*, p. 800.)

DESTROYING, ETC., GOODS IN PROCESS OF MANUFACTURE, AND MACHINERY.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 14.]—Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, *hair*, mohair, or *alpaca*, or of any one or more of those materials mixed with each other or mixed with any other material, *or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless*, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 3, *with addition of the words in italics to settle doubts expressed in* R. *v.* Ashton, 2 B. & Ad. 750.]

Indictment for cutting, etc., Goods in the Loom, etc.

STATEMENT OF OFFENCE.

Damaging goods in a loom, contrary to section 14 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously cut, broke, or destroyed [*or damaged with intent to destroy or to render useless*] any goods or article of silk [*or as the case may be*, see the words in the section, *supra*] being in the loom [*or as the case may be*, see the section.]

The words " with intent, etc.," *appear to apply only to the word* " damage " *and not to the preceding words* " cut, break." See R. *v.* Smith, 6 Cox, 198. *The words* " in any stage or process of manufacture " *in the section appear to*

include products until fit for sale. R. *v.* Woodhead, 1 M. & Rob. 549, and see R. *v.* Clegg, 3 Cox, 295.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 14; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant cut or destroyed, etc., the goods in the loom as stated in the indictment, and then prove that it was done maliciously. (*See ante*, p. 741, *post*, p. 800). It is not necessary to prove that it was done out of actual malice to the owner. 24 & 25 Vict. c. 97, s. 58 (*ante*, p. 738).

If an intent is charged in the indictment, it must be proved by circumstances, if it cannot be inferred from the act itself. (*See ante*, pp. 352, 357, 397.)

Where the prisoner, in company with others, unfastened and took away a certain part of a stocking-frame called the half-jack, without which the frame was useless, but did no further injury either to the half-jack or to the frame, than the removal of the half-jack; it was held that this was a damaging the frame within 28 G. 3, c. 55, s. 4 (*rep.*), as it made the frame imperfect and inoperative. *R.* v. *Tacey*, R. & R. 452; *cf. R.* v. *Fisher*, L. R. 1 C. C. R. 7; 35 L. J. (M. C.) 57; 10 Cox, 146.

DESTROYING, ETC., MACHINES USED IN AGRICULTURE OR CERTAIN MANUFACTURES.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 15.—Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended *to be used for sowing, reaping, mowing,* threshing, *ploughing or draining, or for performing any other agricultural operation,* or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, *hair,* mohair, *or alpaca* goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 4, *with the additions italicized.*]

Indictment.

STATEMENT OF OFFENCE.

Damaging a machine, contrary to section 15 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously cut, broke or destroyed [*or damaged with intent to destroy or to render useless*] a threshing-machine [*or as the case may be*, see the section, p. 768.]

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 15; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant cut, broke, or destroyed the threshing-machine in question (*see ante*, p. 768); *R.* v. *Tacey*, R. & R. 452). Prove that it was done maliciously (*see ante*, p. 741); but whether from malice against the owner or otherwise is immaterial. 24 & 25 Vict. c. 97, s. 58 (*ante*, p. 738). *In R.* v. *Crutchley*, 5 C. & P. 133, upon an indictment under 7 & 8 G. 4, c. 30, s. 4 (*rep.*), for breaking a threshing-machine, Patteson, J., allowed the prisoner's counsel to ask whether the mob had not compelled several persons to join them, and to give each a blow with a sledge-hammer to every machine that was broken; he also allowed the witnesses for the prisoner to prove that he had been forced by the mob to join them, and had resolved to escape on the first opportunity. If the damage is alleged to have been done with intent to destroy the machine, or to render it useless, the intent must be proved by circumstances, if it cannot be implied from the act done. (*See ante*, pp. 352, 357, 397.) If a threshing-machine is taken to pieces and separated by the owner, the destruction of any part of it is within that statute. *R.* v. *Mackerel*, 4 C. & P. 448. So is the destruction of a water-wheel, by which a threshing-machine is worked. *R.* v. *Fidler*, 4 C. & P. 449; or the displacing of a machine. *R.* v. *Foster*, 6 Cox, 25. Even if the side-boards of the machine were wanting (without which it would act, but not perfectly), it was held to be within 7 & 8 G. 4, c. 30, s. 4 (*rep.*). *R.* v. *Bartlett*, 2 Deacon, Cr. L. 1517: *and see R.* v. *Chubb*, *Id.* 1518: *R.* v. *Hutchins*, *Id.* 1517. But where the machine was taken to pieces, and in part destroyed by the owner from fear, the remaining parts were held not to be a machine within the meaning of that statute. *R.* v. *West*, *Id.* 1518. It is not necessary that the damage done should be of a permanent kind. Where the prisoner was indicted for maliciously damaging a steam-engine, the evidence was that he had maliciously screwed up parts of the engine, so that they would not work while so screwed up, and had reversed the plug of the pump which supplied the engine with water, and that the engine was rendered temporarily useless and liable to burst. But the prosecutor discovered the

state of the engine before any permanent damage was done, and the screws were loosened, and the plug properly replaced, and the engine was made just as good as before. Held that the prisoner was properly convicted. *R.* v. *Fisher*, L. R. 1 C. C. R. 7; 35 L. J. (M. C.) 57; 10 Cox, 146.

A table, with a hole in it for water, used in the manufacture of bricks, was held not to be a "machine prepared for or employed in any manufacture" within 7 & 8 G. 4, c. 30, s. 4 (*rep.*). *R.* v. *Penny*, Chester Sum. Ass. 1855 (*per* Jervis, C.J., *after consulting* Campbell, C.J.). But it would no doubt be held to be a "tool" or "implement" within the present enactment.

DROWNING MINES, ETC.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 28.]—Whosoever shall unlawfully and maliciously cause any water to be conveyed *or run* into any mine, or into any subterranean passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct, *or damage with intent to destroy, obstruct, or render useless* any air-way, water-way, drain, pit, level or shaft, of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping.

Provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine, in working the same, or by any person duly employed in such working. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 6, *with the additions italicized.*]

Indictment for drowning a Mine. (24 *& 25 Vict. c.* 97, *s.* 28.)

STATEMENT OF OFFENCE.

Drowning a mine, contrary to section 28 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously caused water to be conveyed into a mine with intent to destroy or damage it [*or to hinder its working, etc., as the case may be*, see the statute, supra].

The mine may be laid as the property of a person in possession of and working it, though only as agent for others. R. v. Jones, 1 C. & K. 181; 2 Mood. 293. *But this case does not seem definitely to decide that it is necessary to prove the ownership.*

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 28; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant caused the water to be conveyed into the mine and that it was done maliciously. (*See ante*, p. 741, *post*, p. 800.) Prove the intent by circumstances from which it may be inferred. (*See ante*, pp. 352, 357, 397.) Underground damage by adjoining mine owners and their servants is not punishable under this section: see *the proviso*.

Where the indictment is for pulling down an airway under the same section, prove that the defendant pulled down, etc., the airway of a mine as described in the indictment. If workmen stop up an airway by order of their master in a portion of his mine, it is not felony in the workmen, even though the master know that he has no right to the airway; but if the workmen know that the stopping of the airway is a malicious act of the master, it is felony in the workmen. *R.* v. *James*, 8 C. & P. 131. Prove that it was done maliciously. (*See ante*, p. 741, *post*, p. 800.) And prove the intent, as above. If the act is done by the prisoner under a *bonâ fide* claim of right, it is not within the statute. *R.* v. *Matthews*, 14 Cox, 5, Brett, J.: *cf. R.* v. *Phillips*, 2 Mood. 252: *R.* v. *Clemens* [1898] 1 Q. B. 556; 67 L. J. (Q. B.) 482. The proviso to 24 & 25 Vict. c. 97, s. 28 (*ante*, p. 770), applies to this offence.

DESTROYING, ETC., ENGINES, ERECTIONS, ETC., USED IN MINES.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 29.]—Whosoever shall unlawfully and maliciously pull down and destroy, or damage with intent to destroy or render useless, any steam engine or other engine for sinking, draining, *ventilating*, or working, or for in anywise assisting in *sinking*, *draining*, *ventilating*, or working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building,

erection, bridge, waggon-way, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, *or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever in anywise belonging or appertaining to or connected with or employed in any mine, or the working or business thereof,* shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 & 8 G. 4, c. 30, s. 7, *and* 23 & 24 Vict. c. 29, s. 1, *with the additions in italics.*]

Indictment.

STATEMENT OF OFFENCE.

Damaging a steam engine, contrary to section 29 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously pulled down and destroyed [*or damaged, with intent to destroy or to render useless*] a steam engine [*or engine for sinking, etc., as the case may be*, see the statute].

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 97, s. 29; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant pulled down or destroyed the engine described in the indictment, and that it was erected for the purposes described in the indictment. It is immaterial whether it was completed or in an unfinished state. A scaffold, erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, was held to be an *erection* used in conducting the business of the mine within 7 & 8 G. 4, c. 30, s. 7 (*rep.*). *R.* v. *Whittingham*, 9 C. & P. 234. Where a steam-engine used in working a mine had been stopped and locked up for the night, and the defendant got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received injury, this was held to be a damaging of the engine within that statute. *R.* v. *Norris*, *Id.* 241. Where a mine was worked by a steam-engine, which caused

a cylinder called a drum to revolve, and take up the rope as the coal was drawn up from the mine, it was held on 7 & 8 G. 4, c. 30, s. 7 (*rep.*), that proof of damaging the drum would not support an indictment which charged the damaging of the steam-engine. *R.* v. *Whittingham*, *supra*. But the words of the present statute include "any appliance or apparatus in connection with any such steam or other engine," and apply also to many other injurious acts which were not mentioned in the former statutes. Prove that the act was done maliciously (*see ante*, p. 741, *post*, p. 800); and, if an intent is stated, prove it from circumstances from which that intent may be inferred, if it cannot be implied from the act itself. (*See ante*, pp. 352, 357, 397.)

DESTROYING, ETC., SHIPS WITH INTENT, ETC.

Statute.

24 & 25 *Vict. c.* 97, *ss.* 42, 43, 44.]—Ante, pp. 748. 749.

Indictment. (24 & 25 *Vict. c.* 97, *s.* 42, *ante*, p. 748.)

STATEMENT OF OFFENCE.

Destroying a ship, contrary to section 42 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, on the high seas, maliciously cast away or destroyed a ship or vessel called the *Rattler*.

If the offence is committed in the body of a county, see *the precedent*, ante, p. 749. *For precedent under section* 43 *alleging intent to prejudice the owner of the ship, etc.*, see ante, p. 750.

Felony. (*For punishment*, see ante, p. 749.)

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant cast away or otherwise destroyed the vessel. (*See ante*, p. 749.) It is immaterial whether the ship were complete or in an unfinished state. 24 & 25 Vict. c. 97, s. 42. A pleasure boat eighteen feet long is, it seems, a vessel within the meaning of these sections. *R.* v. *Bowyer* 4 C. & P. 559. *See R.* v. *Smith*, 4 C. & P. 569 (*ante*, p. 750). If the ship had only run aground, and it was afterwards got off in a condition so as to be easily

refitted, it seems it would not be an offence within the Act. *See R.* v. *De Londo*, 2 East, P. C. 1098. Prove the offence to have been done maliciously (*see ante*, p. 741, *post*, p. 800), and with the intent charged in the indictment. Proving that it was done wilfully is of itself sufficient evidence from which the jury may presume that it was committed with intent to prejudice either the owner or part-owner of the ship or of the goods; but if the intent charged is to prejudice the underwriters, you must prove the policy (*see ante*, p. 745), the inception of the risk, and circumstances from which the jury may infer the intent. (*See ante*, pp. 352, 357, 397.)

DAMAGING SHIPS WITH INTENT, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 46.—*Damaging ships otherwise than by fire or explosives.*]—Whosoever shall unlawfully and maliciously damage, otherwise than by fire, *gunpowder, or other explosive substance*, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 10, *with the additions italicized.*]

Sect. 45.—*Attempting to damage ships with explosives.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel, any gunpowder or other explosive substance with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 Vict. c. 25, s. 6. And see 24 & 25 Vict. c. 100, s. 30, post, p 948.]

Indictment.

STATEMENT OF OFFENCE.

Damaging a ship, contrary to section 46 of the Malicious Damage Act, 1861, *supra*.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously damaged [*state in ordinary language how; the section applies to damage otherwise than*

by fire, gunpowder, or other explosive substance] a ship or vessel called the *Rattler*, with intent to destroy it or to render it useless.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 46; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant damaged the ship in the mode stated in the indictment. It is immaterial whether the ship were in a complete or unfinished state. 24 & 25 Vict. c. 97, s. 46. Prove that the act was done maliciously. (*See ante*, p. 741, *post*, p. 800.) Prove circumstances from which the intent stated in the indictment may be inferred (*see ante*, pp. 352 *et seq.*), if it cannot be presumed from the act itself. A pleasure boat eighteen feet long is, it seems, within this enactment. *R.* v. *Bowyer*, 4 C. & P. 559. *See R.* v. *Smith*, 4 C. & P. 569 (*ante*, p. 750).

EXHIBITING FALSE SIGNALS, ETC.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 47.]—Whosoever shall *unlawfully mask, alter, or remove any light or signal*, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, *or boat* into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, *or boat, and for which no punishment is hereinbefore provided*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, s. 5, *with the additions italicized.*]

57 *& 58 Vict. c.* 60 (*Merchant Shipping Act*, 1894), *s.* 220.]—*Misconduct endangering life or ship. Ss.* 667 *to* 680 (1.)]—*Penalties for misleading fires and lights, and proceedings for their removal.*

Indictment for exhibiting False Signals. (24 *& 25 Vict. c.* 97, *s.* 47.)

STATEMENT OF OFFENCE.

Altering Signals [or exhibiting false signals], contrary to section 47 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, masked or altered [*or removed, as the case may be*] a light or signal [*or exhibited a false light or signal, as the case may be*] with intent to bring a ship or vessel or boat called the *Mary* into danger.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 47; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

The intent must be proved by the circumstances of the case which fairly and naturally lead to that conclusion or by statements made by the defendant. *See ante*, pp. 352 *et seq.*

DESTROYING PARTS OF SHIPS IN DISTRESS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 49.]—Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, s. 8.]

Indictment for destroying Part of a Ship, etc., in Distress.

STATEMENT OF OFFENCE.

Destroying part of a ship, contrary to section 49 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously destroyed a part of the ship or vessel called the *Mary*, which was wrecked [*stranded or cast on the shore, as the case may be*].

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 97, s. 49; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the ship was stranded or cast ashore; prove the destruction of a part of the ship, and that it was done by the defendant maliciously. (*See ante*, p. 741, *post*, p. 800.)

CUTTING AWAY, ETC., BUOYS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 48.]—Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen, or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was new law in* 1861.]

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *ss.* 666, 680.]—*Summary proceedings for injuring light-houses, removing buoys, etc.* See 2 Russ. Cr. (7th ed.) 1798.

Indictment. (24 & 25 *Vict. c.* 97, *s.* 48).

STATEMENT OF OFFENCE.

Injuring a buoy, contrary to section 48 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, on the high seas maliciously cut away [*etc.*, see the section, supra] a buoy [*or as the case may be*, see the section] intended for the guidance of seamen, or for the purpose of navigation.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour;

and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 48; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the buoy, etc., in question was used or intended for the guidance of seamen, or in some manner for the purpose of navigation, and that the defendant cut it away maliciously, that is, wilfully. (*See ante*, p. 741, *post*, p. 800).

DESTROYING SEA AND RIVER BANKS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 30.]—Whosoever shall unlawfully and maliciously break down or cut down *or otherwise damage or destroy* any sea-bank or sea-wall, or the bank, dam, or wall of *or belonging to* any river, canal, drain, reservoir, *pool*, or marsh, whereby any land *or building* shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully and maliciously throw, *break or cut* down, level, undermine, or otherwise destroy, any *quay*, *wharf*, *jetty*, lock, sluice, flood-gate, weir, tunnel, towing-path, drain, water-course, or other work *belonging to any port, harbour, dock, or reservoir, or* on *or belonging to* any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 12, *with the additions italicized.*]

Indictment for cutting down River or Sea Banks. (24 & 25 *Vict. c.* 97, *s.* 30, supra.)

STATEMENT OF OFFENCE.

Cutting down a river bank, contrary to section 30 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously cut down or broke down part of the bank of the river Tyne [*or as the case may be*, see the section, supra], by means of which certain land was then overflowed or damaged or was in danger of being overflowed or damaged.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 30; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant broke down or cut down the banks of the river, situate as described in the indictment. Prove, also, that the offence was committed maliciously (*see ante*, p. 741, *post*, p. 800); and prove that, in consequence of the breaking or cutting of the banks, certain land was, or was in danger of being, overflowed, as stated in the indictment.

Indictment for throwing down, etc., Locks on Rivers, etc. (24 & 25 *Vict. c.* 97, *s.* 30, *ante*, p. 778.)

STATEMENT OF OFFENCE.

Breaking down a lock, contrary to section 30 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously threw or broke or cut down [*or levelled, undermined, as the case may be*] or otherwise destroyed a lock [*or as the case may be*, see the section supra] belonging to a harbour [*or as the case may be*, see the section supra].

Felony. See *the last precedent.*—24 & 25 Vict. c. 97, s. 30.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant threw down, etc., the lock in question upon the canal or navigable river, as described in the indictment; prove the local situation of the canal or river, and prove that it was done maliciously. (*See ante*, p. 741, *post*, p. 800.)

DESTROYING OR REMOVING, ETC., PILES, ETC., IN RIVERS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 31.]—Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or

sea-wall, or the bank, dam or wall of any river, canal, *drain*, *aqueduct*, marsh, *reservoir*, *pool*, *port*, *harbour*, *dock*, *quay*, *wharf*, *jetty or lock*, or shall unlawfully and maliciously open or draw up any flood-gate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 12, *with the additions italicized.*]

Indictment for cutting, etc., Piles, etc., in Rivers or Sea-banks. (24 & 25 *Vict. c.* 97, *s.* 31.)

STATEMENT OF OFFENCE.

Removing piles from a sea-wall, contrary to section 31 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously cut off, drew up or removed certain piles [*or as the case may be*, see the section] used for securing a sea-wall [*or as the case may be*, see the section, supra].

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 31; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the pile was fixed in the ground and used to secure the sea-wall; prove that the defendant cut it, or as the case may be, and prove that he did so maliciously. (*See ante*, p. 741, *post*, p. 800.)

Indictment for opening Flood-gates, etc., with intent, etc. (24 & 25 *Vict. c.* 97, *s.* 31.)

STATEMENT OF OFFENCE.

Opening a flood-gate, contrary to section 31 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously opened or drew up a flood-gate or sluice of a navigable river [*or canal*] with intent and so as to obstruct or prevent carrying on [*completing*] or maintaining the navigation of the said river.

Felony. See *the last precedent.*—24 & 25 Vict. c. 97, s. 31.

Evidence.

Prove that the defendant opened or drew up the flood-gate of the navigable river in question. Prove that he did so maliciously (*see ante*, p. 741, *post*, p. 800); prove the intent from circumstances from which the jury may infer it (*see ante*, pp. 352 *et seq.*); and prove that the navigation was obstructed, which even alone is reasonable evidence of the intent.

DESTROYING BRIDGES, VIADUCTS, AND AQUEDUCTS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 33.]—Whosoever shall unlawfully and maliciously pull *or throw* down or in anywise destroy any bridge (*whether over any stream of water or not*), *or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway, or canal shall pass*, or do any injury with intent and so as thereby to render such bridge, *viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same*, or any part thereof, dangerous or impassable, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 13, *with additions, to settle doubts which existed as to what was a public bridge.* See R. *v.* Oxfordshire, 1 B. & Ad. 289: R. *v.* Same, 1 B. & Ad. 297 n.: R. *v.* Derbyshire, 2 Q. B. 745.]

Indictment for pulling down a Bridge. (24 & 25 *Vict. c.* 97, *s.* 33.)

STATEMENT OF OFFENCE.

Destroying a bridge, contrary to section 33 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously pulled or threw down or destroyed a bridge [*viaduct or aqueduct*] over [*or under*]

which a highway [*or as the case may be*, see the section] passed, with intent and so as to render the bridge [*or highway, etc., as the case may be*] or a part thereof dangerous or impassable.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 Vict. c. 97, s. 33; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant did the injury to the bridge stated in the indictment. Prove that the bridge is situated as described: and prove that the act was done maliciously by the defendant. (*See ante*, p. 741, *post*, p. 800.) It must also be proved that the bridge was, by the act of the defendant, rendered dangerous or impassable, and this, even alone, is reasonable evidence of the intent.

DESTROYING TOLL-BARS, ETC.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 34.]—Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate *or toll-bar*, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate *or toll-bar*, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of parliament relating thereto, or any house, building or weighing-engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 14.]

Punishment: imprisonment with or without hard labour (Criminal Justice Administration Act, 1914 (4 & 5 G. 5, c. 58), s. 16 (1), *ante*, p. 740), *and* (*or*) *fine* (24 & 25 Vict. c. 97, s. 73, ante, p. 740), *or both. As to recognizances* see s. 73, ante, p. 740.

All turnpike trusts in England and Wales have now expired. As to toll-bars for collecting franchise tolls, *see New Windsor* (*Mayor, etc.*) v. *Taylor* [1889] A. C. 41; 68 L. J. (Q. B.) 87.

INJURIES TO RAILWAYS, TELEGRAPHS AND ELECTRIC LINES.

Statutes.

3 & 4 *Vict. c.* 97 (*Regulation of Railways Act*, 1840), *s.* 13.]—*Summary punishment of railway servants guilty of misconduct or neglect, whereby life or limb of persons on the railway, or the works of the line might be endangered, or the passage of trains obstructed.*

Sect. 14.]—*Power to send the case to quarter sessions.*

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 35.—*Maliciously obstructing, etc., railways, etc.*]—Whosoever shall *unlawfully* and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall *unlawfully* and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall *unlawfully* and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall *unlawfully* and maliciously make or show, hide, or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 14 & 15 Vict. c. 19, s. 6, *with the substitution of* " *unlawfully* " *for* " *wilfully.*"]

Sect. 36.—*Unlawfully obstructing railways.*]—Whosoever, *by any unlawful act, or by any wilful omission or neglect*, shall obstruct *or cause to be obstructed* any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 3 & 4 Vict. c. 97, s. 15, *with the additions italicized.* See R. *v.* Pardenton, 6 Cox, 247.]

Sect. 37.—*Destroying telegraphs.*]—Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and

the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet. [*This section was new law in* 1861.] *The term "electric telegraph" seems to include telephone.* See Att.-Gen. *v.* Edison Telephone Co., 6 Q. B. D. 244; 50 L. J. (Q. B.) 145: *and the preamble to s.* 1 *of the* Telegraph Act, 1892 (55 & 56 Vict. c. 59). *The powers of a single justice under this section are limited in England by* 42 & 43 Vict. c. 49, s. 20, (7).

Sect. 38.—*Attempts to commit offences against s.* 37.]—Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet. [*This section was new law in* 1861.]

45 *&* 46 *Vict. c.* 56 (*Electric Lighting Act*, 1882), *s.* 22.—*Injuring electric lines or works with intent to cut off supply of electricity.*]—Any person who unlawfully and maliciously cuts or injures any electric line or work with intent to cut off any supply of electricity shall be guilty of felony, and be liable to be kept in penal servitude for any term not exceeding five years or to be imprisoned with or without hard labour for any term not exceeding two years; but nothing in this section shall exempt a person from any proceeding for any offence which is punishable under any other provision of this Act, or under any other Act, or at common law, so that no person be punished twice for the same offence (*see ante*, p. 160).

48 *&* 49 *Vict. c.* 49 (*Submarine Telegraph Act*, 1885), *s.* 3.—*Making or injuring submarine telegraph cables.*]—(1) A person shall not unlawfully and wilfully, or by culpable negligence, break or injure any submarine cable to which the Convention [the Submarine Telegraph Convention, 1884] for the time being applies, in such manner as might interrupt or obstruct, in whole or in part, telegraphic communication.

(2) Any person who acts, or attempts to act, in contravention of this section shall be guilty of a misdemeanor, and on conviction—

(*a*) if he acted wilfully shall be liable to penal servitude for a term not exceeding five years, or to imprisonment with or without hard labour for a term not exceeding two years, and to a fine, either in lieu of or in addition to such penal servitude or imprisonment; and

(*b*) If he acted by culpable negligence, shall be liable to imprisonment for a term not exceeding three months, without hard labour, and to a fine not exceeding 100*l.*, either in lieu of, or in addition to, such imprisonment.

(3) Where a person does any act with the object of preserving the life or

limb of himself or of any other person, or of preserving the vessel to which he belongs, or any other vessel, and takes all reasonable precautions to avoid injury to a submarine cable, such person shall not be deemed to have acted unlawfully and wilfully within the meaning of this section.

(4) A person shall not be deemed to have unlawfully and wilfully broken or injured any submarine cable where in the *bonâ fide* attempt to repair another submarine cable injury has been done to such first-mentioned cable, or the same has been broken, but this shall not apply so as to exempt such person from any liability under this Act, or otherwise, to pay the cost of repairing such breakage or injury.

(5) Any person who within or (being a subject of his Majesty) without his Majesty's dominions, in any manner procures, counsels, aids, abets, or is accessory to the commission of any offence under this section, shall be guilty of a misdemeanor, and shall be liable to be tried and punished for the offence as if he had been guilty as a principal.

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 62.—*Disfiguring, etc., telegraph posts, etc.*]—*Summary conviction only.*

Indictment for placing Wood on Rails with Intent, etc. (24 & 25 *Vict. c.* 97, *s.* 35, ante, p. 783.)

STATEMENT OF OFFENCE.

First Count.

Offence under section 35 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously displaced a sleeper belonging to the Great Western Railway Company with intent to obstruct, upset, overthrow, injure or destroy an engine, tender, carriage or truck using the said railway.

STATEMENT OF OFFENCE.

Second Count.

Obstructing railway, contrary to section 36 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by unlawfully displacing a sleeper belonging to the Great Western Railway Company obstructed or caused to be obstructed an engine or carriage using the said railway.

Sect. 35.—*Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.*—54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239).

Sect. 36.—*Misdemeanor: imprisonment, with or without hard labour, for not more than two years, and whipping as above.*

As to requiring the offender to enter into recognizances and find sureties for keeping the peace, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740). *As to summary trial of youthful offenders*, see 42 & 43 Vict. c. 49, ss. 10, 11, sched. 1.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant placed the piece of wood upon or across the railway named and situate as described in the indictment, or was present aiding and assisting in doing so. It does not matter whether the railway is public or private. *O'Gorman* v. *Sweet*, 54 J. P. 663. Prove that he did it maliciously (*see ante*, p. 741, and *R.* v. *Hoyroyd*, 2 M. & Rob. 339). The intention may be inferred from the circumstances from which the jury may presume it (*see ante*, pp. 352, 357, 397). In general, the act being done wilfully, and its being likely to obstruct or upset the railway train, would be sufficient *primâ facie* evidence of an intent to do so. *See R.* v. *Upton*, 5 Cox, 298. *Semble*, the intent to injure or destroy a train, provided against by this section, is an intent to injure or destroy otherwise than by *burning*, which is specially mentioned in 24 & 25 Vict. c. 97, s. 4 (*ante*, p. 737). *See R.* v. *Sanderson*, 1 F. & F. 37.

A person may be convicted of a misdemeanor under s. 36, though no train is in fact obstructed by his act, and the line is not formally open to traffic. *See R.* v. *Bradford*, Bell, 268; 29 L. J. (M. C.) 171; 8 Cox, 309. Where the defendant had unlawfully altered some railway signals at a railway station, and this alteration caused a train which would otherwise have passed the station without slackening speed, to slacken speed, and to come nearly to a stand, it was held (Martin, B., *diss.*) that he was guilty of "obstructing" a train within the meaning of 24 & 25 Vict. c. 97, s. 36. *R.* v. *Hadfield*, L. R. 1 C. C. R. 253; 39 L. J. (M. C.) 131; 11 Cox, 574. And so where the defendant, by holding up his arms in the mode used by inspectors of the line when desirous of stopping a train, intentionally induced the driver of a train to reduce his speed from twenty miles to four miles an hour, although the train was not wholly stopped, but immediately afterwards resumed its ordinary speed, he was held to be guilty of an unlawful obstruction within that section. *R.* v. *Hardy*, L. R. 1 C. C. R. 278; 40 L. J. (M. C.) 62; 11 Cox, 656. "Any unlawful act" in s. 36 includes each of the acts mentioned in s. 35. *Id.* An acquittal on an indictment framed under s. 35 is no bar to a subsequent indictment upon the same facts for a misdemeanor under s. 36. *R.* v. *Gilmore*, 15 Cox, 85, Huddleston, B., *and see ante*, p. 157.

DESTROYING DAMS OF FISH-PONDS, ETC.

Statutes.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 32.]—Whosoever shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam, *flood-gate, or sluice* of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destuction of any of the fish, or shall unlawfully and maliciously put any lime, or other noxious material, in any such pond or water, with intent thereby to destroy any of the fish *that may then be or that may thereafter be put* therein, or shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam *or flood-gate* of any mill-pond, *reservoir, or pool*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 15, *with the additions italicized.*]

36 & 37 *Vict. c.* 71 (*Salmon, etc., Fisheries Act*, 1873, *s.* 13.]—The provisions of the 32nd section of the *Malicious Damage Act*, 1861 (24 & 25 Vict. c. 97), so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words " or in any salmon river " were inserted in the said section in lieu of the words " private rights of fishery " after the words " noxious material in any such pond or water." (*As to the proper construction to be placed upon this section*, see R. *v.* Vasey and Lally [1905] 2 K. B. 748; 75 L. J. (K. B.) 19; 21 Cox, 49.)

Indictment for breaking down the Dam of a Fish-pond. (24 & 25 *Vict. c.* 97, *s.* 32, supra.)

STATEMENT OF OFFENCE.

Destroying dam of fish-pond, contrary to section 32 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously cut through, broke down or otherwise destroyed the dam [*flood-gate or sluice*] of a fish-pond with intent to take or destroy some of the fish in the pond.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—

24 & 25 Vict. c. 97, s. 32; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine and recognizances and sureties for keeping the peace and being of good behaviour*, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant broke down or destroyed the dam of the fish-pond situate as described in the indictment, and that it was done maliciously (*see ante*, p. 741, *post*, p. 800); and prove circumstances from which the intent may be inferred (*see ante*, pp. 352, 357); and if the loss of fish is stated in the indictment, prove that fact.

OFFENCES WITH REFERENCE TO ANIMALS.

(a) *Killing or Maiming.*

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 40.—*Killing or maiming cattle.*]—Whosoever shall unlawfully and maliciously kill, maim or wound any cattle shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 16.]

Sect. 41.—*Killing or maiming animals other than cattle.*]—Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit. [*This section was new law in* 1861. *The accused can elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17 (ante, p. 7). *The indictment need not state the fact of the election.* R. *v.* Chambers, 65 L. J. (M. C.) 214; 18 Cox, 401. *In* Daniel *v.* Janes, 2 C. P. D. 351; 41 J. P. 712, *it was held that it was not an offence under this section to place poisoned flesh in a garden for the purpose of destroying a dog which was in the habit of straying there*; but see 1 & 2 G. 5, c. 27, s. 8. *In* Smith *v.* Williams, 56 J. P. 840; 9 T. L. R. 9, *it was held that the section did not apply to the shooting of trespassing fowls. But*

where a gamekeeper killed a trespassing dog at which he had shot (with the intention of driving it away, and in order to protect his master's pheasants), it was held that the test of liability to be convicted under this section was whether he acted under the bonâ fide *belief that what he did was necessary for the protection of his master's property, and that it was the only way in which it could be protected.* Miles *v.* Hutchings [1903] 2 K. B. 714; 72 L. J. (K. B.) 775; 20 Cox, 455; and cf. Armstrong *v.* Mitchell, 67 J. P. 329. *The prosecution need not prove that the particular animal was in fact kept for a domestic purpose if it belongs to a class of animals which are ordinarily so kept, nor need the ownership of the animal be proved.* Nye *v.* Niblett [1918] 1 K. B. 23; 26 Cox, 113.

Indictment for killing a Horse. (24 *&* 25 *Vict. c.* 97, *s.* 40.)

STATEMENT OF OFFENCE.

Killing or maiming cattle, contrary to section 40 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously killed [*maimed or wounded*] a horse.

It has been held that the particular species of cattle killed, maimed, or wounded, must be specified, and that an allegation that the prisoner maimed certain cattle is not sufficient. R. *v.* Chalkley, R. & R. 258. *But see now the* Indictments Act, 1915, s. 3, ante, p. 44. *The word "cattle" is the only word in s.* 40, *and this in former statutes upon this subject* (9 G. 1, c. 22, s. 1; 4 G. 4, c. 54, s. 2) *was held to include horses, as well as oxen, etc.*, R. *v.* Paty, 2 W. Bl. 721; 2 East, P. C. 1074; *and also pigs*, R. *v.* Chapple, R. & R. 77; *and asses*, R. *v.* Whitney, 1 Mood. 3.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour.— 24 & 25 Vict. c. 97, s. 40; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant killed the horse. Prove also that it was done maliciously (*see ante*, p. 741, *post*, p. 800); but it is not now necessary, as it was formerly, to prove the offence to have been committed from malice to the owner. 24 & 25 Vict. c. 97, s. 58 (*ante*, p. 738); *R.* v. *Tivey*, 1 Den. xviii. 63; 1 C. & K. 704. On an indictment under 7 & 8 G. 4, c. 30, s. 16 (*rep.*), for unlawfully and maliciously killing a mare, it was proved that the prisoner

caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina. There was no evidence that the prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not intend to kill the mare; but that he knew what he was doing would or might kill her, and nevertheless did what he did recklessly, and not caring whether the mare was injured or not. The jury having convicted the prisoner, it was held that there was sufficient malice, and that the conviction was right. *R.* v. *Welch*, 1 Q. B. D. 23; 45 L. J. (M. C.) 17.

Upon an indictment for administering sulphuric acid to a horse, evidence may be given of other acts of administering, in order to show the intent. *R.* v. *Mogg*, 4 C. & P. 364, *and ante*, pp. 352 *et seq.*

To constitute *maiming*, *a permanent* injury must be inflicted on the animal. *R.* v. *Jeans*, 1 C. & K. 539. But if a *wounding* is alleged, it is not necessary to prove a permanent injury. Where the wounding proved was driving a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover, it was objected that no wounding was within the meaning of 9 G. 1, c. 22 (*rep.*), that was not productive of permanent injury to the animal; but the judges overruled the objection, holding that the word "wound" was used by the legislature as contra-distinguished from maiming, which is a permanent injury. *R.* v. *Haywood*, 2 East, P. C. 1076; R. & R. 16. It is not necessary to constitute a wounding within this section that any instrument other than the hand should be used. *R.* v. *Bullock*, L. R. 1 C. C. R. 115; 37 L. J. (M. C.) 47; 11 Cox, 125.

Upon an indictment for killing, wounding, and maiming a mare, it appeared that the defendant poured nitrous acid into her ears, some of which either ran into her eye, or was poured into it, and blinded her; she was killed by her owner, and surgeons proved that the injuries done to the ears were not wounds, but ulcers; the defendant was therefore convicted of the maiming, and the judges held the conviction right. *R.* v. *Owens*, 1 Mood. 205.

Upon an indictment for wounding a sheep, it appeared that the prisoner set a dog at the sheep, which bit it; and Parke, J., held that this was not a wounding within the meaning of 4 G. 4, c. 54, s. 2 (*rep.*). *R.* v. *Hughes*, 2 C. & P. 420. *But see R.* v. *Elmsly*, 2 Lew. 126. And where the prisoner set fire to a cow-house, in which was a cow, which was burnt to death, Taunton, J., held that the prisoner could be convicted upon an indictment for killing the cow. *R.* v. *Haughton*, 5 C. & P. 559.

Where the injury is done in self-defence, the defendant is entitled to acquittal. *See Hanway* v. *Boultbee*, 4 C. & P. 350; 1 M. & Rob. 15.

Upon an indictment under this section, Russell, C.J., after consulting Grantham, J., held that a man could be convicted for maliciously injuring an animal of his own. *R.* v. *Parry* [1900] 35 L. J. Newsp. 456, *sed quære*. Such an act falls within the *Protection of Animals Act*, 1911, *infra*.

As to injuries to trespassing animals, *see* note to s. 41 (*ante*, p. 788), and *R.* v. *Fetzer* [1900] 19 N. Z. L. R. 438.

(b) *Cruelty to Animals.*

The *Protection of Animals Act*, 1911 (1 & 2 G. 5, c. 27), which repeals and replaces the *Cruelty to Animals Acts* of 1849 (12 & 13 Vict. c. 92) and 1854 (17 & 18 Vict. c. 60), does not create any offence punishable on indictment. The penalty for cruelty to animals under this Act is six months' imprisonment, but this has been reduced to three months by s. 1 of the *Protection of Animals Act* (1911) *Amendment Act*, 1912 (2 & 3 Geo. 5, c. 17). Section 2 of the Act of 1849 (replaced by s. 1, (1) (a) of the Act of 1911) applied to cock-fighting. *Allen* v. *Small* [1904] 2 Ir. Rep. 705 : *Budge* v. *Parsons*, 3 B. & S. 382. Where a gamekeeper shot a dog (which he found disturbing pheasants in a field over which the keeper's master had sporting rights), meaning not to kill it, but to injure it, if necessary, for the purpose of frightening it away, it was held that proof of the existence of such intent as above stated did not necessarily render the keeper liable to conviction under 12 & 13 Vict. c. 92, s. 2. *Armstrong* v. *Michell*, 67 J. P. 329. Where, under the same section, C. was convicted of overstocking five cows with milk, it was held, on application for a *certiorari*, that it was not necessary to have a separate summons and conviction in respect of each cow. *R.* v. *Cable* [1906] 1 K. B. 719; 75 L. J. (K. B.) 381; 70 J. P. 246. Where the alleged cruelty consisted in a practice which was found as a fact to be reasonably necessary for the identification of sheep, the summons was held to have been rightly dismissed. *Bowyer* v. *Morgan*, 70 J. P. 253. As to the construction of 12 & 13 Vict. c. 92, s. 2 (replaced by 1 & 2 G. 5, c. 27, s. 1 (1) (a)), *see Johnson* v. *Needham* [1909] 1 K. B. 626; 78 L. J. (K. B.) 412.

The *Cruelty to Animals Act*, 1876 (39 & 40 Vict. c. 77), as appears from its preamble, was passed to amend the law relating to cruelty to animals, by extending it to the cases of animals which for medical, physiological, or other scientific purposes are subjected when alive to experiments calculated to inflict pain. For this purpose it enacts in s. 2, that a person shall not perform on a living animal any experiment calculated to give pain, except subject to the restrictions imposed by the Act, under a penalty not exceeding 50*l.* for the first offence, and not exceeding 100*l.* or imprisonment for not exceeding three months for a second or any subsequent offence; and in s. 6, that an exhibition to the general public, whether admitted on payment of money or gratuitously, of experiments on living animals calculated to give pain, shall be illegal, and shall subject the offender to a penalty not exceeding 50*l.* for the first offence, and not exceeding 100*l.* or imprisonment for not exceeding three months for a second or any subsequent offence. By s. 14, in England offences against this Act may be prosecuted and penalties under this Act recovered before a court of summary jurisdiction in manner directed by the *Summary Jurisdiction Acts;* but by s. 15, " In England, where a person is accused before a court of summary jurisdiction of any offence against this Act, in respect of which a penalty of more than five pounds can be imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused

were charged with an indictable offence, and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly." (*Cf.* 42 & 43 Vict. c. 49, s. 17, *ante*, p. 7.) By s. 21, "A prosecution under this Act against a licensed person shall not be instituted except with the assent in writing of the secretary of state."

DESTROYING HOPBINDS.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 19.]—Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years, . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 18, *as to which* see R. *v.* Boucher, 5 Jur. 709.]

Indictment.

STATEMENT OF OFFENCE.

Destroying hopbinds, contrary to section 19 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously cut or otherwise destroyed certain hopbinds growing on poles in a plantation of hops.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under the age of sixteen, with or without whipping.—24 & 25 Vict. c. 97, s. 19; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant cut or otherwise destroyed the hopbinds, or some part of them, as alleged; that they were at the time growing in a plantation of hops, situate as described. Prove, also, that the act was done maliciously. (*See ante*, p. 741, *post*, p. 799.)

DESTROYING TREES, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 20.—*Destroying trees in parks, etc.*]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude . . . or to be imprisoned. . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 19.]

Sect. 21.—*Destroying trees not in parks, etc.*]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 19.]

Indictment for cutting, etc., Trees, etc., in Parks, etc., Value above 1*l.*
(24 & 25 *Vict. c.* 97, *s.* 20.)

STATEMENT OF OFFENCE.

Damaging trees, contrary to section 20 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously damaged an oak tree [*sapling or shrub or underwood, as the case may be*] growing in a park, or pleasure garden [*orchard or avenue, etc.*, see the section, supra], and thereby did injury exceeding the sum of one pound.

A count may be added for cutting with intent to steal the trees. (See ante, p. 574).

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 20; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the defendant "cut, broke, barked, rooted up, or otherwise destroyed or damaged" one or more of the trees mentioned in the indictment, and that the injury done exceeds the sum of one pound. Prove that the trees, at the time, were growing in a park situate as described in the indictment (*or*, "in a pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house") (*see R.* v. *Hodges*, M. & M. 341, *ante*, p. 575). Prove, also, that the trees were cut maliciously (*see ante*, p. 741, *post*, p. 800); but if it is doubtful whether the defendant did not intend to steal the trees, add a count to meet that. (*See ante*, p. 575.)

Indictment for cutting, etc., Trees, etc., growing elsewhere, Value about 5l.
(24 & 25 *Vict. c.* 97, *s.* 21, ante, p. 793.)

STATEMENT OF OFFENCE.

Damaging trees, contrary to section 21 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously damaged an oak tree there growing, and thereby did injury exceeding the sum of 5*l.*

Felony: see *the last precedent.*—24 & 25 Vict. c. 97, s. 21.

Evidence.

Prove that the defendant cut, etc., the tree mentioned in the indictment; that damage exceeding five pounds was done at one time (*R.* v. *Williams*, 9 Cox, 338 (C. C. R. Ir.)), or as part of one continuing transaction (*see ante*, p. 676); and that the cutting was done maliciously (*ante*, p. 741, *post*, p. 800). The "amount of injury done" means the actual injury done to the trees, etc., by the defendant's act; it is not sufficient to bring the case within the statute, that, although the amount of such actual injury is less than 5*l.*, the amount of *consequential* damage (as by its being necessary, in consequence of the defendant's act, to stub up and replace a hedge) would exceed 5*l.* *R.* v. *Whiteman*, Dears. 353; 23 L. J. (M. C.) 120; 6 Cox, 370. (*See ante*, p. 575.) It is not necessary to prove that the trees grew elsewhere than in a park, etc.

DESTROYING TREES, ETC., AFTER TWO PREVIOUS CONVICTIONS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 22.]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood,

wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, *either* against this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (*whether both or either of such convictions shall have taken place before or after the passing of this Act*), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 20. *The accused, when charged after a first conviction, can elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17 (ante, p. 7). *The election need not be averred:* see ante, p. 788.]

Indictment after two previous Convictions for cutting Trees, etc., wheresoever growing, Value 1s.

STATEMENT OF OFFENCE.

Damaging trees, contrary to section 22 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously damaged an oak tree there growing, and did injury to the amount of two shillings.

A. B. has been twice previously convicted of an offence under section 22 of the Malicious Damage Act, 1861, namely, at ——, on the —— day of ——, and at ——, on the —— day of ——.

Misdemeanor: imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 22. *As to fine, recognizances, and sureties for keeping the peace and being of good behaviour*, Id. s. 73 (ante, p. 740).

Evidence.

Prove that the defendant cut and damaged the tree: prove that it was done maliciously (*see ante*, p. 741, *post*, p. 800); and prove that the damage amounted

at least to one shilling. (*See ante*, p. 575.) Prove the two previous convictions in the manner directed by 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 421), and the identity of the defendant.

In *Heaven* v. *Crutchley* [1903] 68 J. P. 52, it was held that a person could be convicted under this section for damage done in assertion of a legal right if the damage exceeded what could be reasonably supposed to be necessary for the assertion of the right. The court followed *R.* v. *Clemens* [1898] 1 Q. B. 556; 67 L. J. (Q. B.) 482; 19 Cox, 18.

DESTROYING PLANTS, ETC., AND FENCES.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 23.—*Plants growing in gardens.*]—Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory shall on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet;

And whosoever, having been convicted of any such offence, *either* against this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 21. *On a charge for a first offence the accused can elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17, ante, p. 7. *The election need not be averred:* see ante, p. 788.]

Sect. 24.—*Plants not growing in gardens.*]—Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing on any land, open or enclosed, not being a garden, orchard, or nursery-ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty shillings as to the justice shall seem meet, and in default of payment thereof, together with the costs, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made;

And whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding *six* months, as the convicting justice shall think fit. [*This section re-enacts* 7 & 8 G. 4, c. 30, s. 22. *On a charge for a second or subsequent offence, the accused can elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17 (ante, p. 7). *The election need not be averred:* see ante, p. 788.]

Sect. 25.—*Destroying fences.*]—Whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, shall, on conviction thereof, before a justice of the peace, for the first offence, forfeit and pay over and above the amount of the injury done, such sum of money not exceeding 5*l.*, as to the justice shall seem meet;

And whosoever having been convicted of any such offence, *either* under this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months, as the convicting justice shall think fit. [*This section is taken from* 7 & 8 G. 4, c. 30, s. 23. *On a charge for a second or subsequent offence, the accused can elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17 (*ante*, p. 7). *The election need not be averred:* see ante, p. 788.]

Indictment after a previous Conviction, for destroying Plants, etc., in a Garden, etc. 24 & 25 *Vict. c.* 97, *s.* 23, *ante*, p. 796.)

STATEMENT OF OFFENCE.

Damaging plants, contrary to section 23 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously destroyed, [*or damaged with intent to destroy*] a rhubarb plant or root [*plant, root, fruit or vegetable production*] growing in a garden [*or orchard, nursery-ground, hothouse, greenhouse or conservatory*].

A. B. has been previously convicted of an offence against section 23 of the Malicious Damage Act, namely, at ——, on the —— day of ——.

Felony: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 Vict. c. 97, s. 23; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace, see* 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove the first offence stated in the indictment: that the defendant destroyed the rhubarb plant, situate as described in the indictment; and that the offence was committed maliciously. (*See ante*, p. 741, *post*, p. 800.) Prove the previous conviction in the manner directed by 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 421), and the identity of the defendant.

The words "plant" or "vegetable production" do not apply to young trees. *R.* v. *Hodges*, M. & M. 341. (*See ante*, p. 575.)

DESTROYING OR DAMAGING WORKS OF ART, ETC., IN MUSEUMS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 39.]—Whosoever shall unlawfully and maliciously destroy or damage any *book*, *manuscript*, *picture*, *print*, *statue*, *bust*, *or vase*, *or any other* article or thing kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library or other repository, which museum, gallery, cabinet, library or other repository is either at all times, or from time to time, open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, *or other memorial of the dead*, painted glass, or other ornament or work of art, in any church, chapel, *meeting-house*, or other place of divine worship, *or in any building belonging to the queen*, *or to any county*, *riding*, *division*, *city*, *borough*, *poor-law union*, *parish or place*, *or to any university*, *or college or hall of any university*, *or to any inn of court*, or in any street, square, *churchyard*, *burial-ground*, *public garden or ground*, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping:

Provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed. [*This section was framed from* 8 & 9 Vict. c. 44, ss. 1, 4; *and* 17 & 18 Vict. c. 33, s. 6, *with the additions italicized. The defacing of tombs, etc., is said to be punishable at common law.* See Corven's case, 12 Co. Rep. 105; Greaves, Crim. Law Cons. Acts (2nd ed.), p. 238.

MALICIOUS DAMAGE TO PROPERTY TO AMOUNT OF FIVE POUNDS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 51.]—Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, [*the damage, injury, or spoil being to an amount exceeding five pounds,*] shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable . . . to be kept in penal servitude. . . . [*This section was new law in* 1861. *The words italicized between square brackets have been repealed by* 4 & 5 G. 5. c. 58, s. 14 (2), infra.]

4 & 5 *Geo.* 5, *c.* 58 (*Criminal Justice Administration Act*, 1914), *s.* 14.—*Provisions as to malicious damage to property.*]—(1) If any person wilfully or maliciously commits any damage to any real or personal property whatsoever, either of a public or private nature, and the amount of the damage does not, in the opinion of the court, exceed twenty pounds, he shall be liable on summary conviction—(*a*) if the amount of the damage, in the opinion of the court, exceeds five pounds, to imprisonment for a term not exceeding three months or to a fine not exceeding twenty pounds; and (*b*) if the amount of the damage is, in the opinion of the court, five pounds or less, to imprisonment for a term not exceeding two months or to a fine not exceeding five pounds; and in either case to the payment of such further amount as appears to the court reasonable compensation for the damage so committed which last-mentioned amount shall be paid to the party aggrieved: Provided that this provision shall not apply where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of.

(2) So much of section fifty-one of the Malicious Damage Act, 1861, as limits the cases which may be dealt with under that section to cases where the damage, injury or spoil exceeds five pounds, shall be repealed but a court of summary jurisdiction shall not commit any person for trial for an offence under that section unless it is of opinion that the damage, injury or spoil exceeds five pounds.

(3) Except so far as otherwise provided in the last foregoing sub-section, nothing in this section shall be construed as preventing a court of summary jurisdiction from committing a person for trial for an offence notwithstanding that the offence is an offence which the court has power to deal with summarily under this section.

Indictment.

An indictment under 24 & 25 Vict. c. 97, s. 51, *can be framed from the precedents*, ante, pp. 793, 795.

Misdemeanor: imprisonment for not more than two years, with or without hard labour. If committed between 9 *p.m. and* 6 *a.m., the offender may be sentenced to penal servitude for not more than five years nor less than three years.* See 54 & 55 Vict. c. 69, s. 1 (1), ante, pp. 237, 238. *As to fine and recognizances, see* 24 & 25 Vict. c. 97, s. 73, ante, p. 740.

Evidence.

To justify a conviction under 24 & 25 Vict. c. 97, s. 51, the act done by the prisoner must be done wilfully, or at least recklessly. Where a prisoner was indicted for unlawfully and maliciously committing damage, about the value of 5*l.*, to a window in a house, and the jury found that the prisoner threw a stone which broke the window, but that he threw it at some people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window, and returned a verdict of guilty; it was held that upon this finding the conviction must be quashed. It was, however, intimated by the Court that if the jury had found that the prisoner was aware that the window was where it was, and that he was likely to break it, and was reckless whether he did so or not, the case might have been different. *R.* v. *Pembliton*, L. R. 2 C. C. R. 119; 43 L. J. (M. C.) 91. *See R.* v. *Latimer*, 17 Q. B. D. 359; 55 L. J. (M. C.) 135 (where the meaning of the decision in *R.* v. *Pembliton* is explained), and *R.* v. *Welch*, 1 Q. B. D. 23; 45 L. J. (M. C.) (*ante*, p. 741). Where a thief broke a window in order to reach and steal goods in a shop, it was held that his act was a misdemeanor within the *Malicious Damage Act*, 1861. *M'Dowell* v. *Mayor, etc., of Dublin* [1903] 2 Ir. Rep. 541, C. A. In *Re Borrowes* [1902] 2 Ir. Rep. 593 (C. A.), some boys, who had been allowed to visit a demesne, from motives of curiosity broke open the doors and windows of a building in the demesne and entered the building. In getting out again, one of the boys broke some mirrors stored in the building by wilfully and recklessly climbing over them. It was held that these acts were wanton and malicious, and punishable under s. 52. Where the defence to an indictment under the section is that the acts complained of were done in exercise of the claim of right, it will fail unless the defendants can show that they acted in *bonâ fide* exercise of a supposed right, and did no more damage than they could reasonably have supposed to be necessary for its assertion. *R.* v. *Clemens* [1898] 1 Q. B. 556; 67 L. J. (Q. B.) 482; 19 Cox, 18; *and see Heaven* v. *Crutchley*, 68 J. P. 53: *Croydon Rural District Council* v. *Cowley*, 73 J. P. 205. In an indictment under s. 51 for maliciously damaging certain articles of personal property, the damage exceeding 5*l.*, it is not necessary to allege the value of each article injured, but only that the amount of damage done to the several articles exceeded 5*l.* in the aggregate. *R.* v. *Thoman*, 12 Cox, 54 (C. C. R.); *cf. R.* v. *Forsyth*, R. & R. 274. The measure of damage is the cost of replacing the damaged property. *R.* v. *Hewitt*, 76 J. P. 360; 28 T. L. R. 378; 7 Cr. App. R. 219. Where A. and B. were jointly indicted under s. 51, and it was proved that A. broke a window of less value than 5*l.* while B. broke other windows a few yards away, the value of which added to the value of that broken by A. exceeded 5*l.*, and there was some

evidence that A. and B. were acting in concert, it was held that A. had been rightly convicted, and that it was unnecessary for each to know of the existence of the other if they were both acting under the direction of the same organisation. *R.* v. *Joachim*, 28 T. L. R. 380. The soil of a town moor was vested in the corporation of the town in fee, but freemen were under statute entitled to the " full right and benefit of the herbage " of the moor for pasturing cows. It was held that this right to the herbage was not " any real or personal property whatsoever " within the meaning of 24 & 25 Vict. c. 97, s. 52, which applies only to tangible property and not to a mere incorporeal right. *Laws* v. *Eltringham*, 8 Q. B. D. 283; 51 L. J. (M. C.) 13. In *Gardner* v. *Mansbridge*, 19 Q. B. D. 217, picking wild mushrooms was held not to be within s. 52. In *Gayford* v. *Chouler* [1898] 1 Q. B. 316; 67 L. J. (Q. B.) 404, damaging grass by walking over it was held within that section. Sect. 52 has the words " *wilfully* or *maliciously*," whereas s. 51 has " *unlawfully* and *maliciously* ": *see Roper* v. *Knott* [1898] 1 Q. B. 868; 61 L. J. (Q. B.) 574; 19 Cox, 69. " Wilfully " means " deliberately and intentionally, not by accident or inadvertence " : *see R.* v. *Senior* [1899] 1 Q. B. 283, 291; 68 L. J. (Q. B.) 175.

ATTEMPTED INJURIES TO POST OFFICE LETTER-BOXES.

Statute.

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 61.—*Placing injurious substances in or against post office letter-boxes.*]—(1) A person shall not place or attempt to place in or against any post office letter-box any fire, any match, any light, any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, or any fluid, and shall not commit a nuisance in or against any post office letter-box, and shall not do or attempt to do anything likely to injure the box, appurtenances or contents. (2) If any person acts in contravention of this section he shall be guilty of a misdemeanor, and be liable, on summary conviction, to a fine not exceeding 10*l.*, and on conviction on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months. [*This section re-enacts* 47 & 48 Vict. c. 76, s. 3.]

Sect. 63.—*Sending by post substances or articles likely to injure other postal packets.*]—See ante, p. 583.

Sect. 77.—*Saving clause as to liability under other laws.*]—See ante, p. 585.

Sect. 89.—*Post Office letter-box defined.*]—Ante, p. 586.

SECT. 7.

FORGERY.

The earliest law books treat of forgery only in the case of forging seals of state, which was treason. Bracton de Coronâ, ff. 118 b, 119 b. Other forms of forgery came to be treated as misdemeanors, in all cases of "forging any document by which any other person may be injured, or uttering any such document knowing it to be forged, with intent to defraud." Steph. Dig. Cr. L. (6th ed.) 350; 4 Bl. Com. 247. *R.* v. *Coogan*, 1 Leach, 448: *R.* v. *Ward*, 2 Str. 747; 2 East, P. C. 861; *R.* v. *Jones*, 2 East, P. C. 991: *R.* v. *Wilcox*, R. & R. 50.

Effect of Forgery Act, 1913.]—By the *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), s. 4, forgery of any document which is not made felony under that or any other statute for the time being in force, if committed with intent to defraud (or in the case of a public document, with intent to defraud or deceive) is a misdemeanor punishable with imprisonment with or without hard labour for any term not exceeding two years. By s. 14 (1) (*b*) of the same Act, provision is made as to the venue in the case of an offence indictable at common law. See *post*, p. 828.

Common Law.

Forgery at common law is defined by Blackstone (4 Com. 247) as the fraudulent making or alteration of a writing to the prejudice of another man's right; and this definition was accepted in *R.* v. *Elsworth*, 2 East, P. C. 986, and *R.* v. *Riley* [1896] 1 Q. B. 309; 65 L. J. (M. C.) 74; 18 Cox, 285. Notwithstanding some ancient authorities to the contrary, forgery is indictable at common law even if the fraud contemplated to be effected thereby is not actually effected, and the offence is committed if intent to defraud is proved. *See R.* v. *Ward*, 2 Str. 747; 2 Ld. Raym. 1461; 2 East, P. C. 861, 862; 2 Russ. Cr. (7th ed.) 1643. It is not necessary to allege in the indictment an intent to defraud any particular person. 3 & 4 Geo. 5. c. 27, s. 17 (2), *post*, p. 829, Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), rule 10, *ante*, p. 52. Forgery must be of a writing (*R.* v. *Closs*, Dears. & B. 460; 27 L. J. (M. C.) 54; 7 Cox, 494), but may be of the body of the writing, or the signature or the seal. *R.* v. *Collins*, 1 Cox, 57, and for a discussion as to what amounts to forgery at common law, *see R.* v. *White*, 1 Den. 208.

The following have been held to be forgeries at common law if done with intent to defraud or deceive:—Counterfeiting a letter of credit, Style, 12; a bill of lading, *R.* v. *Stocker*, 1 Salk. 342; a debtor's discharge, *R.* v. *Fawcett*, 2 East, P. C. 862; a summons in the common law county court, *R.* v. *Collier*, 5 C. & P. 160; a magistrate's order to a gaoler to discharge a prisoner, as upon bail having been given, *R.* v. *Harris*, 1 Mood. 393; 6 C. & P. 129; an order of admission to see a prisoner committed for trial, *R.* v. *Barrett*, 130, C. C. C. Sess. Pap. 797, Fulton, Common Serjeant; a certificate of the master of a

ship that the defendant had served on board the ship, and conducted himself in a sober and orderly manner, the production of such certificate being necessary to enable the defendant to undergo the voluntary examination at the Trinity House, as to his ability to act as a master, *R.* v. *Toshack*, 1 Den. 492; 4 Cox, 38; a certificate of ordination, *R.* v. *Etheridge*, 19 Cox, 676; a testimonial as to character in order to obtain an appointment as a schoolmaster, *R.* v. *Sharman*, Dears. 285; 23 L. J. (M. C.) 51; 6 Cox, 312; a recommendation to a situation as a police constable, *R.* v. *Moah*, Dears. & B. 550; 27 L. J. (M. C.) 204; a railway pass, *R.* v. *Boult*, 2 C. & K. 604; forgery by a money lender of the signature of an Admiralty official in order to obtain payment of a debt justly due, *R.* v. *Parker*, 74 J. P. 208. *And see* 2 East, P. C. 862, and the authorities there cited, and *R.* v. *Riley* [1896] 1 Q. B. 309; 65 L. J. (M. C.) 74; *and* 2 Russ, Cr. (7th ed.) 1600 *et seq.*

Where B., the prosecutor, made powders called B.'s Baking Powders, which he sold in packets wrapped up in printed papers, and the defendant caused a great number of wrappers to be printed, so nearly resembling B.'s as to deceive persons of ordinary observation, and make them believe they were B.'s, in which the defendant inclosed powders of his own, which he fraudulently sold as B.'s powders; this was held not to be forgery, but obtaining money by false pretences. *R.* v. *Smith*, Dears. & B. 566; 27 L. J. (M. C.) 225. Frauds of this kind are also punishable under the *Merchandise Marks Act*, 1887 (50 & 51 Vict. c. 28).

Forgery of a signature on a painting is not forgery at common law. *R.* v. *Closs*, Dears. & B. 460; 27 L. J. (M. C.) 54; 7 Cox, 494. But the offence is a common law cheat if the picture is sold as genuine, or it may be the subject of an indictment for obtaining money by false pretences, or may be punished summarily under the *Fine Arts Copyright Act*, 1862 (25 & 26 Vict. c. 68, ss. 7, 8).

It has been held not to be forgery at common law to forge a medical diploma, unless there was at the time of the forgery an intent to defraud (*R.* v. *Hodgson*, 25 L. J. (M. C.) 78; Dears. & B. 3; 7 Cox, 122).

Falsification of accounts (*ante*, p. 734) is in some, but not all, cases, forgery. *Re Arton* (No. 2) [1896] 1 Q. B. 509, 517; 65 L. J. (M. C.) 50, Russell, L.C.J. Filling up the voting papers of marksmen with their assent has been held not to be forgery at common law. *R.* v. *Hartshorne*, 6 Cox, 295. Nor is it forgery at common law for a bank clerk to make false entries in a book of account kept by the bank (*Re Windsor*, 34 L. J. (M. C.) 163; 6 B. & S. 522; 10 Cox, 118).

Uttering.]—It is a misdemeanor at common law knowingly to utter a forged document, the forging whereof is a misdemeanor at common law; and it is not necessary to prove that any fraud was actually effected by means of the uttering. *R.* v. *Sharman*, Dears. 285; 23 L. J. (M. C.) 51; 6 Cox, 312, expressly overruling *R.* v. *Boult*, 2 C. & K. 604.

FORGERY BY STATUTE.

The *Forgery Act*, 1913 (3 & 4 Geo. 5, c. 27), has now consolidated the statute law relating to forgery and kindred offences, and rendered unnecessary much of the matter which appeared in the 24th edition of this book. Some cases are retained as illustrative of provisions in the Act of 1913 which are similar to provisions in the Act of 1861, or other Acts now superseded by the consolidating statute.

Statutes.

3 & 4 *Geo.* 5, *c.* 27 (*Forgery Act*, 1913), *s.* 1.—*Definition of forgery.*]—(1) For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Act the counterfeiting of a seal or die, and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.

(2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false :—(*a*) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; (*b*) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; (*c*) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.

(3) For the purposes of this Act—(*a*) It is immaterial in what language a document is expressed or in what place within or without the King's dominions it is expressed to take effect; (*b*) Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law; [*This provision gets rid of such difficulties as occurred in* R. *v.* Wall, 2 East, P. C. 953.] (*c*) The crossing on any cheque, draft on a banker, post-office money order, postal order, coupon, or other document the crossing of which is authorised or recognised by law, shall be a material part of such cheque, draft, order, coupon, or document.

Definition of forgery.]—Before the Act of 1913 the statutes relating to forgery did not define forgery. The following instances of acts held to be or not to be forgery may still be of some use as illustrations. The slightest alteration of a genuine instrument in a material part, whereby a new operation is given to it; *e.g.*, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale*, by changing the *D* to *S*; 1 Hawk. c. 70, s. 2; making a bill of exchange for eight pounds appear to be eighty pounds, by adding a cipher

to the 8; *R.* v. *Elsworth*, 2 East, P. C. 986, 988; altering a banker's one-pound note by substituting the word ten for the word one; *R.* v. *Post*, R. & R. 101; or altering the notes of a country banker, as to the place at which they were made payable in London. *R.* v. *Treble*, R. & R. 164; 3 Taunt. 328; 1 Leach. 1040; expunging an indorsement of part payment on a bill; *R.* v. *Bigg*, 3 P. Wms. 419; 2 East, P. C. 855, 882; counterfeiting the signature of one of several parties to a bond, though the other signatures are genuine; *R.* v. *Richards*, 1 Cox, 62; altering a document already forged by the person who makes the alteration: *R.* v. *Kinder*, 2 East, P. C. 855; were all held to be forgeries.

Forging the signature of the drawer of a bill of exchange was deemed to be the same precisely as forging the entire bill, and could be laid as such. Where an illiterate woman of the name of Dunn represented herself to the prosecutor as the widow of a deceased seaman of the name of Wallace, and obtained from him a loan of money upon her promissory note; the note was written by the prosecutor, and upon his asking her what name he should put to it, she answered "Mary Wallace;" he thereupon subscribed the name "Mary Wallace" to the note; and she affixed her mark in the usual place, between the christian and surname; the judges held this to be a forgery of the note. *R.* v. *Dunn*, 2 East, P. C. 962, 976; 1 Leach, 57. And whether the name forged was that of a merely fictitious person, who never existed, or of a person actually existing, was wholly immaterial: it was as much a forgery in the one case as in the other; *R.* v. *Lewis*, Fost, 116: *R.* v. *Wilks*, 2 East, P. C. 957: *R.* v. *Bolland*, *Id.* 958; 1 Leach, 83: *R.* v. *Lockett*, *Id.* 94; R. & R. 389: *R.* v. *Sheppard*, 1 Leach. 226: *R.* v. *Francis*, R. & R. 209: *R.* v. *Peacock*, *Id.* 278: *and see R.* v. *Webb*, 3 B. & B. 228; R. & R. 405: *R.* v. *Watts*, R. & R. 436: *R.* v. *Mitchell*, 1 Den. 282 n.; if the fictitious name was assumed for the purpose of fraud in the particular instance in question, *R.* v. *Bontien*, R. & R. 260. And the signing of a bill of exchange in the name of a non-existing firm, or in the defendant's own name to represent a fictitious firm with intent to defraud, was forgery. *R.* v. *Rogers*, 8 C. & P. 629. But merely assuming and signing a fictitious name, without any intention to defraud by the use of such fictitious name, although the transaction may be fraudulent in other respects, was not forgery. *R.* v. *Martin*, 5 Q. B. D. 34; 49 L. J. (M. C.) 11; 14 Cox, 375; *and cf. R.* v. *Whyte*, 5 Cox, 290. So, where the prisoner, Robert M., in payment for goods bought by him from the prosecutor, drew a cheque in the name of William M. in the presence of the prosecutor upon a bank at which the prisoner had no account, and gave it to the prosecutor as his own cheque drawn in his own name, the prisoner knowing at the time he drew the cheque that it would be dishonoured, and the prosecutor, who well knew the prisoner and his real name, receiving the cheque in the belief that it was drawn in the prisoner's own name, it was held that the prisoner was not guilty of the offence of forgery. *Id.*

Where a man drew a bill on Williams & Co., bankers, 3, Birchin Lane, London, and at the time he paid away the bill he was asked if the drawees were Williams, Burgess & Co., the London bankers, and he answered in the affirmative; the bill was presented, not to Williams, Burgess & Co., who

lived at No. 20 in the same street, but at a counting house, No. 3, where the words "*Williams & Co.*" were on a brass plate on the door, and it was there accepted in the name of "*Williams & Co.*"; proof was given at the trial that the acceptance was not that of Williams, Burgess & Co., and that there were no other London bankers of that name; the prisoner was convicted; but, upon the point being afterwards argued before the judges, ten of them held that it was not a forgery. *R.* v. *Watts*, R. & R. 436; 3 B. & B. 197. But where a bill, payable to J. S. or order, got into the hands of another person of the same name, and he indorsed it, it was held to be a forgery. *Mead* v. *Young*, 4 T. R. 28. It was forgery for a person, having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum (*R.* v. *Minter Hart*, 1 Mood. C. C. 486; 7 C. & P. 652: *R.* v. *Bateman*, 1 Cox, 186: *R.* v. *Wilson*, 1 Den. 284; 2 C. & K. 527; 17 L. J. (M. C.) 82: *see R.* v. *Richardson*, 8 Cox, 448; 2 F. & F. 343); or to fill in the sum on a cheque signed in blank. *Flower* v. *Shaw*, 2 C. & K. 703. And it was forgery for a man to put the name of another on a bill of exchange without his authority, even if when he did so he expected to be able to meet the bill when due. *R.* v. *Forbes*, 7 C. & P. 224. *See R.* v. *Hill*, 2 Mood. 30; 8 C. & P. 274: *R.* v. *Cooke*, 8 C. & P. 582.

Intent.]—For forgery to constitute an offence there must be an intent to defraud or deceive. In the case of forgeries within section 2, *infra*, an intent to defraud is necessary; in the case of forgeries within sections 3, 4, and 5 the intent may be either to defraud or to deceive. See further as to Intent, *post*, p. 833.

Sect. 2.—*Forgery of certain documents with intent to defraud.*]—(1) Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with penal servitude for life:—(*a*) Any will, codicil, or other testamentary document, *either of a dead or of a living person, or any probate or letters of administration, whether with or without the will annexed;* (*b*) any deed or bond, or any assignment at law or in equity of any deed or bond, or any attestation of the execution of any deed or bond; (*c*) any bank note; or any indorsement on or assignment of any bank note.

(2) Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with penal servitude for any term not exceeding fourteen years:—(*a*) Any valuable security or assignment thereof or endorsement thereon, or, where the valuable security is a bill of exchange, any acceptance thereof; (*b*) any document of title to lands or any assignment thereof or endorsement thereon; (*c*) any document of title to goods or any assignment thereof or endorsement thereon; (*d*) any power of attorney or other authority to transfer any share or interest in any stock, annuity, or public fund of the United Kingdom or any part of His Majesty's dominions or of any foreign state or country or to transfer any share or interest in the debt of any public body, company, or society, British or foreign, or in the capital stock of any such company or society, or to receive any dividend or money payable in respect of such share or interest or any attestation of any such

power of attorney or other authority; (*e*) any entry in any book or register which is evidence of the title of any person to any share or interest hereinbefore mentioned, or to any dividend or interest payable in respect thereof; (*f*) any policy of insurance or any assignment thereof or endorsement thereon; (*g*) any charter-party or any assignment thereof; (*h*) any declaration, warrant, order, affidavit, affirmation, certificate, or other document required or authorised to be made by or for the purposes of the *Government Annuities Act*, 1829, or the *Government Annuities Act*, 1832, or by the National Debt Commissioners acting under the authority of the said Acts; (*i*) any certificate of the Commissioners of Inland Revenue or any other Commissioners acting in execution of the *Income Tax Acts*; (*j*) any certificate, certificate of valuation, sentence or decree of condemnation or restitution, or any copy of such sentence or decree, or any receipt required by the *Slave Trade Acts*.

Sect. 2 (1) (a).—**Any will, etc.**]—Sub-section 1 (a) of s. 2 replaces ss. 21, 39 of the *Forgery Act*, 1861, with the addition of the words printed in italics. It now expressly enacts that forgery may be committed by the false making of the will of a living or dead person, and by s. 1 (2) (b) a document is false if it purports to be made by a fictitious or deceased person. As to whether the forgery of the will of a fictitious person is within this section, *see R.* v. *Kennaway* [1917] 1 K. B. 25; 12 Cr. App. R. 147; 25 Cox, 559; *R.* v. *Avery*, 8 C. & P. 596. Proof that the will has been proved and that the probate is unrevoked is not conclusive evidence in bar of an indictment for forging a will. *R.* v. *Buttery*, R. & R. 342.

On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested had been written over pencil marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror, and traced the pencil marks, was admissible on the part of the prosecution. *R.* v. *Williams*, 8 C. & P. 434.

In *R.* v. *Tylney*, 1 Den. 319, the judges were equally divided upon the question whether in the absence of the existence of some person who could have been defrauded by the forged will a count for forging it with intent to defraud a person or persons unknown could be supported. But on this case, *see* Greaves' Crim. Law Cons. Acts (2nd ed.) 303, 306. Now by s. 17 (2) it is not necessary to allege or prove an intent to defraud or deceive any particular person.

As to the privilege of solicitors with respect to the production of wills alleged to be forged, *see ante*, p. 471.

Sect. 2 (1) (b).—**Any deed or bond, etc.**]—Sub-section 1 (b) of s. 2 replaces ss. 20, 39 of the *Forgery Act*, 1861, and s. 32 of the *Local Loans Act*, 1875 (38 & 39 Vict. c. 83).

The forging of a deed, which is directed to be in a particular form by particular statutes, which had not been complied with, was held within 2 G. 2, *c.* 25 (*rep.*). *R.* v. *Lyon*, R. & R. 255. *And see* now s. 1 (3) (b) of the Act of 1913. So was a power of attorney to transfer Government stock, signed, sealed, and delivered. *R.* v. *Fauntleroy*, 1 Mood. 52; 2 Bing. 413; 1 C. & P. 421; *and see R.* v. *Pringle*, 9 C. & P. 408; 2 Mood. 127. The forging of such a power of attorney is now within s. 2 (2) (d) of the Act of 1913. A

letter of orders, a document under the hand and seal of a bishop, testifying that he has admitted the person named therein into holy orders, was held not to be a deed within 24 & 25 Vict. c. 98, s. 20 (now replaced by s. 2 (1) (b) of the Act of 1913.) *R.* v. *Morton*, L. R. 2 C. C. R. 22; 42 L. J. (M. C.) 58; but to fabricate such a document is forgery at common law. *R.* v. *Etheridge*, 19 Cox, 676; and would now come within s. 4 (1) of the Act of 1913. The giving of an administration bond to the ordinary in a false name is a forgery. *R.* v. *Barber*, 1 C. & K. 434. A man may be guilty of forgery by making a deed in his own name, but containing a false date: *R.* v. *Ritson*, L. R. 1 C. C. R. 200; 39 L. J. (M. C.) 10; 11 Cox, 352; or by making a deed in the name of another person bearing the same name. *Re Cooper*, 20 Ch. D. 611, 634; 51 L. J. (Ch.) 862, Lindley, L.J.

Sect. 2 (1) (c).—**Any bank note.**]—Sub-section 1 (c) of s. 2 replaces s. 12 of the Act of 1861. By s. 18 (1) of the Act of 1913 the expression bank note includes, unless the context otherwise requires, any note or bill of exchange of the Bank of England or Bank of Ireland, or of any other person, body corporate, or company carrying on the business of banking in any part of the world, and includes "bank bill," "bank post bill," "blank bank note," "blank bank bill of exchange," and "blank bank post bill."

By 16 & 17 Vict. c. 2, s. 1, the Bank of England may cause the name of their cashier or other officer appointed to sign, to be impressed by machinery upon their bank notes, bank post bills, and bank bills of exchange, and all bank notes, etc., on which the name of the authorized officer is so impressed, shall be as good and valid to all intents and purposes as if such notes had been subscribed in the proper handwriting of such officer, and shall be deemed and taken to be bank notes, and may be described as such in all indictments, and other criminal and civil proceedings whatsoever.

By 4 & 5 Geo. 5. c. 14 (*Currency and Bank Notes Act*, 1914), s. 1 (5), currency notes under the Act shall be deemed to be bank notes within the meaning of the Forgery Act, 1913, and any other enactment relating to offences in respect of bank notes, which is for the time being in force in any part of the British Islands.

Sect. 2 (2) (a).—**Any valuable security.**]—By s. 18 (1) of the Act of 1913, unless the context otherwise requires, the expression "valuable security" includes any writing entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund, or debt of any part of His Majesty's dominions or of any foreign state, or in any stock, annuity, fund, or debt of any body corporate, company, or society, whether within or without His Majesty's dominions, or to any deposit in any bank, and also includes any scrip, debenture, bill, note, warrant, order, or other security for the payment of money, or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal.

Sub-section 2 (a) of s. 2 replaces the following provisions of various Acts, which are now repealed either wholly or in part, relating to forgery of specified documents: 52 G. 3, c. 143, s. 6 (land tax certificates); 10 G. 4, c. 24, s. 41: 2 & 3 W. 4, c. 59, s. 19 (Government annuities); 10 G. 4, c. 50, s. 124: 39 &

40 Vict. c. 36, s. 28 (Customs and Excise drafts); 2 & 3 W. 4, c. 53, s. 49 (prize money); 2 & 3 Vict. c. 51, s. 9 (pension orders); 5 & 6 Vict. c. 35, s. 181 : 53 & 54 Vict. c. 21, s. 37 (2) (Inland Revenue certificates); 14 & 15 Vict. c. 102, s. 55 (seamen's pensions); 24 & 25 Vict. c. 98, s. 2 : 25 & 26 Vict. c. 7, s. 14 : 32 & 33 Vict. c. 102, s. 19 : 38 & 39 Vict. c. 83, s. 32; 40 & 41 Vict. c. 59, s. 21 (shares, transfers, and powers of attorney); 24 & 25 Vict. c. 98, s. 7 (East India bonds) and subsequent *East India Loans Acts*; 24 & 25 Vict. c. 98, s. 1, as amended by 40 & 41 Vict. c. 2, s. 10 (Treasury bills), and extended by 54 & 55 Vict. c. 62, s. 19, to L.C.C. Bills; 24 & 25 Vict. c. 98, ss. 22, 39 (bills of exchange and promissory notes); 24 & 25 Vict. c. 98, ss. 23, 24, 25, 39 (warrants, etc., for payment of money, and accountable receipts); 24 & 25 Vict. c. 98, s. 26 (debentures); 24 & 25 Vict. c. 98, s. 33; 35 & 36 Vict. c. 44, s. 12 (certificates of Paymaster-General); 25 & 26 Vict. c. 7, s. 14 (India Stock transfer certificates); 26 & 27 Vict. c. 73, s. 13 (India Stock certificates); 29 & 30 Vict. c. 25, s. 15 : 40 & 41 Vict. c. 2, s. 10 (Treasury bills); 33 & 34 Vict. c. 58, s. 3 : 33 & 34 Vict. c. 71 : 40 & 41 Vict. c. 59, s. 21 (stock certificates and coupons under Part v. of *National Debt Act*, 1870 (33 & 34 Vict. c. 71) and *Colonial Stocks Act*, 1877 (40 & 41 Vict. c. 59); 33 & 34 Vict. c. 58, s. 6 (certificates under Part vi. of *National Debt Act*, 1870 (33 & 34 Vict. c. 71); 8 Edw. 7, c. 69, s. 38 (share warrants or coupons under *Companies (Consolidation) Act*, 1908).

The above definition of valuable security was followed in s. 46 of the *Larceny Act*, 1916 (*ante*, p. 508), and is wide enough to include many documents the forging of which was previously not specifically punishable; *e.g.*, documents of companies not within the provisions of the *Companies (Consolidation) Act*, 1908, as well as stock and share certificates of companies within that Act.

Forgery of any document specified in any of the foregoing Acts, if not included in the above definition of "valuable security," will be punishable as a misdemeanor under s. 4 of the Act of 1913 (*post*, p. 820).

The following cases decided under former statutes in reference to valuable securities may still be of use by way of illustration.

Bills of exchange.]—"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." 45 & 46 Vict. c. 61, s. 3 (1). "A cheque is a bill of exchange drawn on a banker payable on demand." *Id.* s. 73. "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." *Id.* s. 83 (1): *see R.* v. *Harrison*, 1 Leach, 180; 2 East, P. C. 923. It has been held that a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, and purporting to be indorsed by the drawer, and accepted by the drawer, cannot, in an indictment for forgery or uttering, be described as a bill of exchange. *R.* v. *Bart-*

lett, 2 M. & Rob. 362. But such a bill is now valid as a promissory note. 45 & 46 Vict. c. 61, s. 5. An instrument payable to the order of A., and directed "*At* Messrs. P. & Co., Bankers," was held to be properly described as a bill of exchange. *R.* v. *Sidney Smith*, 2 Mood. 295 : *see Gray* v. *Milner*, 8 Taunt. 739.

A bill payable ten days after sight, purporting to have been drawn upon the commissioners of the navy, by a lieutenant, for the amount of certain pay due to him, was held to be a bill of exchange within 2 G. 2, c. 25 (*rep.*) *R.* v. *Chisholm*, R. & R. 297. So a note promising to pay A. and B., "stewardesses" of a certain benefit society, "or their successors," a certain sum of money on demand, has been held to be a promissory note within the meaning of that Act, although it appeared that the society was not duly enrolled, as directed by Act of Parliament; for, within the meaning of the Act, it was not necessary that the note should be negotiable. *R.* v. *Box*, 6 Taunt. 325; R. & R. 300. *See R.* v. *M'Keay*, 1 Mood. 130. An instrument drawn by A. on B., requiring him to pay to the administrators of C. a certain sum at a certain time "without acceptance," is a bill of exchange, and may be so described in the indictment. *R.* v. *Kinnear*, 2 M. & Rob. 117. So, though there be no person named as drawee, the defendant may be indicted for uttering a forged acceptance on a bill of exchange : *R.* v. *Hawkes*, 2 Mood. 60; for the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange. *And see* s. 1 (3) (b) of the Act of 1913. Forgery may be committed on unstamped paper of a bill which by law requires a stamp. *R.* v. *Hawkeswood*, 1 Leach, 257; 2 T. R. 606 n. : *R.* v. *Morton*, 2 East, P. C. 955 : *R.* v. *Reculist*, *Id.* 956; 2 Leach, 703 : *and see* 54 & 55 Vict. c. 39, s. 14, sub-s. 4 (*ante*, p. 447). A seaman's advance note, purporting to be signed by the master and owner, and in the following form—"Ten days after the ship C. sails from the port of L. the undersigned hereby promise and agree to pay to any person who shall advance 4*l.* to H. on this agreement the sum of 4*l.*, provided that the said H. shall sail in the said ship from the said port of L."—is not a promissory note. *R.* v. *Howie*, 11 Cox, 320.

The adding of a false address to the name of the drawee of a bill, while the bill is in the course of completion, in order to make the acceptance appear to be that of a different existing person, is a forgery. *R.* v. *Blenkinsop*, 1 Den. 276; 2 C. & K. 531; 17 L. J. (M. C.) 62. So is the adding of an address to a bill so as to make it appear that the acceptance though really written by a person of the same name is that of a different person—whether such person existed or not. *R.* v. *Epps*, 4 F. & F. at p. 85, Willes, J. Putting off the bill of A., an existing person, as the bill of A., a fictitious person, has been held forgery. *R.* v. *Nisbett*, 6 Cox, 320, 324 n. *And see* s. 1 (2) (*c*) of the Act of 1913. As to what is a fictitious party to a bill of exchange, *see Vagliano's case* [1891] App. Cas. 107; 60 L. J. (Q. B.) 145; *Clutton* v. *Attenborough* [1895] 2 Q. B. 707; 66 L. J. (Q. B.) 122; [1897] A. C. 90; 66 L. J. (Q. B.) 221 : *North and South Wales Bank* v. *Macbeth* [1908] A. C. 137, 77 L. J. (Q. B.) 464.

An indorsement "per procuration, J. S.," signed in the defendant's own name, was held, on 11 G. 4 & 1 W. 4, c. 66, s. 3 (*rep.*), not to be a forgery,

though the defendant falsely alleged that he had authority from J. S. to indorse. *R.* v. *White*, 1 Den. 208; 2 C. & K. 404; 2 Cox, 210. But such a case was within 24 & 25 Vict. c. 98, s. 24, *R.* v. *Holden* [1912] 1 K. B. 483; 81 L. J. (K. B.) 327; 22 Cox, 727; 106 L. T. 305; 76 J. P. 143; 28 T. L. R. 173; and is now within s. 2 (2) (*a*) of the Act of 1913.

Warrant, order, or other security for payment of money.]—It was not necessary, in order to constitute a document a "warrant," etc., for the payment of money, that it should appear to be so on its face. It was sufficient if the party to whom it was addressed had been in the habit of treating similar documents as warrants, etc., for the payment of money. And therefore a document, in form a mere receipt given by a depositor to a building society that received money on deposit, could properly be described in an indictment as a "warrant" for the payment of money, if, by the custom of the society, such receipts were in fact treated as warrants for the payment of money. *R.* v. *Kay*, L. R. 1 C. C. R. 257; 39 L. J. (M. C.) 118; 11 Cox, 529. A cheque, in addition to being a bill of exchange (*see ante*, p. 809), is also, even if post-dated (*R.* v. *Taylor*, 1 C. & K. 213) a warrant and order for the payment of money: *R.* v. *Willoughby*, 2 East, P. C. 944; as is any other form of bill of exchange. *R.* v. *Sheppard*, *Id.* 944; 1 Leach, 226: *R.* v. *Smith*, 1 Den. 79; 1 C. & K. 700. So an order to pay "all my prize money due to me for my services on board his Majesty's ship 'Leander,'" without specifying any particular sum, was held to be within 7 G. 2, c. 22 (*rep.*). *R.* v. *M'Intosh*, 2 East, P. C. 942; 2 Leach, 883. So is a letter of credit. *R.* v. *Raake*, 8 C. & P. 626; 2 Mood. 66. In *R.* v. *Lee*, 3 Cox, 80, it was held forgery to counterfeit the signatures of the chairman and committee of a society to a cheque (requiring their signatures and that of the clerk) with the object and result of obtaining the genuine signature of the clerk. A mere transposition of the words in a cheque has been held not to make it invalid. *R.* v. *Boreham*, 2 Cox, 189. On an indictment for forging and uttering a "warrant and order for the payment of money, to wit, a warrant and order for the payment of 85*l.*," and for forging an acquittance and receipt for money, to wit, for 85*l.*, it was proved that J. M. had paid 85*l.* into a country bank, and had taken an accountable receipt for that amount, and that the course of dealing at the bank was to treat such receipt with the depositor's name thereon, as an order for the payment of the money deposited, and interest. The defendant took the receipt to the bank, and having written the name of "J. M." thereon, delivered it to the bankers, who paid him 87*l.* 17*s.* 6*d.*, for principal and interest. He was held to have been rightly convicted. *R.* v. *Atkinson*, 2 Mood. 215; C. & Mar. 325. Where the instrument was an order to pay the prisoner, or order, the sum of four pounds five shillings, being a month's advance on an intended voyage to Quebec, in the ship "Mary Ann," as per agreement with G. M., master: and the prisoner had written in the margin of the order, "On receiving this cheque I agree to sail, and to be on board within sixteen days from the date of this cheque:" it was held a good order for the payment of money within 1 W. 4, c. 66, s. 3 (*rep.*). *R.* v. *Bamfield*, 1 Mood. 416. *And see* *R.* v. *Anderson*, 2 M. & Rob. 469; and *R.* v. *Howie*, 11 Cox, 320 (*ante*, p. 810).

So, a foreign letter, requesting a correspondent in England to advance money, it being proved that such letters are in the course of business treated as orders, was held to support a charge of forging an order for the payment of money. *R.* v. *Raake*, 2 Mood. 66; 8 C. & P. 626. A dividend warrant of a railway company, signed by the secretary and addressed to a banker, requiring him to pay the sum named in the warrant to a certain shareholder, and to charge the same to the company's revenue account, was held to be properly described as a warrant and an order for the payment of money. *R.* v. *Autey*, Dears. & B. 294; 26 L. J. (M. C.) 190; 7 Cox, 329. And the document containing a statement that the shareholder's name must be indorsed on the back, without which indorsement it was proved that the money would not be paid even to him, a forgery of such indorsement was held to be a forgery of the entire document. *Id.* A writing purporting to authorize the bearer to receive money deposited in a bank by a friendly society on accountable receipts and purporting to be signed by the principal officers of the society (the bank having received the money on terms of repayment to the order of the society), was held to be well described as a warrant for the payment of money, and it was held no objection that the defendant was himself a member of the society. *R.* v. *Harris*, 2 Mood. 267; 1 C. & K. 179. Where the forged paper was as follows: "This is to certify that R. R. has swept the flues and cleaned the bilges, and repaired four bridges of the 'Princess Victoria,' J. N. 4*l.* 0*s.* 10*d.*:" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay the 4*l.* 0*s.* 10*d.*; this was held sufficient to support an indictment charging it as a warrant for the payment of money. *R.* v. *Rogers*, 9 C. & P. 41. But a paper in the following terms:—"I hereby certify that the within-named W. M. is gaining his living by hawking;" the production of which was necessary in order that the defendant might obtain payment of a sum of money,—was held not to be either a warrant, or an order for the payment of money, and to be the subject only of forgery at common law. *R.* v. *Mitchell*, 2 F. & F. 44. A forged document, purporting to be a bill for goods sold to the prosecutor, with a request for its payment, was held to be both a warrant and an order for the payment of money. *R.* v. *Dawson*, 2 Den. 75; 20 L. J. (M. C.) 102. A letter written to a wholesale house in London, in the name of a customer in the country, in the following terms:—"I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same; you will please have a receipt, and add the amount to invoice of order on hand:" was held not to be either a warrant, or an order for the payment of money; but a request. *R.* v. *Thorn*, 2 Mood. 210; C. & Mar. 206. *See also R.* v. *Roberts*, 2 Mood. 258; C. & Mar. 652. The forgery of a "request" for the payment of money was an indictable offence under 24 & 25 Vict. c. 98, s. 23 (*rep.*), but the definition of "valuable security" in the Act of 1913 does not include a request for the payment of money, nor is the term to be found in any other part of the Act. A forged request for the payment of money is, however, a forged instrument within s. 7 of the Act of 1913 (*R.* v. *Cade* [1914] 2 K. B. 209; 83 L. J. (K. B.) 796; *post*, p. 824), and forging such request is an indictable misdemeanor under s. 4 of the Act of 1913 (*post*, p. 820).

A " warrant or order " for the payment of money must purport, or must be shown by evidence, to be made by some person who might command the payment of the money, and to be made upon a person who was compellable to obey it. *See R.* v. *Clinch*, 2 East, P. C. 938, 940. Thus, an order to a tradesman to let the bearer have certain goods, which it was optional for the tradesman to obey or not, was held not to be within 45 G. 3, c. 89 (*rep.*), the words of which were " warrant or order for the delivery of goods." *R.* v. *Williams*, 1 Leach, 114; 2 East, P. C. 938: *R.* v. *Mitchell*, Fost. 119: *and see R.* v. *Baker*, 1 Mood. 231: *R.* v. *Newton*, 2 Mood. 59: *R.* v. *Thorn* (*supra*): *R.* v. *Mitchell* (*supra*): *R.* v. *Ellor*, 1 Leach, 323; 2 East, P. C. 938. So forgery of a justice's order under 17 G. 2, c. 5 (*rep.*) for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal, or directed to the constable, etc., was held not to be within 7 G. 2, c. 22 (*rep.*); for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. *R.* v. *Rushworth*, R. & R. 317; 1 Stark (N. P.) 396: *cf. R.* v. *Graham*, 2 East, P. C. 945. An indictment for forging an order for relief to a discharged prisoner, under 5 G. 4, c. 85 (*rep.*), being in many places ungrammatical, and at variance from the Act, was held bad. *R.* v. *Donnelly*, 1 Mood. 438. Such an instrument, however, was properly described as an order for the payment of money. *R.* v. *M'Connell*, 2 Mood. 298; 1 C. & K. 371. Where a defendant was indicted for forging the order of a justice upon the treasurer of a county made under the *Burial of Drowned Persons Act*, 1808 (48 G. 3. c. 75), by which a justice may order the treasurer of a county to pay churchwardens, etc., the expenses of burying dead bodies cast on shore, and it did not appear on the order that the person to whom the money was to be paid was an officer within the words of that statute; it was held to be an order within the statute; because it did not appear that the party was *not* such an officer, and the treasurer was bound to conclude that the justice would not make such an order without satisfying himself that the party was such an officer. *R.* v. *Froud*, R. & R. 389; 1 B. & B. 300. Where the defendant, who was in the employ of a tanner, and paid by the job, was employed also to arrange the accounts for himself and the other men, and made out the account weekly, and brought it to the foreman, stating therein the amount to which he was entitled, and the foreman looked it over, and if he found it correct, signed it, and then the defendant took it so signed to the cashier, who on seeing the signature paid the amount; and the defendant on one occasion presented to the cashier an account for a larger sum than was due to him, with the name of the foreman forged thereto; this was held not to be a forgery of a warrant for the payment of money, inasmuch as, assuming the document to be genuine, the cashier would have no claim in respect of it on the foreman. *R.* v. *Pilling*, 1 F. & F. 324. A forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker, was held to be a warrant or order within the meaning of 7 G. 2, c. 22 (*rep.*) (*R.* v. *Lockett*, 2 East, P. C. 940; 1 Leach, 94: *R.* v. *Abraham*, 2 East, P. C. 941), for it imports, upon the face of it, to be an order by a person having authority to make it. So, a forged draft in the name of a person who *does* keep cash with the banker, is an order within the

Act, whatever be the state of his account at the time. *R.* v. *Carter*, 1 Den. 65; 1 C. & K. 741. Where, on the contrary, a man obtains goods or cash upon his own draft on a banker, with whom he does not keep cash, we have seen (*ante*, p. 691) that the proper mode of proceeding against him criminally is by indictment for obtaining by false pretences.

The cases on this subject, some of which it is not easy to reconcile, were all considered by the judges in *R.* v. *Vivian*, 1 Den. 35; 1 C. & K. 719; in which they laid down the principle, that any instrument for the payment of money, under which, if genuine, the payer might recover the amount against the party signing it, might properly be considered as a *warrant* for the payment of money; and that it was equally such whatever were the state of account between the parties, and whether the party apparently signing it had at the time funds in the hands of the party to whom it was addressed or not. In that case the forged instrument was as follows :—" Mr. M. will be pleased to send by the bearer 10*l.* on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself." Signed, " M. R., foreman, St. A. foundry." M. was a clerk of bankers, with whom H. kept an account, and by drafts on whom he paid his workmen. M. R. was H.'s foreman, having authority to pay the workmen, but not to draw for the money. H. being ill in bed, the defendant forged this paper in the name of M. R. and obtained the 10*l.* from M. by means of it. It was held that he was properly convicted under 1 W. 4, c. 66, s. 3 (*rep.*), although M. R. himself had no account with the bankers; because by this instrument, if genuine, M. R. said in effect that he had authority from H., who had an account with them; and as against him, therefore, it was as much a warrant as if he himself had had such account, and would equally have bound him. This decision seems to render the authority of some of those before referred to at least questionable. (*See also R.* v. *Carter*, *supra*: *R.* v. *Ferguson*, 1 Cox, 241: *R.* v. *Rouse*, 4 Cox, 7: *R.* v. *Turberville*, 4 Cox, 13, Erle, J.)

In *R.* v. *Rogers*, 9 C. & P. 41, Bosanquet, J., and Parke, B., held that a warrant for the payment of money need not, in order to come within 45 G. 3, c. 89, s. 1 (*rep.*), be addressed to any particular person: but that it was sufficient if it would, if genuine, have been an authority to a certain person to pay the amount mentioned in it. And in *R.* v. *Snelling*, Dears. 219; 23 L. J. (M. C.) 8, where the forged instrument was thus :—" Sir, please to pay," etc., it was held that it might be shown by evidence to be an order for the payment of money, and for whom it was intended. These cases appear to overrule contrary decisions on the prior statutes as to " orders," *e.g.*, *R.* v. *Richards*, R. & R. 193: *R.* v. *Denny*, 1 Cox, 178: *R.* v. *Ravenscroft*, R. & R. 161.

It was no offence, under the Acts before 1861, now repealed, to forge an *indorsement* on a warrant or order for the payment of money (*R.* v. *Arscott*, 6 C. & P. 408); but the Act of 1861 expressly included " any indorsement on or assignment of any such undertaking, warrant, order, authority, or request " : and now the *Forgery Act*, 1913, s. 2 (2) (*a*), includes any indorsement on a valuable security.

Receipt, etc.]—A scrip receipt, in which a blank was left for the subscriber's name, was held not to be a receipt within 2 G. 2, c. 25, s. 1 (*rep.*): *R.* v.

Lyon, 2 Leach, 597; 2 East, P. C. 933; *and see* 2 Leach, 808; but it would have been otherwise if the blank had been filled up. A memorandum, importing that A. B. had paid to C. D. a sum of money, but importing no acknowledgment from C. D. of his having received it, was held not to be a " receipt " within 2 G. 2, c. 25, s. 1 (*rep.*), which, however, did not contain the words " accountable receipt." *R.* v. *Harvey*, R. & R. 227. A *scrip certificate* of a railway company was held not to be a receipt, or a receipt *and* acquittance within 1 W. 4, c. 66 (*rep.*) *R.* v. *West*, 10 L. J. (N. S.) M. C. 133; 1 Den. 258; 2 C. & K. 496: *Clarke* v. *Newsam*, 1 Ex. 131; 16 L. J. (Ex.) 296. A pawnbroker's ticket or duplicate, given in the form prescribed by 39 & 40 G. 3, c. 99, s. 6 (*rep.*), was held to be an accountable receipt for goods within s. 23 of the *Forgery Act*, 1861 (*rep.*). *R.* v. *Fitchie*, Dears. & B. 175: 26 L. J. (M. C.) 90. This decision appears to apply to tickets given under the *Pawnbrokers Act*, 1872 (35 & 36 Vict. c. 93), *see* ss. 6, 24, 49. A turnpike toll-gate ticket was held to be a receipt for money. *R.* v. *Fitch*, *R.* v. *Howley*, L. & C. 159; 9 Cox, 160. An ordinary passenger's *railway ticket* was held not to be an acquittance or receipt for money. *R.* v. *Gooden*, 11 Cox, 672, Cleasby, B. (*but see ante*, p. 803). The following document was held to be an " accountable receipt " for goods :—" By order of R. F. Pries we have this day transferred into the name of Messrs. C. & S. 759 quarters and 4 bushels of wheat on 'August Ferdinand,' Captain Richards, at Neustadt, entered by R. F. Pries, and now lying at our granaries Bermondsey Wall. The wheat is insured against risk of fire by us. B. & Y. Corn Exchange, Oct. 23, 1852." *R.* v. *Pries*, 6 Cox, 165; *and cf. R.* v. *Meigh*, 7 Cox, 401. A document in the form of an agreement to release claims for a sum containing a receipt or release was held an accountable receipt. *R.* v. *Hill*, 2 Cox, 246, Coleridge, J. The prisoner was indicted for forging and uttering a receipt on an order for the payment of money, which appeared to be thus :—" Received, for R. Aikman, G. Arscott " (his own name being G. Arscott), written on the back of a bill of exchange payable at a banker's : Littledale, J., Vaughan, J., and Bolland, B., held that the evidence did not support the indictment, and directed an acquittal. *R.* v. *Arscott*, 6 C. & P. 408. Where it was shown to be the custom of bankers to give receipts on the deposit of money in the following form :—" Received of A. B. 85*l.* to his credit. This receipt not transferable;" and to repay the same, with interest, on the return of the receipt with a name written on it; it was held that the forging the name of A. B., and receiving the money due, on its return, was a forging and uttering of an acquittance for the 85*l.* and interest. *R.* v. *Atkinson*, 2 Mood. 215; C. & Mar. 325. A receipt given by bankers to poor-rate collectors for moneys paid to the account of the guardians was held an accountable receipt. *R.* v. *Johnston*, 5 Cox, 133 (C. C. R. Ir.). A receipt signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence of such detachment, was held to be properly described as a receipt for money, although it appeared that such instruments were frequently cashed upon indorsement by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *R.* v. *Rice*, 6 C. & P. 634: *R.* v. *Hope*, 1 Mood. 414. Where a high constable

had issued his precept for the payment of a county rate for a certain amount, and, having received it, wrote a receipt at the foot, and the prisoner, who had collected the rate, afterwards fraudulently altered the precept, by adding a figure in the amount (viz., changing 5*s.* to 15*s.*), and claimed to be allowed that larger amount in the account, this was held to be a forgery of the receipt. *R.* v. *Vaughan*, 8 C. & P. 276. *And see R.* v. *Griffiths*, Dears. & B. 548; 27 L. J. (M. C.) 205; 7 Cox, 501. Whether an addition by the prisoner of words to the receipt is a material alteration is a matter for the jury. *R.* v. *Milton*, 10 Cox, 364; *cf. Upfold* v. *Leit*, 5 Esp. 100. The prisoner, who was a rate-collector, received money from the prosecutor on account of a rate for which he gave a receipt. After he had ceased to be a collector he called on the prosecutor for the balance, which the prosecutor paid to him, and for a receipt the prisoner altered the figures in the former receipt, which then appeared as a receipt for the entire rate. Pigott, B., and Martin, B., doubted whether these facts amounted to a forgery of a receipt. *R.* v. *Sargent*, 10 Cox, 161. It was the practice of the treasurer of the county of S., when an order had been made on him for the payment of the expenses of a prosecution, to pay the whole amount to the attorney for the prosecution or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively; it was held, that such a signature was not a receipt the forging of which is an offence against the statute, but was merely an authority to the treasurer to pay the amount. *R.* v. *Cooper*, 2 C. & K. 586; *R.* v. *Parker*, 2 Cox, 274, Erle, J. A friendly society had branches in various towns. A member belonging to one branch could not be received in another branch as a clearance member without a document called a "clearance," certifying that he had paid all the demands of the branch to which he originally belonged, and authorizing the other branch to receive him. The prisoner was secretary of the society, and had received from a member all the fees due to his branch, and the member thereupon became entitled to a clearance. The prisoner ought to have paid the money over to the treasurer of the society, but did not do so, and sent, nevertheless, a clearance to the member. To this clearance the prisoner forged the signature of two of the officers of the society, without whose signatures the clearance would not have been accepted. It was held that this clearance was not an acquittance or receipt for money. *R.* v. *French*, L. R. 1 C. C. R. 217; 39 L. J. (M. C.) 58. If a person, with intent to defraud and to cause it to be supposed, contrary to the fact, that he has paid a certain sum into a bank, makes in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. *R.* v. *Moody*, L. & C. 173; 31 L. J. (M. C.) 156: *R.* v. *Smith*, L. & C. 168; 13 L. J. (M. C.) 154; 9 Cox, 162: *and see R.* v. *Hunter*, 2 East, P. C. 928, 977.

Sect. 2 (2) (*b*).—**Any document of title to lands.**]—This includes any deed, map, roll, register, or instrument in writing being or containing evidence of the title or any part of the title to any land, or to any interest in or arising out of any land, or any authenticated copy thereof. *Forgery Act*, 1913, s. 18 (1). *Cf.*

Larceny Act, 1916 (*ante*, p. 508). Sub-s. (2) (*b*) of s. 2 replaces ss. 30, 31 of the *Forgery Act*, 1861, and s. 45 of the *Declaration of Title Act*, 1862 (25 & 26 Vict. c. 67). It is no longer necessary that forgery of documents under 25 & 26 Vict. c. 67, should be " in the course of proceedings before the High Court of Justice under that Act." The definition will also include documents connected with the registration of title, which previously were not specifically dealt with.

Sect. 2 (2) (*c*).—**Any document of title to goods.**]—This includes any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. *Forgery Act*, 1913, s. 18 (1). *Cf. Larceny Act*, 1916 (*ante*, p. 508). Sub-s. 2 (*c*) of s. 2 replaces ss. 23, 39 of the Act of 1861. An order " to deliver my work to bearer " (and which was explained in evidence to mean an order to Goldsmiths' Hall to deliver certain plate a silversmith had sent there to be marked) was held to be within 7 G. 2, c. 22 (*rep.*), although it did not specify any particular articles. *R.* v. *Jones*, 1 Leach, 53; 2 East. P. C. 941. A pawnbroker's ticket is a warrant for the delivery of goods. *R.* v. *Morrison*, Bell, 158; 28 L. J. (M. C.) 210. At the London Docks, a person bringing a " tasting order " from a merchant having wine there, is not allowed to taste until the order has across it the signature of a clerk of the company. The defendant uttered a tasting order with the merchant's name forged to it, by presenting it to the company's clerk for his signature across it, which the clerk refused. It was held to be in this state a forged order for the delivery of goods. *R.* v. *Illidge*, 18 L. J. (N. S.) (M. C.) 179; 1 Den. 404; 2 C. & K. 871.

Sect. 2 (2) (*d*).—**Any power of attorney, etc.**]—Sub-s. 2 (*d*) of s. 2 replaces 10 G. 4, c. 24, s. 41; 10 G. 4, c. 50, s. 124; 2 & 3 W. 4, c. 59, s. 19; 24 & 25 Vict. c. 98, ss. 2, 4. The former law is extended to all powers of attorney within the sub-section, which follows the wording of the first part of the definition of valuable security in s. 18 of the Act of 1913.

Sect. 2 (2) (*e*).—**Any entry in any book or register, etc.**]—Prior to the Act of 1913, forgery of such entries was only punishable at common law.

Sect. 2 (2) (*f*).—**Any policy of insurance, etc.**]—Prior to the Act of 1913, forgery of an insurance policy was only punishable at common law, unless the policy was under seal and therefore a deed.

Sect. 2 (2) (*g*).—**Any charter-party, etc.**]—Prior to the Act of 1913, forgery of a charter-party was only punishable at common law.

Sect. 2 (2) (*h*).—**Any declaration, warrant, order, etc., under Government Annuities Acts.**]—This sub-section replaces 10 G. 4, c. 24, s. 41, and 2 & 3 W. 4, c. 59, s. 19.

Sect. 2 (2) (*i*).—**Any certificate of the Commissioners of Inland Revenue, etc.**]—This sub-section replaces 5 & 6 Vict. c. 35, s. 181, and 53 & 54 Vict. c. 21, s. 37 (2).

Sect. 2 (2) (*j*).—**Any certificate, etc., required by the Slave Trade Acts.**]—This sub-section replaces 5 G. 4, c. 113, s. 10. Such documents probably fall

under other sections of the Act of 1913, but are specifically referred to in view of the special provisions with regard to jurisdiction in the cases of offences under the *Slave Trade Acts*. See s. 14, *post*, p. 828.

Sect. 3.—*Forgery of certain documents with intent to defraud or deceive.*]—(1) Forgery of the following documents, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for life :—Any document whatsoever having thereupon or affixed thereto the stamp or impression of the Great Seal of the United Kingdom, His Majesty's Privy Seal, any privy signet of His Majesty, His Majesty's Royal Sign Manual, any of His Majesty's seals appointed by the Twenty-fourth Article of the Union between England and Scotland to be kept, used, and continued in England, the Great Seal of Ireland or the Privy Seal of Ireland.

(2) Forgery of the following documents, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for any term not exceeding fourteen years :—(*a*) Any register or record of births, baptisms, namings, dedications, marriages, deaths, burials, or cremations, which now is, or hereafter may be, by law authorised or required to be kept in the United Kingdom, relating to any birth, baptism, naming, dedication, marriage, death, burial, or cremation, or any part of any such register, or any certified copy of any such register, or of any part thereof; (*b*) any copy of any register of baptisms, marriages, burials, or cremations, directed or required by law to be transmitted to any registrar or other officer; (*c*) any register of the birth, baptism, death, burial, or cremation of any person to be appointed a nominee under the provisions of the *Government Annuities Act*, 1829, or any copy or certificate of any such register, or the name of any witness to any such certificate; (*d*) any certified copy of a record purporting to be signed by an assistant keeper of the Public Records in England; (*e*) any wrapper or label provided by or under the authority of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise.

(3) Forgery of the following documents, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for any term not exceeding seven years :—(*a*) Any official document whatsoever of or belonging to any court of justice, or made or issued by any judge, magistrate, officer, or clerk of any such court; (*b*) any register or book kept under the provisions of any law in or under the authority of any court of justice; (*c*) any certificate, office copy, or certified copy of any such document, register, or book or of any part thereof; (*d*) any document which any magistrate or any master or registrar in lunacy is authorised or required by law to make or issue; (*e*) any document which any person authorised to administer an oath under the *Commissioners for Oaths Act*, 1889 (52 Vict. c. 10), is authorised or required by law to make or issue; (*f*) any document made or issued by an officer of state or law officer of the Crown, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act; (*g*) any document or copy of a document used or intended to be used in evidence in any Court of Record, or any document which is made evidence by law; (*h*) any certificate required by any Act for the celebration of marriage; (*i*) any licence for the celebration of marriage which may be given by law; (*j*) any certificate, declara-

tion, or order under any enactment relating to the registration of births or deaths; (*k*) any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage, or certificate of mortgage or sale under Part I. of the *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), or any entry or endorsement required by the said Part of the said Act to be made in or on any of those documents; (*l*) any permit, certificate, or similar document made or granted by or under the authority of the Commissioners of Customs and Excise.

Sect. 3 (1).—**Any document having the stamp or impression of the Great Seal, etc.**]—This sub-section replaces part of s. 1 of the Act of 1861. Forgery of the seals themselves is dealt with in s. 5 (1) (*a*) of the Act of 1913, *post*, p. 820.

Sect. 3 (2) (*a*).—**Any register or record of births, etc.**]—This sub-section replaces 3 & 4 Vict. c. 92, s. 8; 20 & 21 Vict. c. 81, s. 15; 24 & 25 Vict. c. 98, s. 36; 26 & 27 Vict. c. 11, s. 56; 26 & 27 Vict. c. 90, s. 23; and extends to registers of cremations. The words "United Kingdom" have been substituted for "England and Ireland." The offences of destroying, defacing, etc., such registers are still punishable under 24 & 25 Vict. c. 98, s. 36 (*post*, p. 843).

Sect. 3 (2) (*b*).—**Any copy of any register of baptisms, etc.**]—This sub-section replaces part of s. 37 of the *Forgery Act*, 1861, and extends to copies of registers of cremations.

Sect. 3 (2) (*c*).—**Any register of births, etc., under the Government Annuities Act, 1829.**]—This sub-section replaces 10 G. 4, c. 24, s. 41, and 2 & 3 W. 4, c. 59, s. 19, and extends to registers of cremations.

Sect. 3 (2) (*d*).—**Any certified copy of a record purporting to be signed by an assistant keeper of the Public Records in England.**]—This sub-section replaces 1 & 2 Vict. c. 94, s. 19. Prior to the Act of 1913, it was only an offence to forge the *signature* of such assistant keeper. Forgery of the Seal of the Record Office is dealt with in s. 5 (1) (*b*) of the Act of 1913 (*post*, p. 821).

Sect. 3 (2) (*e*).—**Any Inland Revenue or Customs and Excise wrapper or label.**]—This sub-section replaces 16 & 17 Vict. c. 107, s. 116, and extends its provisions to *all* wrappers and labels provided under the authority of the Commissioners.

Sect. 3 (3) (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*).—**Judicial documents, etc.**]—These sub-sections replace various provisions of numerous statutes dealing with forgery of judicial documents. The punishment, which previously varied from five years' penal servitude to penal servitude for life, has been made uniform, and fixed at seven years' penal servitude. Forgery of the *seal* of any court of record is still punishable with penal servitude for life under s. 5 (1) (*c*) of the Act of 1913 (*post*, p. 821). In every case where it was previously an offence to forge the *signature* to a judicial document, it is now an offence to forge the whole or any part of such document. The offence specified in paragraph (*f*) was, prior to the Act of 1913, only punishable at common law. As to substituting names in a *subpœna*, *see In re Taylor* [1912] A. C. 347.

Sect. 3 (3) (*h*), (*i*).—**Any marriage certificate or licence.**]—These provisions replace s. 35 of the *Forgery Act*, 1861.

Sect. 3 (3) (*j*).—**Any certificate, etc., of births or deaths.**]—This sub-section

replaces 37 & 38 Vict. c. 88, ss. 40 (2), 46; 43 & 44 Vict. c. 13, ss. 30 (2), 36. The offence is made a felony instead of, as previously, a misdemeanor, and the proviso limiting the time within which proceedings must be commenced has been omitted.

Sect. 3 (3) (*k*).—**Any register book, etc., under Part I. of the Merchant Shipping Act, 1894.**]—These provisions also appear in 57 & 58 Vict. c. 60, s. 66, and have been left standing there.

Sect. 3 (3) (*l*).—**Any Customs and Excise permit, etc.**]—This sub-section generalises the provisions of 2 & 3 W. 4, c. 16, s. 4; 11 & 12 Vict. c. 121, s. 18; 43 & 44 Vict. c. 24; 53 & 54 Vict. c. 21, s. 37; extends them to similar documents, and makes the offence a felony instead of, as previously, a misdemeanor.

Sect. 4.—*Forgery of other documents with intent to defraud or to deceive a misdemeanor.*]—(1) Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanor and punishable with imprisonment with or without hard labour for any term not exceeding two years.

(2) Forgery of any public document which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud or deceive, shall be a misdemeanor and punishable with imprisonment with or without hard labour for any term not exceeding two years.

Unspecified documents.]—Section 4 of the Act of 1913 reproduces common law forgery, and in addition gathers together all statutory forgeries which have not already been made felonies by ss. 2 and 3 of the Act. Forgery of such documents, for example, as ballot papers and nomination papers, hackney carriage licences, certificates under the *Explosives Act*, 1875, etc., will now be punishable under this section. The uniform punishment of imprisonment with or without hard labour for any term not exceeding two years is substituted for the varying punishments under former enactments. It would seem that an indictment would not lie under this section in the case of a document the forging of which is made felony under this or any other statute for the time being in force (*R.* v. *Carlile*, 3 B. & Ald. 164); but such indictment, if drawn *per incuriam*, might still, it is submitted, be held good in certain cases as charging a common law misdemeanor. *See R.* v. *Garland* [1910] 1 K. B. 154; 79 L. J. (K. B.) 239.

As to the meaning of public document, *see Sturla* v. *Freccia*, 5 A. C. 623, 643, *per* Lord Blackburn; and *ante*, pp. 402 *et seq.*

FORGERY OF SEALS AND DIES.

Sect. 5.—*Forgery of seals and dies.*]—(1) Forgery of the following seals, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for life:—(*a*) The Great Seal of the United Kingdom, His Majesty's Privy Seal, any privy signet of His Majesty, His Majesty's

Royal Sign Manual, any of His Majesty's seals appointed by the Twenty-fourth Article of the Union between England and Scotland to be kept, used, and continued in Scotland, the Great Seal of Ireland or the Privy Seal of Ireland; [*This paragraph replaces* 24 & 25 Vict. c. 98, s. 1.] (*b*) the seal of the Public Record Office in England; [*This paragraph replaces* 1 & 2 Vict. c. 94, s. 19.] (*c*) the seal of any court of record; [*This paragraph replaces various statutory provisions as to forging seals of courts of record, viz.:* 20 & 21 Vict. c. 60, s. 397; 20 & 21 Vict. c. 77, s. 28; 20 & 21 Vict. c. 79, s. 33; 24 & 25 Vict. c. 98, ss. 27, 28, 36; 34 & 35 Vict. c. 22, s. 50; 34 & 35 Vict. c. 49, s. 18; 51 & 52 Vict. c. 43, s. 180; 53 Vict. c. 5, s. 147.] (*d*) the seal of the office of the Registrar-General of Births, Deaths, and Marriages. [*This paragraph replaces* 3 & 4 Vict. c. 92, s. 8.]

(2) Forgery of the following seals, if committed with intent to defraud or deceive, shall be felony, and punishable with penal servitude for any term not exceeding fourteen years:—(*a*) The seal of any register office relating to births, baptisms, marriages, or deaths; [*This paragraph replaces* 24 & 25 Vict. c. 98, s. 36.] (*b*) the seal of any burial board or of any local authority performing the duties of a burial board; [*This paragraph extends the provisions of* 24 & 25 Vict. c. 98, s. 36, *to local authorities performing the duties of a burial board.*] (*c*) the seal of or belonging to any office for the registry of deeds or titles to lands. [*This paragraph replaces* 24 & 25 Vict. c. 98, s. 31, *and extends to "titles to lands" in view of recent legislation with regard to registration of title.*]

(3) Forgery of the following seals, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for any term not exceeding seven years:—(*a*) The seal of any court of justice other than a court of record; [*This paragraph replaces* 7 & 8 Vict. c. 19, s. 5, *and* 24 & 25 Vict. c. 98, s. 28.] (*b*) the seal of the office of any master or registrar in lunacy: [*This paragraph replaces* 34 & 35 Vict. c. 22, s. 50, *and* 53 Vict. c. 5, s. 147.]

(4) Forgery of the following dies, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for any term not exceeding fourteen years:—(*a*) Any die provided, made, or used by the Commissioners of Inland Revenue or the Commissioners of Customs and Excise; [*This paragraph replaces* 54 & 55 Vict. c. 38, s. 13.] (*b*) any die which is or has been required or authorised by law to be used for the marking or stamping of gold or silver plate, or gold or silver wares. [*This paragraph replaces* 13 G. 3, c. 52, s. 14; 23 & 24 G. 3, c. 23, s. 28 (I.); 5 G. 4, c. lii. s. 22; 7 & 8 Vict. c. 22, s. 2.]

(5) Forgery of the following die, if committed with intent to defraud or deceive, shall be felony and punishable with penal servitude for any term not exceeding seven years:—Any stamp or die provided, made, or used in pursuance of the *Local Stamp Act*, 1869. [*This sub-section replaces* 32 & 33 Vict. c. 49, s. 8.]

Meaning of "seal," "stamp," "die."]—By s. 18 (1) the expression "seal" includes any stamp or impression of a seal or any stamp or impression made or apparently intended to resemble the stamp or impression of a seal, as

well as the seal itself. The expression "stamp" includes a stamp impressed by means of a die, as well as an adhesive stamp. The expression "die" includes any plate, type, tool, or implement whatsoever, and also any part of any die plate, type, tool, or implement, and any stamp or impression thereof or any part of such stamp or impression. [*This definition is taken from the* Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38).]

Treason.]—As to the offence of treason in connection with counterfeiting the privy signet, *see Robinson's Case*, 2 Rolle Rep. 50; 1 Hale, 184. The mere misuser of the great seal was not treason; 1 Hale, 183; 3 Co. Inst. 15; as, for instance, the taking of the great seal from an original patent and appending it to a pretended patent. Bro. Abr., Treason, pl. 3; 1 Hale, 182: *Leate's Case*, 12 Co. Rep. 15. Nor was the alteration of the instrument to which the real seal is appended treason within the meaning of the statutes. 3 Co. Inst. 15; 1 Hale, 183.

UTTERING.

Sect. 6.—*Uttering.*]—(1) Every person who utters any forged document, seal, or die shall be guilty of an offence of the like degree (whether felony or misdemeanor) and on conviction thereof shall be liable to the same punishment as if he himself had forged the document, seal, or die.

(2) A person utters a forged document, seal, or die, who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document, seal, or die, uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off the said forged document, seal, or die.

(3) It is immaterial where the document, seal, or die was forged.

Uttering.]—Sub-s. (2) of s. 6 of the Act of 1913 defines the offence of uttering a forged document, seal, or die. It will now no longer be necessary in any case to prove that the uttering was to a particular class of persons (*see* 10 *G.* 4, *c.* 24, *s.* 41; 2 *& 3 W.* 4, *c.* 59, *s.* 19); or in a particular manner (*see* 31 *& 32 Vict. c.* 37, *s.* 4; 45 *& 46 Vict. c.* 9, *s.* 4: "*utters by tendering in evidence*"; 32 *& 33 Vict. c.* 49, *s.* 8: "*sells or exposes for sale*"). Uttering was not punishable under 1 & 2 Vict. c. 94, s. 19; nor under 57 & 58 Vict. c. 60, ss. 66, 282. The following decisions under other statutes, now repealed, are still retained by way of illustration. Where on an indictment under 13 G. 3, c. 79 (*rep.*), which contained the words "utter or publish," it appeared that the defendant merely showed a forged instrument to a person, though with intent to raise a false idea of his substance, and afterwards left the instrument under cover, in the custody of that person, as he pretended, for safe custody, it was held not to be an uttering or publishing within these words. *R.* v. *Shukard*, R. & R. 200. But such conduct might now be held to amount to

using the document with intent to deceive, and so to constitute the offence of uttering as defined by s. 6 (2) of the Act of 1913. The showing of a forged *receipt* to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering within the statute then in force (1 W. 4, c. 66, s. 10), though the defendant refused to part with the possession of it. *R.* v. *Radford*, 1 Den. 59; 1 C. & K. 707. Where a pawnbroker, upon the hearing of an application against him under 39 & 40 G. 3, c. 99, s. 14 (*rep.*), to compel him to deliver up goods which had been pledged with him (the money advanced, with interest, having been repaid), produced and delivered to the magistrates, through the hand of his attorney, a forged duplicate as the genuine one, which he had given when the goods were pledged, and which he had received back when the money was repaid: this was held to amount to an uttering by the pawnbroker of an accountable receipt within 24 & 25 Vict. c. 98, s. 23 (*rep.*). *R.* v. *Fitchie*, Dears & B. 175; 26 L. J. (M. C.) 90; 7 Cox, 257. And where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the prosecutor to advance money to a third person, for whom the defendant proposed to become a surety for its repayment: this was held to be an offering, etc., within the statute. *R.* v. *Ion*, 2 Den. 475; 21 L. J. (M. C.) 166. And the rule there laid down by the Court is, that a using of the forged instrument in some way, in order to get money or credit upon it, or by means of it, is sufficient to constitute the offence described in the statute. On an indictment for uttering forged bonds in this country, it was held that such uttering here was sufficiently proved by evidence of the bonds having been posted in England to a firm at Brussels for negotiation. *R.* v. *Finkelstein*, 16 Cox, 107, Common Serjeant, after consulting Stephen, J. The uttering of the bill of A., an existing person, as that of a fictitious person of the same name, has been held felonious. *R.* v. *Nisbett*, 6 Cox, 320. Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held this to be an uttering, although it was objected that the prisoner had been solicited to commit the act proved against him, by the bank themselves, by means of their agents. *R.* v. *Holden*, 2 Taunt. 334; R. & R. 154.

Questions have arisen upon the subject of uttering, as to the quality of the offences of different parties, viz., whether they were indictable as principals or accessories. It has been decided that the giving of a forged note to an innocent agent, or to an accomplice, in order that he may utter it, is a disposing of and putting away of the note. *R.* v. *Palmer*, 1 B. & P. (N. R.) 96; R. & R. 72; 2 Leach, 978: *R.* v. *Giles*, 1 Mood. 166; *and see Brooks* v. *Warwick*, 2 Stark. (N. P.) 389. But where several, by concert, are privy to the uttering of a forged note, which is uttered by one only in the absence of the others, he only who utters it is a principal, but the others are accessories before the fact. *R.* v. *Soares*, R. & R. 25: *R.* v. *Badcock*, *Id.* 249: *R.* v. *Stewart*, *Id.* 363: *R.* v. *Davis*, *Id.* 113. *See R.* v. *Morris*, *Id.* 270; 2 Leach, 1096: *R.* v. *Harris*, 7 C. & P. 416; and *post*, *tit.* "*Accessories.*"

A *conditional* uttering is as much a crime as any other. Where the defendant

gave a forged acceptance, knowing it to be so, to the manager of a bank where he kept an account, saying that he hoped the bill would satisfy the bank as a security for the money he owed them, and the manager replied that that would depend on the result of inquiries as to the acceptors, this was held a sufficient uttering. *R.* v. *Cooke*, 8 C. & P. 782. The offence of uttering a forged stamp is complete, although, at the time of uttering, certain parts of it are concealed. *R.* v. *Collicott*, R. & R. 212; 2 Leach, 1048. As to the distinction between uttering forged paper and false pretences, *see R.* v. *Inder*, 1 Den. 325; 2 C. & K. 635.

DEMANDING PROPERTY ON FORGED DOCUMENT.

Sect. 7.—*Demanding property on forged documents, etc.*]—Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, with intent to defraud, demands, receives, or obtains, or causes or procures to be delivered, paid or transferred to any person, or endeavours to receive or obtain or to cause or procure to be delivered, paid or transferred to any person any money, security for money or other property, real or personal :—(*a*) under, upon, or by virtue of any forged instrument whatsoever, knowing the same to be forged; or (*b*) under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit.

This section replaces 2 & 3 W. 4, c. 53, s. 49; 24 & 25 Vict. c. 98, ss. 2, 38; 26 & 27 Vict. c. 73, s. 13; 29 & 30 Vict. c. 25, s. 15; 33 & 34 Vict. c. 58, s. 3; 40 & 41 Vict. c. 59, s. 21; 8 Edw. 7. c. 69, s. 38. The word "instrument" has been retained from s. 38 of the *Forgery Act*, 1861, though the word "document" has been substituted for "instrument" in other sections of the Act of 1913. The meaning of "instrument" was discussed in *R.* v. *Riley* [1896] 1 Q. B. 309; 65 L. J. (M. C.) 74; 18 Cox, 291; and in *R.* v. *Cade* [1914] 2 K. B. 209; 83 L. J. (K. B.) 796; 110 L. T. 624; 24 Cox, 131; 78 J. P. 240; 30 T. L. R. 289; 10 Cr. App. R. 23. It has been held to include a telegram, *R.* v. *Riley* (*supra*); a "cut-out letter," *R.* v. *Howse*, 107 L. T. 239; 28 T. L. R. 186; 7 Cr. App. R. 103; and a request for the payment of money, *R.* v. *Cade* (*supra*).

It is essential that the accused should know that the document is a forged document and the question as to his knowledge should be left to the jury. *R.* v. *Smith*, 14 Cr. App. R. 101.

POSSESSION OF FORGED BANK NOTES, SEALS, AND DIES.

Sect. 8.—*Possession of forged documents, seals, and dies.*]—(1) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, purchases or receives from any person, or has in his custody or possession, a forged bank note, knowing the same to be forged. [*This sub-section replaces* 24 & 25 Vict. c. 98, s. 13.]

(2) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, and knowing the same to be forged, has in his custody or possession—(*a*) any forged die required or authorised by law to be used for the marking of gold or silver plate, or of gold or silver wares, or any ware of gold, silver, or base metal bearing the impression of any such forged die; [*This paragraph replaces* 13 G. 3, c. 52, s. 14; 23 & 24 G. 3, c. 23 (I.); 5 G. 4. c. lii.; 7 & 8 Vict. c. 22, s. 2.] (*b*) any forged stamp or die as defined by the *Stamp Duties Management Act*, 1891; [*This paragraph replaces* 54 & 55 Vict. c. 38, s. 13 (9).] (*c*) any forged wrapper or label provided by or under the authority of the Commissioners of Inland Revenue or the Commissioners of Customs and Excise. [*This paragraph replaces* 16 & 17 Vict. c. 107, s. 116.]

(3) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding seven years who, without lawful authority or excuse, the proof whereof shall lie on the accused, and knowing the same to be forged, has in his custody or possession :—Any forged stamp or die, resembling or intended to resemble either wholly or in part any stamp or die which at any time whatever has been or may be provided, made, or used by or under the direction of the local authority for the purposes of the *Local Stamp Act*, 1869. [*This sub-section replaces* 32 & 33 Vict. c. 49, s. 8.]

As to what constitutes possession, see s. 15 of the Act of 1913 (post, p. 828), *and as to the meaning of lawful authority or excuse*, see Dickins *v.* Gill [1896] 2 Q. B. 310; 18 Cox, 384; 65 L. J. (M. C.) 187; R. *v.* Harvey, L. R. 1 C. C. R. 284; 40 L. J. (M. C.) 63; 11 Cox. 662.

MAKING OR POSSESSING IMPLEMENTS FOR FORGERY.

Sect. 9.—*Making or having in possession paper or implements for forgery.*]—Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding seven years, who, without lawful authority or excuse, the proof whereof shall lie on the accused :—(*a*) Makes, uses, or knowingly has in his custody or possession any paper intended to resemble and pass as—(i) Special paper such as is provided and used for making any bank note, Treasury bill, or London county bill; (ii) Revenue

paper; (*b*) makes, uses or knowingly has in his custody or possession, any frame, mould, or instrument for making such paper, or for producing in or on such paper any words, figures, letters, marks, lines, or devices peculiar to and used in or on any such paper; (*c*) engraves or in anywise makes upon any plate, wood, stone, or other material, any words, figures, letters, marks, lines, or devices, the print whereof resembles in whole or in part any words, figures, letters, marks, lines, or devices peculiar to and used in or on any bank note, or in or on any document entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund, or debt of any part of His Majesty's dominions or of any foreign state, or in any stock, annuity, fund, or debt of any body corporate, company, or society, whether within or without His Majesty's dominions; (*d*) uses or knowingly has in his custody or possession any plate, wood, stone, or other material, upon which any such words, figures, letters, marks, lines, or devices have been engraved or in anywise made as aforesaid; (*e*) uses or knowingly has in his custody or possession any paper upon which any such words, figures, letters, marks, lines, or devices have been printed or in anywise made as aforesaid. [*This section replaces* 2 & 3 W. 4, c. 16, s. 3; 11 & 12 Vict. c. 121, s. 18; 24 & 25 Vict. c. 98, ss. 9, 10, 14, 15, 16, 17, 18, 19; 26 & 27 Vict. c. 73, s. 15; 29 & 30 Vict. c. 25, s. 20; 33 & 34 Vict. c. 58, s. 5; 40 & 41 Vict. c. 2, s. 10; 40 & 41 Vict. c. 59, s. 21; 54 & 55 Vict. c. 38, s. 14; 61 & 62 Vict. c. 46, s. 12; 8 Edw. 7, c. 48, s. 60; 8 Edw. 7, c. 69, s. 38 (2).]

Bank note.]—By s. 18 (1) of the Act of 1913 the expression "bank note" includes any note or bill of exchange of the Bank of England or Bank of Ireland, or of any other person, body corporate, or company carrying on the business of banking in any part of the world, and includes "bank bill," "bank post bill," "blank bank note," "blank bank bill of exchange," and "blank bank post bill."

Revenue paper.]—By s. 18 (1) of the Act of 1913 the expression "revenue paper" means any paper provided by the proper authority for the purpose of being used for stamps, licences, permits, post-office money orders, or postal orders, or for any purpose whatever connected with the public revenue.

Treasury bill.]—By s. 18 (1) of the Act of 1913 "Treasury bill" includes exchequer bill, exchequer bond, exchequer debenture, and war bond.

PURCHASE OR POSSESSION OF PAPER FOR TREASURY BILLS, ETC.

Sect. 10.—*Purchasing or having in possession certain paper before it has been duly stamped and issued.*]—Every person shall be guilty of a misdemeanor and on conviction thereof shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years, who, without lawful authority or excuse the proof whereof shall lie on the accused, purchases, receives,

or knowingly has in his custody or possession—(*a*) Any special paper provided and used for making Treasury bills or London county bills or any Revenue paper before such paper has been duly stamped, signed, and issued for public use: (*b*) any die peculiarly used in the manufacture of any such paper. [*This section replaces* 24 & 25 Vict. c. 98, s. 11; 29 & 30 Vict. c. 25, s. 21; 40 & 41 Vict. c. 2, s. 10; 54 & 55 Vict. c. 38, s. 15; 61 & 62 Vict. c. 46, s. 12; 8 Edw. 7, c. 48, s. 60. *The provisions of the foregoing statutes are generalised, and the punishments are standardised.*]

ACCESSORIES.

Sect. 11.—*Accessories and abettors.*]—Any person who knowingly and wilfully aids, abets, counsels, causes, procures, or commands the commission of an offence punishable under this Act shall be liable to be dealt with, indicted, tried, and punished as a principal offender. [*This section reproduces* 24 & 25 Vict. c. 94, ss. 1-3; *and* 24 & 25 Vict. c. 98, s. 49 (see post, *tit.* "Accessories.")]

PUNISHMENTS.

Sect. 12.—*Punishments.*]—(1) Where a sentence of penal servitude may be imposed on conviction of an offence against this Act, the court may, instead thereof, impose a sentence of imprisonment, with or without hard labour, for not more than two years.

(2)—(*a*) On conviction of a misdemeanor punishable under this Act, the court, instead of or in addition to any other punishment which may be lawfully imposed, may fine the offender: (*b*) on conviction of a felony punishable under this Act, the court, in addition to imposing a sentence of penal servitude or imprisonment, may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace and being of good behaviour: (*c*) on conviction of a misdemeanor punishable under this Act, the court, instead of or in addition to any other punishment which may lawfully be imposed for the offence, may require the offender to enter into his own recognizances, with or without sureties, for keeping the peace and being of good behaviour: (*d*) no person shall be imprisoned under this section for more than one year for not finding sureties. [*This section reproduces* 24 & 25 Vict. c. 98, s. 51, *and* 54 & 55 Vict. c. 69, s. 1 (2).]

JURISDICTION OF QUARTER SESSIONS.

Sect. 13.—*Jurisdiction of quarter sessions in England.*]—A court of quarter sessions in England shall not have jurisdiction to try an indictment for any offence against this Act or for an offence which, under any enactment for the time being in force, is declared to be forgery or to be punishable as forgery. [*This section reproduces* 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).]

VENUE.

Sect. 14.—*Venue.*]—(1) A person charged—(*a*) with an offence against this Act; or (*b*) with an offence indictable at common law or under any Act for the time being in force consisting in the forging or altering of any matter whatsoever, or in offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered; may be proceeded against, indicted, tried, and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place; and for all purposes incidental to or consequential on the prosecution, trial, or punishment of the offence, it shall be deemed to have been committed in that county or place: Provided that, where the offence charged relates to documents made for the purpose of any Act relating to the suppression of the slave trade, it shall, for the purposes of jurisdiction and trial, be treated as an offence against the *Slave Trade Act*, 1873.

(2) Nothing in this section shall affect the laws relating to the government of His Majesty's naval or military forces.

CRIMINAL POSSESSION DEFINED.

Sect. 15.—*Criminal possession.*]—Where the having any document, seal, or die in the custody or possession of any person is in this Act expressed to be an offence, a person shall be deemed to have a document, seal or die in his custody or possession if he—(*a*) has it in his personal custody or possession; or (*b*) knowingly and wilfully has it in the actual custody or possession of any other person, or in any building, lodging, apartment, field, or other place, whether open or enclosed, and whether occupied by himself or not. It is immaterial whether the document, matter, or thing is had in such custody, possession, or place for the use of such person or for the use or benefit of another person.

SEARCH WARRANTS.

Sect. 16.—*Search warrants.*]—(1) If it shall be made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession without lawful authority or excuse—(*a*) any bank note; or (*b*) any implement for making paper or imitation of the paper used for bank notes; or (*c*) any material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of a bank note; or (*d*) any forged document, seal, or die; or (*e*) any machinery, implement, utensil, or material used or intended to be used for the forgery of any document; the justice may grant a warrant to search for the same; and if the same shall be found on search, it shall be

lawful to seize it and carry it before a justice of the county or place in which the warrant was issued, to be by him disposed of according to law.

(2) Every document, seal, or die lawfully seized under such warrant shall be defaced and destroyed or otherwise disposed of—(*a*) by order of the court before which the offender is tried; or (*b*) if there be no trial, by order of a justice of the peace; or (*c*) if it affects the public revenue, by the Commissioners of Inland Revenue or the Commissioners of Customs and Excise, as the case may require; or (*d*) if it affects any of the companies of Goldsmiths or Guardians referred to in the *Gold and Silver Wares Act*, 1844, by the said company or guardians.

INDICTMENT.

Sect. 17.—*Form of indictment and proof of intent.*]—(1) In an indictment or information for an offence against this Act with reference to any document, seal, or die, it is sufficient to refer to the document, seal, or die by any name or designation by which it is usually known, or by its purport, without setting out any copy or facsimile of the whole or any part of the document, seal, or die. [*This sub-section reproduces* 24 & 25 Vict. c. 98, s. 42.]

(2) Where an intent to defraud or an intent to deceive is one of the constituent elements of an offence punishable under this Act, or under any other Act relating to forgery or any kindred offence for the time being in force, it shall not be necessary to allege in the indictment or to prove an intent to defraud or deceive any particular person; and it shall be sufficient to prove that the defendant did the act charged with intent to defraud or to deceive, as the case may require. [*This sub-section reproduces* 24 & 25 Vict. c. 98, s. 44.]

(3) If any person who is a member of any co-partnership or is one of two or more beneficial owners of any property, forges any document, matter, or thing with intent to defraud the co-partnership or the other beneficial owners, he is liable to be dealt with, indicted, tried, and punished as if he had not been or was not a member of the co-partnership, nor one of such beneficial owners. [*This sub-section extends to forgery the provisions of* 31 & 32 Vict. c. 116, s. 1 (*rep.*), *which formerly applied only to larceny or embezzlement.*]

For precedents of indictments under this Act, *see post*, pp. 831, 832.

INTERPRETATION OF TERMS.

Sect. 18.—*Interpretation.*]—(1) In this Act unless the context otherwise requires—

The expression "bank note" includes any note or bill of exchange of the Bank of England or Bank of Ireland, or of any other person, body corporate, or company carrying on the business of banking in any part of the world, and includes "bank bill," "bank post bill," "blank bank note," "blank bank bill of exchange," and "blank bank post bill":

The expression "die" includes any plate, type, tool, or implement whatsoever, and also any part of any die plate, type, tool, or implement, and any stamp or impression thereof or any part of such stamp or impression:

The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise either by endorsement or by delivery the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to:

The expression "document of title to lands" includes any deed, map, roll, register, or instrument in writing being or containing evidence of the title or any part of the title to any land or to any interest in or arising out of any land, or any authenticated copy thereof:

The expression "revenue paper" means any paper provided by the proper authority for the purpose of being used for stamps, licences, permits, post office money orders, or postal orders, or for any purpose whatever connected with the public revenue:

The expression "seal" includes any stamp or impression of a seal or any stamp or impression made or apparently intended to resemble the stamp or impression of a seal, as well as the seal itself:

The expression "stamp" includes a stamp impressed by means of a die as well as an adhesive stamp:

The expression "Treasury bill," includes Exchequer bill, Exchequer bond, Exchequer debenture, and War bond:

The expression "valuable security" includes any writing entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund, or debt of any part of His Majesty's dominions or of any foreign state, or in any stock, annuity, fund, or debt of any body corporate, company, or society, whether within or without His Majesty's dominions, or to any deposit in any bank, and also includes any scrip, debenture, bill, note, warrant, order, or other security for the payment of money, or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal.

(2) References in this Act to any Act in force at the commencement of this Act shall be held to include a reference to that Act as amended, extended, or applied by any other Act.

(3) References in this Act to any Government department shall in relation to any functions performed by that department be held to include references to any other Government department by which the same functions were previously performed.

MISCELLANEOUS SECTIONS.

Sect. 19.—*Savings.*]—(1) Where an offence against this Act also by virtue of some other Act subjects the offender to any forfeiture or disqualification, or to any penalty other than penal servitude or imprisonment or fine, the liability

of the offender to punishment under this Act shall be in addition to and not in substitution for his liability under such other Act.

(2) Where an offence against this Act is by any other Act, whether passed before or after the commencement of this Act, made punishable on summary conviction, proceedings may be taken either under such other Act or under this Act: Provided that where such an offence was at the commencement of this Act punishable only on summary conviction, it shall remain only so punishable.

Sect. 20.—*Repeals.*]—The enactments specified in the schedule to this Act are hereby repealed as to England and Ireland to the extent specified in the third column of that schedule.

Sect. 21.—*Extent.*]—This Act shall not extend to Scotland.

PRECEDENTS OF INDICTMENTS UNDER THE FORGERY ACT, 1913.

Indictment for Forging and Uttering a Will. (3 & 4 *G.* 5, *c.* 27, *ss.* 2 (1) (*a*) *and* 6, ante, pp. 807, 822.)

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offences :—

STATEMENT OF OFFENCE.

First Count:

Forgery, contrary to section 2 (1) (a) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to defraud, forged a certain will purporting to be the will of C. D.

STATEMENT OF OFFENCE.

Second Count:

Uttering forged document, contrary to section 6 (1) (2) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, uttered a certain forged will purporting to be the will of C. D., knowing it to be forged, and with intent to defraud.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour. 3 & 4 G. 5, c. 27, ss. 2 (2), 6, 12 (1) (ante, pp. 808, 822, 827). *As to*

recognizances and sureties for keeping the peace, see 3 & 4 G. 5, c. 27, s. 12 (2) (*b*) (ante, p. 827).

This offence is not triable at quarter sessions. 3 & 4 G. 5, c. 27, s. 13 (ante, p. 827).

Indictment for Forging and Uttering a Document, Forgery of which is not made Felony. (3 & 4 G. 5, c. 27, ss. 4 (2), 6, ante, pp. 820, 822.)

STATEMENT OF OFFENCE.

First Count:

Forgery of document, contrary to section 4 (1) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to defraud, forged a certain document purporting to be [*describe the document in ordinary language*].

Second Count:

As in last precedent.

Misdemeanor: imprisonment with or without hard labour for not more than two years or fine. 3 & 4 G. 5, c. 27, ss. 4 (1), 12 (2) (*a*), *ante*, pp. 820, 827. *As to recognizances and sureties for keeping the peace*, see 3 & 4 G. 5, c. 27, s. 12 (2) (*c*), (*d*), ante, p. 827.

This offence is not triable at quarter sessions. 3 & 4 G. 5, c. 27, s. 13, ante, p. 827.

Indictment for Demanding Money upon a Forged Instrument. (3 & 4 G. 5, c. 27, s. 7 (*a*), ante, p. 824.)

STATEMENT OF OFFENCE.

Demanding money on forged document, contrary to section 7 of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to defraud, demanded, received, or obtained from C. D. [*or caused or procured to be delivered, paid, or transferred from C. D. to* ——] [*or endeavoured, etc.*, see the section, supra] the sum of 50*l.* under, upon, or by virtue of a forged bill of exchange knowing the same to be forged.

Felony: penal servitude for not more than fourteen nor less than three years or imprisonment for not more than two years, with or without hard labour. 3 & 4 G. 5, c. 27, ss. 7, 12 (1), ante, pp. 824, 827. *As to recognizances and sureties for keeping the peace*, see s. 12 (2) (*b*), ante, p. 827.

This offence is not triable at quarter sessions. S. 13, ante, p. 827.

Evidence.

Intent to defraud or deceive.]—"To deceive is to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action:" *Re London and Globe Finance Corporation* [1903] 1 Ch. 728, 732, Buckley, J.

It is sufficient to prove generally an intent to defraud or deceive without proving intent to defraud a particular person. 3 & 4 G. 5, c. 27, s. 17 (2) (*ante*, p. 829). At common law it is said to be necessary to allege and prove a particular intent, unless the document forged was of a public nature. *R.* v. *Hodgson*, Dears. & B. 3; 25 L. J. (M. C.) 78; 7 Cox, 122. *But see* 2 Russ. Cr. (7th ed.) 1643 n. It is not necessary to prove that any person was actually defrauded by the forgery (*R.* v. *Crooke*, 2 Str. 901: *R.* v. *Goate*, 1 Ld. Raym. 737), if from circumstances, the jury can infer that it was the defendant's intention to defraud; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not, in fact, defraud the prosecutor (*R.* v. *Holden*, R. & R. 154: *R.* v. *Hoatson*, 2 C. & K. 777); or though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him (*R.* v. *Sheppard*, R. & R. 169; *see R.* v. *Harvey*, 2 St. Tr. (N. S.) 1; 2 B. & C. 261); nay, even, as it seems, though in fact *no person* could have been defrauded by the forged instrument. *See R.* v. *Nash*, 2 Den. 493, 503; 21 L. J. (M. C.) 147, 149, Maule, J.; *but cf. R.* v. *Marcus*, 2 C. & K. 356, where Cresswell, J., held that there must be a possibility of some person being defrauded. Where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but to obtain credit, it was held to be a fraudulent intent within the meaning of the statute. *R.* v. *Birkett*, R. & R. 86. The jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. *R.* v. *Mazagora*, R. & R. 291; *see R.* v. *Trenfield*, 1 F. & F. 43. A forged cheque drawn on the Worcester Old Bank was presented by the prisoner to Rufford's Bank at Stourbridge, and refused; and upon an indictment for forging and uttering the cheque with the intent to defraud the Messrs. Rufford, it was objected, that, as it was not drawn upon them, it could not defraud

them: but Bosanquet, J., held, that as it was presented at their bank for payment, it was evidence of an intent to defraud them. *R.* v. *Crowther*, 5 C. & P. 316.

The fact that the prisoner intended to provide for the payment of a bill which he uttered knowing it to be forged does not negative the intent to defraud. *R.* v. *Hill*, 2 Mood. 30; 8 C. & P. 274: *R.* v. *Cooke*, *Id.* 582; nor does the fact that he had a legal or *bonâ fide* claim to the extent of the money obtained by the forged instrument. *R.* v. *Wilson*, 1 Den. 284; 2 C. & K. 527. *And see R.* v. *Parker*, 74 J. P. 208. The fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not so completely negative an intent to defraud them as to withdraw the case from the consideration of the jury. *R.* v. *James*, 7 C. & P. 553. *See R.* v. *Cooke*, 8 C. & P. 582: *R.* v. *Geach*, 9 C. & P. 499.

Evidence that the prisoner uttered other forged documents similar to that charged in the indictment may be admissible to prove guilty knowledge. *R.* v. *Whiley*, 2 Leach, 983. *See ante*, pp. 355, 363.

On the trial of an indictment for forgery with intent to defraud A. B., "one of the public officers" of a banking company established under the *Country Bankers Act*, 1826 (7 G. 4, c. 46), A. B. stated that he was a public officer: and an examined copy of the return forwarded to the stamp-office under that Act, in which also he was stated to be so, was put in: but this copy had not the affidavit at the close of the return, which is directed by schedule (A.) of that statute, and the date was left blank. The judges held that A. B. was sufficiently proved to be the public officer. *R.* v. *Carter*, 1 Den. 65; 1 C. & K. 741. *See Edwards* v. *Buchanan*, 3 B. & Ad. 788.

Knowledge of falsity.]—This is not capable of direct proof. It is nearly in all cases, therefore, proved by evidence of facts from which the jury may presume it (*vide ante*, pp. 355, 363, 396). Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant had passed other forged notes, if proved by legitimate evidence, *R.* v. *Millard*, R. & R. 245 (*see R.* v. *Moore*, 1 F. & F. 73), raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; *R.* v. *Wyllie*, 1 B. & P. (N. R.) 92; *S. C. sub nom. R.* v. *Whiley*, 2 Leach, 983: *R.* v. *Tattersal*, *Id.* 93 n. (*ante*, p. 363): *and see R.* v. *Ball*, 1 Camp. 324; R. & R. 132: *R.* v. *Hough*, R. & R. 120: *R.* v. *Green*, 3 C. & K. 209: *R.* v. *Salt*, 3 F. & F. 834: *R.* v. *Francis*, L. R. 2 C. C. R. 128; 12 Cox, 612: *R.* v. *Colclough*, 15 Cox, 92; 10 L. R. (Ir.) 241 (C. C. R. Ir.); and if, in addition to this, it is proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. (*See ante*, p. 397.) It has been ruled, however, that if a subsequent uttering is made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *R.* v. *Smith*, 2 C. & P. 633: *and R.* v. *Smith*, 4 C. & P. 411, 413 n. But this distinction seems to be now exploded; and in *R.* v. *Lewis*, Carnarvon Sum. Ass., 1840, Lord Denman, C.J., said, that "he could not conceive how the relevancy of the fact to this charge could be affected by its being the subject of another

charge;" and offered to admit the evidence, although the above cases were cited. And in another case, Alderson, B., admitted such evidence. *R.* v. *Aston*, 2 Russ. Cr. (7th ed.) 1675. *See also R.* v. *Foster*, Dears. 456; 24 L. J. (M. C.) 134. In *Griffits* v. *Payne*, 11 A. & E. 131, it was said by Tindal, C.J., that such evidence would not be admissible on an indictment for forgery. Evidence may be given of other transactions which have some nexus or connexion with the offence charged, whether the evidence concerns previous or subsequent acts, to show a guilty mind or to rebut a defence of the accused. *R.* v. *Mason*, 10 Cr. App. R. 169. On an indictment under 11 G. 4 & 1 W. 4, c. 66, s. 19 (*rep.*, but re-enacted in 3 & 4 G. 5, c. 27, s. 9, ante, p. 825), for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering of notes of another foreign prince was held admissible in proof of guilty knowledge. *R.* v. *Balls*, 1 Mood. 470; 7 C. & P. 429.

The defendant's statements as to other instruments of the same kind, supposed to have been the subject of a guilty uttering by him, seem not to be admissible in evidence. *R.* v. *Cooke*, 8 C. & P. 582; *but see* the remarks of Crompton, J., on this case in *R.* v. *Brown*, 2 F. & F. 599.

Handwriting.]—That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party may be proved by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. (*Ante*, p. 446.) It is sufficient, *primâ facie*, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name; circumstances showing guilty knowledge are enough. *R.* v. *Hurley*, 2 M. & Rob. 473. The forgery may be proved by the person whose name is forged: or by other witnesses who are acquainted with his handwriting, without calling him as a witness. His testimony as to the fact of forgery is not deemed the best evidence, and that of other persons merely secondary. *R.* v. *Hughes*, 2 East, P. C. 1002: *R.* v. *Macguire*, *Id.*: *Bank Prosecutions*, R. & R. 378. And by *Denman's Act* (28 & 29 Vict. c. 18), s. 8, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." (*See R.* v. *Harvey*, 11 Cox, 546, *and ante*, pp. 446, 447.) "There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business." *R.* v. *Silverlock* [1894] 2 Q. B. at p. 771; 63 L. J. (M. C.) 233, *per* Russell, C.J., and the *admissibility* of evidence of professional experts in handwriting, which formerly seems to have been doubtful (*Goodtitle* v. *Braham*, 4 T. R. 497: *Carey* v. *Pitt*, Peake, Add. Cas. 130: *R.* v. *Cator*, 4 Esp. 117: *Gurney* v. *Langlands*, 5 B. & Ald. 330: *and see ante*, p. 447), has been recognized of recent years, the *weight* of such evidence being for the jury. On an indictment for uttering a forged will, which, it was alleged, had been written over pencil marks that had been rubbed out, it was held that the evidence of engravers, who had

examined the paper with a mirror, and traced the pencil-marks, was admissible for the prosecution. *R.* v. *Williams*, 8 C. & P. 434.

Identity of person whose writing is forged.]—Evidence must also be given of the identity of the person whose handwriting is alleged to be forged; that is, it must be proved expressly or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was attempted to be uttered as the handwriting of a person who never existed. (*Ante*, p. 804.) *See R.* v. *Sponsonby*, 1 Leach, 332; 2 East, P. C. 996, 997: *R.* v. *Downes*, *Id.* 997, 999. Where the defendant uttered a forged note, and said that it was drawn by W. H. of the Bull's Head, it was held to be sufficient to prove that it was not of the handwriting of that W. H., although it appeared that there was another W. H. living in the neighbourhood. *R.* v. *Hampton*, 1 Mood. 255. Where the prisoner obtained money from B. for a cheque on Jones, Loyd & Co., purporting to be drawn by G. Andrews in favour of —— Newman, Esq., or bearer, telling him that it was for Mr. Newman, of Soho Square, in whose service he was for three months, and that Mr. Newman had put his name on the back; and it appeared upon an indictment for forging and uttering the cheque, that no person of the name of G. Andrews kept an account with Jones, Loyd & Co., that Mr. Newman of Soho Square did not write his name on the back of the cheque, and that the prisoner was never in that gentleman's service: Parke, J. (after consulting Gaselee, J.), held this to be sufficient *primâ facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him, or give some evidence upon the subject: the prisoner was convicted. *R.* v. *Backler*, 5 C. & P. 118. Upon an indictment for forging and uttering a bill of exchange, purporting to be drawn by T. W. of Nottingham, and to be accepted by T. K., Market Place, Birmingham, which was passed to the prosecutor by the prisoner, who represented his name to be King, of King Square, which he said was chiefly his property: the prosecutor proved that he made inquiry for T. W. of Nottingham, and could not find him: that he had been twice to Birmingham after T. K., but could find no such person, and that he had made inquiries at King Square for the prisoner, but could hear of no such person; but he admitted that he was a stranger at these places, and no person acquainted with them was called: Parke, J., after consulting the judges present, held this sufficient evidence to go to the jury of the bill being a fictitious one, although he told them that it was not very satisfactory, and not the usual evidence upon such occasions. *R.* v. *King*, 5 C. & P. 123. In *R.* v. *Ashby*, 2 F. & F. 560, on an indictment for forging a cheque dated A. and purporting to be drawn by B. C., evidence that no person named B. C. lived at A. who would be likely to have a banker's account was held evidence to prove that B. C. was a fictitious person. Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co., army agents and bankers, purporting to be drawn by J. Weston, and a clerk in the army department was called to prove that J. Weston kept no account with his employers; he also admitted that he did not know the names of all the customers, but added that he knew of no

customer named J. Weston, and that, upon inquiry of the other clerks, he found that there was no such person: Parke, J., with the concurrence of Patteson, J., and Gurney, B., held this to be *primâ facie* evidence sufficient to call upon the prisoner to show who J. Weston really was. *R.* v. *Brannan*, 6 C. & P. 326.

Description of the forged document, etc.]—The document, seal, die, or instrument need not be set out in facsimile in the indictment. It is sufficient to refer to it by any name or designation by which it is usually known or by its purport. 3 & 4 G. 5, c. 27, s. 17 (1) (*ante*, p. 829). And under the *Indictments Act*, 1915 (5 & 6 G. 5, c. 90), r. 7, it is sufficient to describe any document necessary to be referred to in an indictment by any name or designation by which it is usually known, or by its purport, without setting out any copy of it.

The instrument must appear upon the face of it to have been made to resemble a true instrument of the denomination mentioned in the indictment, and in the statute upon which it is framed: not necessarily an exact resemblance, but such as to be capable of deceiving persons using ordinary observation, according to their means of knowledge (*see R.* v. *Collicott*, R. & R. 212, 229; 2 Leach, 1048; 4 Taunt, 300: *R.* v. *Jones*, 1 Leach, 204: *R.* v. *Mahoney*, 6 Cox, 487), although, not, perhaps, those scientifically acquainted with such instruments. *See R.* v. *Hoost*, 2 East, P. C. 950. Even where upon an indictment for forging a bank-note, there appeared to be no water-mark in the forged note, and the word "pounds" was omitted in the body of it, the defendant being convicted, the judges held the conviction to be right. *R.* v. *Elliott*, 1 Leach, 175; 2 East, P. C. 951. So a man may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence. *See R.* v. *M'Intosh*, 2 Leach, 883; 2 East, P. C. 942. Thus, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular statutes requiring it to be in a particular form (*R.* v. *Lyon*, R. & R. 255: *R.* v. *Froud*, *Id.* 389; 1 B. & B. 300); or for forging a cheque, though it be post-dated. *R.* v. *Taylor*, 1 C. & K. 213. And now, by 3 & 4 G. 5, c. 27, s. 1 (3) (*b*) (*ante*, p. 804), forgery of a document may be complete, even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law.

The forged document must be produced at the trial if possible (*R.* v. *Hall*, 12 Cox, 159); but secondary evidence can be given if it is in the prisoner's possession and is not produced. Notice to produce is expedient, if not essential (*see ante*, p. 368), 2 Russ. Cr. (7th ed.) 2076. *R.* v. *Hunter*, 4 C. & P. 128: *R.* v. *Haworth*, *Id.* 254: *R.* v. *Fitzsimons*, 18 W. R. 763; Ir. Rep. 4 C. L. 1. *See further ante*, pp. 368-370, and p. 467, *tit. Privilege*.

Forgery by several.]—If several combine to forge an instrument, and each separately executes a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. *R.* v. *Bingly*, R. & R. 446. As, if B. makes the paper, C. engraves the plate,

and D. fills up the instrument, each without knowing that the others are employed for that purpose, they are all principals. *R.* v. *Dade*, 1 Mood. 307: *R.* v. *Robert Kirkwood*, *Id.* 304. So, if several concur in employing an innocent agent to make a forged instrument, of which they know the nature, they are all guilty of the forgery. *R.* v. *Mazeau*, 9 C. & P. 676. "I think if a man has an instrument in his possession without an indorsement or other writing the subject of the alleged forgery, and half an hour afterwards is found with the instrument indorsed, there is some evidence of forgery to go to the jury. . . . Although the prisoner might not be able to write himself, yet if he got any one to write the name, he is as much guilty of forgery as if he wrote it himself." *R.* v. *James*, 4 Cox, 90, *per* Erle, J.

GENERAL PROVISIONS IN OTHER STATUTES.

24 & 25 Vict. c. 98 (*Forgery Act*, 1861), s. 44.—*Intent to defraud.*]—[It shall be sufficient, in any indictment for forging, *altering*, uttering, offering, disposing of, or putting off any instrument whatsoever, *where it shall be necessary to allege an intent to defraud*, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and] on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. [*This section re-enacted* 14 & 15 Vict. c. 100, s. 8, *with the additions italicized. The part within square brackets has now been repealed by the* Indictments Act, 1915, see ante, p. 52.]

Sect. 47.—*Other punishments substituted for those of* 5 *Eliz. c.* 14, *where adopted in other Acts.*]—Whosoever shall be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the Act passed in the fifth year of the reign of Queen Elizabeth, intituled "An Act against Forgers of False Deeds and Writings," for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . [*This section re-enacts* 11 G. 4 & 1 W. 4, c. 66, s. 23. 5 Eliz. c. 14 *was repealed by* 11 G. 4 & 1 W. 4, c. 66, s. 31. See post, p. 845.]

Sect. 48.—*Punishment for forgery in general.*]—Where by any Act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased or altered, or any person demanding, or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased or altered, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the Act of the first year of King William

the Fourth, chapter sixty-six (*which, except s.* 21, *was rep.* 24 & 25 Vict. c. 95, s. 1), have been liable to suffer death as a felon; or where by any Act now in force any person falsely personating another or falsely acknowledging any thing in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the said Act of the first year of King William the Fourth, have been liable to suffer death as a felon; or where by any Act now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of the first year of King William the Fourth, have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this Act, every such person shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 11 G. 4 & 1 W. 4, c. 66, s. 1. *As to the statutes to which it applies*, see post, pp. 845 *et seq.*]

Sect. 49.—*Accessories, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, . . . and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender. [*See* 24 & 25 Vict. c. 94, ss. 1-3. *post, tit.* "*Accessories.*"]

Sect. 50.—*Admiralty jurisdiction.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they

had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on "the high seas."

Provided that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces (*see ante*, pp. 31 *et seq*).

Sect. 51.—*Fine and sureties.*]—Whenever any person shall be convicted of a misdemeanor under this Act, it shall be lawful for the Court, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, to fine the offender, and to require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in all cases of felonies in this Act mentioned it shall be lawful for the Court, if it shall think fit, to require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year (*see ante*, p. 247).

46 & 47 *Vict. c.* 55 (*Revenue Act*, 1883), *s.* 17.]—Sections 76 to 82, both inclusive, of the *Bills of Exchange Act*, 1882 (45 & 46 Vict. c. 61), shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument. For the purpose of this section his Majesty's paymaster-general and the King's and lord treasurer's remembrancer in Scotland shall be deemed to be bankers, and the public officers drawing on them shall be deemed customers.

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 59 (2).—*Forgery and stealing of money orders.*]—If any person, with intent to defraud, obliterates, adds to, or alters any such lines or words on a money order, as would in the case of a cheque be a crossing of that cheque, or knowingly offers, utters, or disposes of any money order with such fraudulent obliteration, addition, or alteration, he shall be guilty of felony, and be liable to the like punishment as if the order were a cheque. [*This section re-enacts* 43 & 44 Vict. c. 33, s. 3.]

MAKING FALSE ENTRIES OF STOCK, ETC.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 5.]—Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the Bank of England, or the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds which

now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud; or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland in the name of any person not being the true and lawful owner of such share or interest with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 1 W. 4, c. 66, s. 5.]

2 & 3 *Geo.* 5 *c. cv.* (*London County Council* (*Finance Consolidation*) *Act*, 1912), *s.* 39.]—Any person who, with intent to defraud, makes any false entry in, or alters any word or figure in, any of the books required to be kept under this Act, or in any manner falsifies any of the said books, or makes any transfer of any consolidated stock, in the name of any person who is not the true owner thereof, shall be guilty of felony, and on conviction shall be liable to penal servitude for any term not exceeding fourteen years.

Indictment for wilfully altering words and figures within 24 & 25 *Vict. c.* 98, *s.* 5.

STATEMENT OF OFFENCE.

Making false entry, contrary to section 5 of the Forgery Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to defraud, made a false entry [*or wilfully altered a word or figure*] in a book of account kept by the Bank of England, in which the accounts of owners of stock, annuities, and other public funds transferable at the said Bank were entered and kept.

Felony: Penal servitude for life, or for not less than three years, or imprisonment with or without hard labour not exceeding two years. 24 & 25 Vict. c. 98, s. 5; 54 & 55 Vict. c. 69, s. 1 (1) (2), ante, pp. 238, 239. *As to recognizances and sureties for keeping the peace*, see s. 51 of 24 & 25 Vict. c. 98, ante, p. 840.

This offence is not triable at quarter sessions.

Evidence.

Prove the alteration, as stated in the indictment, and the intent, *as ante*, p. 833.

FALSE DIVIDEND WARRANTS.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 6.]—Whosoever, being a clerk, officer, or servant of, or other person employed or intrusted by the Bank of England, or the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, *or warrant for payment of any annuity, interest or money*, payable at the Bank of England or Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section is taken from* 1 W. 4, c. 66, s. 9, *with the additions in italics.*]

2 & 3 *Geo. 5. c. c.v.* (*London County Council* (*Finance Consolidation*) *Act*, 1912, *s.* 40.]—Any person employed by the London County Council or the Bank [of England], who, with intent to defraud, makes out or delivers any stock certificate, dividend warrant, or document for the payment of money in relation to any consolidated stock (*created by the London County Council*), for a greater or less amount than the person on whose behalf such certificate, warrant, or document is made out is entitled to, shall be guilty of felony, and shall be liable, on conviction, to penal servitude for any term not exceeding seven years.

Indictment. (24 & 25 *Vict. c.* 98, *s.* 6.)

STATEMENT OF OFFENCE.

Making false dividend warrant, contrary to section 6 of the Forgery Act, 1861.

PARTICULARS OF OFFENCE.

A. B., being a clerk, officer, or servant employed by the Bank of England, on the —— day of ——, in the county of ——, with intent to defraud, knowingly made out or delivered to C. D. a dividend warrant payable at the Bank of England for a greater amount than the said C. D. was entitled to.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour, 24 & 25 Vict. c. 98, s. 6; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 98, s. 51 (ante, p. 840).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that J. S. was a clerk or servant of the Bank of England (*see ante*, p. 606); produce the warrant, and prove it to be the prisoner's writing; show the amount of stock to which C. D. was entitled, and prove the intent as directed (*ante*, p. 833).

INJURY TO REGISTERS OF BIRTHS, MARRIAGES, DEATHS, ETC.

3 & 4 *Vict. c.* 92 (*Non-parochial Registers Act*, 1840), *s.* 8, *as amended by the Forgery Act*, 1913.]—Every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming or dedication, death or burial, or marriage, which shall be deposited with the registrar-general, by virtue of this Act, or any part thereof, or shall wilfully insert, or cause to be inserted, in any of such registers or records, any false entry of any birth or baptism, naming or dedication, death or burial, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be an abstract from any register or record, knowing the same register or record to be false in any part thereof, shall be guilty of felony. [*This section was extended by* 21 & 22 *Vict. c.* 25, *s.* 3, *to non-parochial registers transferred under that Act to the custody of the registrar-general.*]

20 & 21 *Vict. c.* 81 (*Burials Act*, 1857), *s.* 15, *as amended by the Forgery Act*, 1913.—*Destruction or forgery of burial registers.*]—Every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register book of burials kept according to the provisions of this Act, or any part or certified copy of any part of such register, or shall wilfully insert, or cause to be inserted, in any registry book or copy thereof any false entry of any burial, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any such register book, knowing the same to be false in any part thereof, shall be guilty of felony. (*For punishment*, see ante, pp. 236 *et seq.*)

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 36, *as amended by the Forgery Act*, 1913.—*Destruction of registers of births, etc.*]—Whosoever shall *unlawfully* destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall knowingly and *unlawfully* (*see R. v. Asplin*, 12 Cox, 391) insert, or cause or permit to be inserted, in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and *unlawfully* give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any

such register, knowing *such writing*, or the part of such register whereof such copy of extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section was framed from* 11 G. 4 & 1 W. 4, c. 66, s. 20; 6 & 7 W. 4, c. 86, s. 43; *and* 20 & 21 Vict. c. 81, s. 15, *with the substitution of* "*unlawfully*" *for* "*wilfully.*" *The proviso in favour of officiating ministers making corrections of accidental errors in registers, which was enacted by* 11 G. 4, & 1 W. 4, c. 66, s. 21, *remains in force. The section is incorporated in the* Registration of Marriages (Ireland) Act, 1863 (26 & 27 Vict. c. 90), s. 23.]

Sect. 37.—*Making false entries in copies of registers sent to registrar.*] —Whosoever shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage, or burial, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or *shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal any such copy of any register*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 11 G. 4 & 1 W. 4, c. 66, s. 22, *with the addition of the words in italics, made in consequence of* R. *v.* Bowen, 1 Den. 22; 1 C. & K. 501. *The section is incorporated in the* Registration of Marriages (Ireland) Act, 1863 (26 & 27 Vict. c. 90), s. 23.]

61 & 62 *Vict. c.* 58 (*Marriage Act*, 1898), *s.* 7].—Provision of register books and for celebration of Nonconformist marriages in absence of registrar.

Indictment for making a false entry in a Marriage Register. (24 & 25 *Vict. c.* 98, *s.* 36, ante, p. 843.)

STATEMENT OF OFFENCE.

Making false entry in marriage register, contrary to section 36 of the Forgery Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, knowingly and unlawfully inserted [*or caused or permitted to be inserted*] in the register of

marriages by law authorized or required to be kept in England a false entry relating to a marriage between C. D. and E. F.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 98, s. 36; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 98, s. 51 (ante, p. 840).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

To prove the indictment for making a false entry in a register, produce the register, prove it to be kept as stated in the indictment, and prove the falsity of the entry. Upon an indictment for making a false entry in a marriage register, it is not necessary that the entry should be made with intent to defraud: and it is no defence that the marriage, being bigamous, was void. If a person, knowing his name to be A., signs another name as a witness to a marriage in the register, he is guilty of inserting a false entry in the register, although he so signs as a third witness, and the *Marriage Act* only requires two witnesses. *R.* v. *Asplin*, 12 Cox, 391, Martin, B. The Court will take judicial notice that a parish in the county of Stafford, or any other English county, is in England, and the indictment need not aver that fact. *R.* v. *Sharpe*, 8 C. & P. 436.

It is not the less a "destroying, defacing, or injuring" of a register, within the meaning of the statute, because the register, when produced in evidence, has the torn part pasted in, and is as legible as before. *R.* v. *Bowen*, 1 Den. 22; 1 Cox, 88. As to the uttering, *see R.* v. *Heywood*, 2 C. & K. 352.

Where a false entry had been actually made in a register of births, etc., on the information of the defendant, he was held to be thereby guilty of the felony mentioned in 6 & 7 W. 4, c. 86, s. 43 (re-enacted in 24 & 25 Vict. c. 98, s. 36), and not merely of the misdemeanor of making a false statement for the same purpose, within the 41st section of that Act. *R.* v. *Mason*, 2 C. & K. 622: *R.* v. *Dewitt*, Id. 905; 4 Cox, 49.

OTHER OFFENCES AKIN TO FORGERY.

The following is, it is believed, a full list of the statutes relating to indictable offences connected with forgery, which have not been repealed by the *Forgery Act*, 1913, and do not find a place in other parts of this work. By 24 & 25 Vict. c. 98, s. 48, *ante*, p. 838; penal servitude for life is made the maximum punishment for forgery under any statute in force on 1st Nov., 1861, which was punishable by death before the passing of 11 G. 4 & 1 W. 4, c. 66: and by 24 & 25 Vict. c. 98, s. 47 (*ante*, p. 838), penal servitude for fourteen years is substituted for the punishments under 5 Eliz. c. 14, where applied to

forgeries under any other statute. As to minimum term of penal servitude and substituted term of imprisonment, *see* 54 & 55 Vict. c. 69, s. 1 (1), (2), *ante*, pp. 238, 239). Where no term of penal servitude is prescribed by the enactment punishing a forgery as felony the term is regulated by 7 & 8 G. 4, c. 28, s. 8 (*ante*, p. 236), as modified by 54 & 55 Vict. s. 69.

Army and Navy.]—By 28 & 29 Vict. c. 124, s. 6, any person, in order to sustain any claim to any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, or other money payable by the Admiralty, or to any effects or money in charge of the Admiralty,—or in order to procure any person to be admitted a pensioner as the widow of an officer in the navy,—doing any of the following things, namely,—offering or uttering to any person in the service of the Crown or of the Admiralty any false affidavit, knowing the same to be false, or making, or subscribing, or offering, or uttering as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false, is guilty of a misdemeanor, punishable with five years' penal servitude. (These offences are also punishable on summary conviction before a justice by imprisonment for any term not exceeding six months, with or without hard labour. *Id.* Sects. 42 and 50 to 53 of the *Forgery Act*, 1861 (24 & 25 Vict. c. 98), are incorporated with 28 & 29 Vict. c. 124, by s. 7 of the last-mentioned Act.)

Hackney carriages.]—Forging, etc., licences or tickets for hackney or stage carriages; misdemeanor. 6 & 7 Vict. c. 86, s. 20.

Frauds against the Transfer of Land Act, 1862.—*25 & 26 Vict. c. 53.*]—This statute contains provisions directed against frauds with reference to the registration of land, treating them as indictable misdemeanors. *See* ss. 105, 106, 107, 138, and 139. No registration has taken place under this Act since 1875. *See* 38 & 39 Vict. c. 87, s. 125.

Frauds against the Land Transfer Acts, 1875 and 1897.—*38 & 39 Vict. c. 87 (Land Transfer Act, 1875), s. 99.*]—If in the course of any proceedings before the registrar or the Court in pursuance of this Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, or attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, will be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award.

Sect. 100.]—If any person fraudulently procures, attempts to fraudulently procure, or is privy to the fraudulent procurement of any entry on the register, or of any erasure from the register or alteration of the register, such person shall be guilty of a misdemeanor, and upon conviction on indictment be liable

to imprisonment for any term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award; and any entry, erasure, or alteration so made by fraud shall be void as between all parties or privies to such fraud.

Sect. 101.]—[*Repealed by* 1 & 2 Geo. 5, c. 6 (*Perjury Act*, 1911).]

Sect. 102.]—No proceeding or conviction for any act declared by this Act to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity.

Sect. 103.]—Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the courts of bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding under this Act. *See ante, pp.* 382 *et seq.*

60 *& 61 Vict. c.* 65 (*Land Transfer Act*, 1897), *s.* 20.]—*Power to make registration of title compulsory on sale. Exercised as to the whole of the administrative county of London.*

Sect. 26.]—This Act . . . shall be construed as one with the *Land Transfer Act*, 1875.

Medical profession.]—Any registrar wilfully making or causing to be made any falsification in any matter relating to the register of medical practitioners, pharmaceutical chemists, dentists, or veterinary surgeons; misdemeanor, imprisonment not exceeding twelve months. 21 & 22 Vict. c. 90, s. 38 (medical practitioners): 15 & 16 Vict. c. 56, s. 15; 31 & 32 Vict. c. 121, s. 14 (chemists): 41 & 42 Vict. c. 33, s. 34 (dentists): 44 & 45 Vict. c. 62, s. 12 (veterinary surgeons). Any person so falsifying any roll of midwives—misdemeanor, imprisonment not exceeding twelve months: 2 Edw. 7, c. 17, s. 12; or the register of nurses—misdemeanor, fine not exceeding one hundred pounds. 9 & 10 Geo. 5, c. 94, s. 8 (2).

Mercantile marine.]—Forging or fraudulently altering, or assisting in forging or fraudulently altering, or procuring to be forged or fraudulently altered, any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage, or any certificate of mortgage or sale, or entry or indorsement under or required by the first part of the *Merchant Shipping Act*, 1894, to be made in or on any of the above documents; felony. 57 & 58 Vict. c. 60, s. 66. Forging a certificate of discharge or report of character of any seaman, etc.; misdemeanor. *Id.* s. 130; *see R.* v. *Wilson*, Dears. & B. 558; 27 L. J. (M. C.) 230. Forging, etc., certificate of competency; misdemeanor. *Id.* s. 104. Forging documents to obtain money in seamen's savings bank; penal servitude not more than five years, or imprisonment, with or without hard labour, not exceeding two years. *Id.* s. 154. Forging documents for purpose of obtaining property of deceased seaman; same punishment. *Id.* s. 180. Forging declarations of certificates of survey, or passenger steamer's certificate; misdemeanor. *Id.* s. 282. Forgery in proceedings as to salvage by King's ships; imprisonment not

exceeding two years. *Id.* s. 564. Forgery of seal, stamp, or signature of documents to which *Merchant Shipping Act* applies; felony, penal servitude not exceeding seven years, or imprisonment not exceeding two years, with or without hard labour. *Id.* s. 695 (4). Falsely certifying documents made evidence under the Act; misdemeanor, imprisonment not exceeding eighteen months. Forging, etc., seal of Board of Trade, misdemeanor. *Id.* s. 722. Misdemeanors under this Act, unless otherwise specially provided, are punishable under s. 680.

Plate.]—Transposing or removing or uttering knowing the same to be transposed or removed any mark of a die or other instrument from gold, silver, or base metal ware; having possession of ware having thereupon any mark so transposed or removed knowing the same to have been transposed or removed; cutting and severing marks with intent to affix them on other wares; affixing any mark cut from other wares; fraudulently using genuine dies: felony, penal servitude for not more than fourteen years. 13 Geo. 3, c. 52, s. 14; 7 & 8 Vict. c. 22, s. 2, as amended by the *Forgery Act*, 1913. See also 5 Geo. 4, c. lii., s. 22.

As to public trade.]—Forgery of trade marks is dealt with by 50 & 51 Vict. c. 28. There are very many statutes with respect to forgeries upon particular companies, to which it is unnecessary to refer, inasmuch as it will be found that all such forgeries are punishable under some section or sections of the *Forgery Act*, 1913. Every person who gives or signs any licence, certificate, document or plan granted or required in pursuance of or for the purposes of the *Explosives Act*, 1875, which is to his knowledge false in any material particular, or wilfully makes use of any such forged, counterfeit, or false licence, etc., shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years. 38 & 39 Vict. c. 17, s. 81, as amended by the *Forgery Act*, 1913. The offence may be prosecuted summarily or on indictment. Every person who commits any of the following offences—that is to say, (1) forges or counterfeits any certificate of competency or other certificate granted under the *Coal Mines Act*, 1911, or any Act repealed by that Act, or any official copy of any such certificate; or (2) knowingly utters or uses any such certificate or copy which has been forged or counterfeited or contains any false statement: or (3) for the purpose of obtaining, for himself or any other person, employment as a manager or under-manager, or the grant, renewal, or restoration of any certificate as aforesaid, or a copy thereof, either (*a*) makes or gives any declaration, representation, statement, or evidence which is false in any particular, or (*b*) knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same; or (4) knowingly makes any false statement in any report or entry required under that Act to be recorded in a book kept at the mine—shall be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding two years, with or without hard labour. 1 & 2 Geo. 5, c. 50, s. 28. Every person, whether principal, broker, or agent, who shall wilfully insert in any contract, agreement, or token of sale and purchase made or

entered into for the sale or transfer of any share or shares, or of any stock or other interest, in any joint-stock banking company in the United Kingdom of Great Britain and Ireland, constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, any false entry of the numbers by which such shares, stock, or other interest are distinguished on the registers or books of such banking company, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as registered proprietors thereof in the books of such banking company, shall be guilty of a misdemeanor and punishable accordingly. 30 & 31 Vict. c. 29, s. 1. This enactment does not extend to shares or stock in the Bank of England or the Bank of Ireland. *Id.* s. 3.

Records and judicial documents.]—By 7 & 8 Geo. 4, c. 28, s. 11, it is a felony punishable with seven years' penal servitude for any officer of a court to utter a false certificate of an indictment and conviction for a previous felony or for a person other than such officer to sign such certificate as officer or to utter such certificate with a false or counterfeit signature.

By s. 28 of the *Forgery Act*, 1861 (24 & 25 Vict. c. 98), as amended by the Act of 1913, the clerk of any court or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, uttering any false copy or certificate of any record, knowing the same to be false; or delivering to any person any paper falsely purporting to be any such process or a copy thereof, or to be any judgment, decree or order of any court of law or equity or a copy thereof, knowing the same to be false; or acting or professing to act under any such false process, knowing the same to be false, is guilty of felony punishable with penal servitude for not more than seven years. An affiliation order is "process" within the meaning of this section. *R.* v. *Powner*, 12 Cox, 235, Quain, J. A certificate of letters of ordination is not a record within its meaning. *R.* v. *Etheridge*, 19 Cox, 676; 65 J. P. 761, Kennedy, J.

By the *County Courts Act*, 1888 (51 & 52 Vict. c. 43), s. 180, delivery or causing to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the county court, knowing the same to be false, or acting or professing to act under any false colour or pretence of the process or authority of that court, is a felony. Mere verbal "professing to act" is insufficient; there must be some instrument. *R.* v. *Myott*, 6 Cox, 406. A notice to produce was held not to be process within the corresponding provision in 9 & 10 Vict. c. 95, s. 57 (*rep.*): *R.* v. *Castle*, Dears. & B. 363; 27 L. J. (M. C.) 70.

Stamps, etc.]—Every person who does, or causes or procures to be done, or knowingly aids, abets, or assists in doing any of the acts following, that is to say,—3. Fraudulently prints or makes an impression upon any material from a genuine die; 4. Fraudulently cuts, tears, or in any way removes from any material any stamp, with intent that any use should be made of such stamp or of any part thereof (*see R.* v. *Smith*, 5 C. & P. 107; 1 Mood. 314:

R. v. *Field*, 1 Leach, 383: *R.* v. *Allday*, 8 C. & P. 136); 5. Fraudulently mutilates any stamp, with intent that any use should be made of any part of such stamp; 6. Fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp; 7. Fraudulently erases or otherwise either really or apparently removes from any stamped material any name, sum, date, or other matter or thing whatsoever thereon written, with the intent that any use should be made of the stamp upon such material; 8. Knowingly sells or exposes for sale or utters or uses any stamp which has been fraudulently printed or impressed from a genuine die; [*a person who sells a forged stamp commits an offence against this sub-section notwithstanding that the stamp when sold bears a cancellation mark.* R. *v.* Lowden [1914] 1 K. B. 144; 83 L. J. (K. B.) 114; 23 Cox, 643; 78 J. P. 111; 9 Cr. App. R. 195]; 9. Knowingly, and without lawful excuse (the proof whereof shall lie on the person accused), has in his possession any stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed, shall be guilty of felony; fourteen years' penal servitude. 54 & 55 Vict. c. 38, s. 13, as amended by the *Forgery Act*, 1913. By s. 18, if any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps knowing the same to be forged. The commissioners of inland revenue may, under s. 18 (2), issue search warrants for forged stamps. Sect. 27 defines stamp. Sect. 23 extends the provisions of the above sections as to offences relating to stamps so as to include any label now or hereafter provided by the commissioners of inland revenue for denoting any duty of excise, *e.g.*, the label on chicory and coffee substitutes. Imitation of post-office stamps, envelopes, forms, and marks is prohibited by 8 Edw. 7, c. 48, s. 64. The provisions of law respecting the punishment of offences connected with stamp duties (including the provisions relating to paper and implements used in the manufacture of that paper, and to the punishment of fraud) shall apply in like manner as if any poundage or commission chargeable for a postal order were stamp duty, and as if the paper used for postal orders were paper provided by the commissioners of inland revenue for receiving the impression of a die, and in the Isle of Man and Channel Islands as if those provisions extended to those islands. 8 Edw. 7, c. 48, s. 60. Money orders are treated as orders for the payment of money within the *Forgery Act*, 1861. 8 Edw. 7, c. 48, s. 59 (1), *ante*, pp. 582.

The offence of uttering a forged stamp is complete although at the time of uttering parts of it are concealed. *R.* v. *Collicott*, R. & R. 212; 2 Leach, 1048.

As to the description of the stamp, *see that case*. As to making, knowingly uttering, dealing in, selling, or using for any postal purpose fictitious postage stamps of any British possession or foreign country, *see* 8 Edw. 7, c. 48, s. 65, *and Dickens* v. *Gill* [1896] 2 Q. B. 310; 65 L. J. (M. C.) 187.

Statutes and executive documents.]—Printing any copy of any private Act or of the journals of either House of Parliament, which copy shall falsely purport to have been printed by the printers to the Crown or by the printers to either House of Parliament, or by any or either of them, or tendering in evidence any such copy knowing that the same was not printed by the persons by whom it purports to have been printed. 8 & 9 Vict. c. 113, s. 4; felony, seven years' penal servitude.

Printing any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or to be printed under the authority of the legislature of any British colony or possession, or tendering in evidence any copy of any proclamation, order, or regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. 31 & 32 Vict. c. 37, s. 4 (1); felony, five years' penal servitude.

Printing any copy of any Act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence or authority of his Majesty's stationery office, or tendering in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. 45 & 46 Vict. c. 9, s. 3; felony, seven years' penal servitude.

Printing any copy or pretended copy of any colonial Act, ordinance, statute, order, regulation, or instrument, which falsely purports to have been printed by the Government printer of a British possession, or tendering in evidence any such copy which falsely purports to have been so printed knowing that it was not so printed. 7 Edw. 7, c. 16, s. 1 (2); misdemeanor, imprisonment for not more than twelve months with or without hard labour.

See also ante, p. 849, as to offences in connexion with the printing of stamps.

Telegrams.]—" Every person who forges or wilfully and without due authority alters a telegram or utters a telegram, knowing the same to be forged, or wilfully and without due authority altered, or who transmits by telegraph as a telegram, or utters as a telegram, any message or communication which he knows to be not a telegram, shall, whether he had or had not an intent to defraud, be guilty of a misdemeanor, and shall be liable, on summary conviction, to a fine not exceeding ten pounds, and, on conviction on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months. . . . For the purposes of this section the expression ' telegram ' means a written or printed message or communication sent to or delivered at a post office, or the office of a telegraph company, for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph. The expression ' telegraph company ' means any company, corporation, or persons carrying on the business of sending

telegrams for the public, under whatever authority or in whatever manner such company, corporation, or persons may act or be constituted. The expression ' telegraph ' has the same meaning as in the *Telegraph Act*, 1869, and the Acts amending the same." 47 & 48 Vict. c. 76, s. 11, *and see* 8 Edw. 7, c. 48, s. 89, *ante*, p. 585. On a prosecution under this section it is necessary to prove an intent to deceive but not an intent to defraud. *R.* v. *Horner*, 74 J. P. 216. Obtaining money by means of forged telegrams can also be dealt with under 3 & 4 G. 5, c. 27, s. 7 (*ante*, p. 824). *R.* v. *Riley* [1896] 1 Q. B. 309; 65 L. J. (M. C.) 74; 18 Cox, 285: *and see Ex parte Wickham*, 10 T. L. R. 266.

Forgery of a telegram now also comes within s. 4 of the *Forgery Act*, 1913 (*ante*, p. 820), under which the punishment is imprisonment not exceeding two years.

Trade unions.]—With intent to mislead or defraud, giving to any member of a trade union registered under 34 & 35 Vict. c. 31 (*Trade Union Act*, 1871), or to any person intending or applying to become a member of such trade union, a copy of any rules, or of any alterations or amendments of the same, other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union, or with the intent aforesaid, giving a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under the above-mentioned Act which is not so registered; misdemeanor. 34 & 35 Vict. c. 31, s. 18.

FALSE PERSONATION

Common Law.

At common law false personation was indictable only as a cheat, and was punishable as a misdemeanor. 3 Chit. Cr. L. 1080.

It is a common law misdemeanor to personate a juryman, and it is not necessary to prove that the personator had any specific intention to deceive other than that which is involved in his going into the jury box and taking the oath in the name of another. *R.* v. *Clark*, 82 J. P. 295 (Avory, J.).

PERSONATING SEAMEN, SOLDIERS, ETC.

Statutes.

32 *G.* 3, *c.* 56.—*Personating master to give a servant's character.*]—*Summary conviction.*

28 *&* 29 *Vict. c.* 124 (*Admiralty Powers, etc., Act*, 1865), *s.* 8.—*Personating seamen, etc.*]—If any person in order to receive any pay, wages, allotment, prize money, bounty money, grant or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the Navy, payable or supposed to be payable by the Admiralty, or any other money so payable, or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding five years . . . or on summary conviction before a justice, sheriff, or magistrate, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

Sect. 9.—*Saving for punishment under other Acts, etc.*]—Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law. (*Cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160).

7 *G.* 4, *c.* 16 (*Chelsea, etc., Hospitals Act*, 1826), *s.* 38.—*Personating soldiers, etc.*]—If any person shall willingly and knowingly personate or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any pension, wages, pay, grant, or other allowance of money, prize money, or relief, due or payable, or supposed to be due or payable, for or on account of any service done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid in his Majesty's army or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant or other allowance of money, prize money, or relief due or payable, or supposed to be due or payable, for or on account of any services done, or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid . . . every such person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be *transported* for life, or for such term of years as the Court shall adjudge. [*The punishment is now penal servitude for life or not less than three years, or imprisonment for not more*

than two years, with or without hard labour. 20 & 21 Vict. c. 3; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2, *ante*, pp. 238, 239.]

Sect. 35.—*Description of property in indictment.*]—*Rep. by* 5 & 6 G. 5, c. 90—see ante, p. 46.

2 & 3 *W.* 4, *c.* 53 (*Army Prize Money Act*, 1832), *s.* 49.—*Personating soldiers, etc.*]—If any person shall knowingly and willingly personate or falsely assume the name or character, or procure any other person to personate or falsely assume the name or character, of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize money, grant, bounty money, share or other allowance of money, due or payable, or supposed to be due or payable, for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served or be supposed to have served in his Majesty's army, or in any other military service, or shall personate or falsely assume, or act, aid or assist in personating or falsely assuming the name or character, or procure any other person to personate or falsely assume the name or character, of the executor or administrator, wife, widow, next of kin, relation or creditor of any such officer, non-commissioned officer, soldier, or other person, as aforesaid, in order to receive or to enable any other person to receive any prize money, grant, bounty money, share, or other allowance of money, due or payable, or supposed to be due or payable, for or on account of any service performed, or supposed to have been performed, by any such officer, non-commissioned officer, soldier, or other person, as aforesaid . . . all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years as the Court before whom such person or persons shall be convicted shall adjudge. [*See* 44 & 45 Vict. c. 58, s. 142, *infra. The punishment is now the same as under* 7 G. 4, c. 16, s. 38, ante, p. 853.]

37 & 38 *Vict. c.* 36. (*False Personation Act*, 1874).]—See post, p. 858.

44 & 45 *Vict. c.* 58 (*Army Act*), *s.* 142.—*Personating soldier, etc.*—(2.) Any person who falsely represents himself to any military, naval, or civil authority to belong to, or be a particular man of, the regular reserve or auxiliary forces shall be deemed to be guilty of personation. (3.) Any person who is guilty of an offence under the *False Personation Act*, 1874 (*post*, p. 858), in relation to any military pay, reward, pension, or allowance, or to any sum payable in respect of military service, or to any money or property in the possession of the military authorities, or is guilty of personation under this section, shall be liable on summary conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding 25*l.* (4.) Provided that nothing in this section shall prevent any person from being proceeded against and punished under any other enactment or at common law in respect of any offence, so that he be not punished twice for the same offence. (*Cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160.)

8 & 9 *Geo.* 5, *c.* 55 (*School Teachers* (*Superannuation*) *Act*, 1918), *s.* 11.—*False representation and fraud* (*including personation*) *to obtain superannuation allowance or gratuity.*]—See ante, p. 692.

11 & 12 *Geo.* 5, *c.* 31 (*Police Pensions Act*, 1921), *s.* 16.—*Obtaining police pension, etc., by fraud* (*including personation*).]—See ante, p. 692.

Indictment for personating a Seaman. (28 & 29 *Vict. c.* 124, *s.* 8, *ante*, p. 853.)

STATEMENT OF OFFENCE.

Personating a seaman, contrary to section 8 of the Admiralty Powers Act, 1865.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, falsely and deceitfully personated C. D., a person entitled, or supposed to be entitled, to receive pay, payable, or supposed to be payable, by the Admiralty to the said C. D., in order that he, the said A. B., should receive the said pay.

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 28 & 29 Vict. c. 124, s. 8; 54 & 55 Vict. c. 69, s. 1 (*ante*, pp. 238, 239).

Evidence.

Prove that C. D. was a person entitled to receive pay from the Admiralty. *See R.* v. *Brown*, 2 East, P. C. 1007: *R.* v. *Tannet*, R. & R. 351. Prove that the defendant personated or assumed the name and character of C. D. The offence will be complete, though the personated seaman be dead; *R.* v. *Martin*, R. & R. 324; and even though the wages have been paid. *R.* v. *Cramp*, *Id.* 327. So, upon an indictment on s. 38 of the *Chelsea, etc., Hospitals Act*, 1826 (7 G. 4, c. 16), for forging the name of a person to a letter of attorney for the receipt of a pension "supposed to be due" to such person; it was held that the defendant was rightly convicted, although it appeared that no such pension was actually existing. *R.* v. *Pringle*, 2 Mood. C. C. 127; 9 C. P. 408. It is no defence to an inducement under 2 & 3 W. 4, c. 53, s. 49 (*ante*, p. 854), for personating a soldier to prove that the prisoner was authorized by the soldier to personate him; *R.* v. *Lake*, 11 Cox, 333; or that the prisoner had bought from the soldier personated the prize money to which the latter was entitled. *Id.*

PERSONATING OWNERS OF STOCK.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 3.—*Personating owners of stock transferable at the bank or of shares in companies.*]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*For indictment*, see post, p. 857.]

33 & 34 *Vict. c.* 58 (*Forgery Act*, 1870), *s.* 4.—*Personation of owners of stock.*]—If any person falsely and deceitfully personates any owner of any share or interest of or in any such stock as aforesaid [i.e., *any stock as defined in the* National Debt Act, 1870, 33 & 34 Vict. c. 71], or of any such stock certificate or coupon as aforesaid [i.e., *any stock certificate or coupon issued in pursuance of Part V. of the* National Debt Act, 1870, *or of any former Act*], and thereby obtains or endeavours to obtain any such stock certificate or coupon, or receives or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner,—he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

26 & 27 *Vict. c.* 73 (*India Stock Certificate Act*, 1863), *s.* 14.—*Personation of owners of India stock.*]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in India stock, or of any India stock, certificate, or coupon, issued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such India stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

38 & 39 *Vict. c.* 83 (*Local Loans Act*, 1875), *s.* 32.]—For the purposes of the *Forgery Act*, 1861 (24 & 25 Vict. c. 98), debenture stock under this Act shall be deemed to be capital stock of a body corporate.

40 & 41 *Vict. c.* 59 (*Colonial Stock Act*, 1877), *s.* 21.]—For the purposes of the *Forgery Act*, 1861 (24 & 25 Vict. c. 98), colonial stock to which this Act

applies shall be deemed to be capital stock of a body corporate. . . . The *Forgery Act*, 1870, shall apply to a stock certificate and a coupon issued in pursuance of this Act, and to colonial stock to which this Act applies, in like manner as if the same were a stock certificate, coupon or stock mentioned in that Act.

8 *Edw.* 7, *c.* 69 (*Companies Consolidation Act*, 1908), *s.* 38 (1).—*Personation of owners of shares.*]—(ii.) If any person falsely and deceitfully personates any owner of any share or interest in any company or of any share warrant or coupon, issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest, or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner, he shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years.

Indictment for Personation under 24 *&* 25 *Vict. c.* 98, *s.* 3.

STATEMENT OF OFFENCE.

Personating owner of stock, contrary to section 3 of the Forgery Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, falsely and deceitfully personated C. D., the owner of [*state the stock in ordinary language*], which was transferable at the Bank of England, and thereby transferred or endeavoured to transfer the interest in the said stock belonging to the said C. D. [*or received or endeavoured to receive the sum of* 100*l. due to the said* C. D. *as if* A. B. *were the true and lawful owner of the said stock*].

Felony: penal servitude for life or not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 98, s. 3; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 237, 238). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 98, s. 51 (ante, p. 840).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

PERSONATION TO OBTAIN PROPERTY.

Statute.

37 & 38 *Vict. c.* 36 (*False Personation Act*, 1874), s. 1.—*Personation in order to obtain property to be felony.*]—If any person shall falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and upon conviction shall be liable . . . to be kept in penal servitude for life. . . .

Sect. 2.—*Saving.*]—Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law. (*Cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160.)

Sect. 3.—*Offences against this Act not to be tried at general or quarter sessions.*]—No offence against this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace. (*See ante*, p. 106.)

54 & 55 *Vict. c.* 69, *s.* 1.—*Minimum term of penal servitude and term of imprisonment.*]—Ante, pp. 237, 238.

PERSONATING BAIL, ETC.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 34.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognizance or bail, or any cognovit actionem, or judgment, or any deed, or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . .

52 & 53 *Vict. c.* 10 (*Commissioners of Oaths Act*, 1889), *s.* 1, *sub-s.* 2.]—A commissioner of oaths may by virtue of his commission in England or elsewhere take any bail or recognizance of bail in or for the purpose of any civil proceeding in the Supreme Court, including all proceedings on the revenue side of the King's Bench Division.

Indictment.

STATEMENT OF OFFENCE.

Acknowledging bail, contrary to section 34 of the Forgery Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, without lawful authority or excuse acknowledged a recognizance in the name of C. D.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 98, s. 34; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 98, s. 51 (ante, p. 840).

NOTE.—Bail is not now taken in civil actions except under the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), s. 6; R. S. C. 1883, O. 69; or by bail bond in admiralty causes. Bail is still required on a *capias* in revenue causes. *See* Revenue Rules of 22nd June, 1860; Stat. Rules and Orders Revised (ed. 1904), vol. 12, tit. Supreme Court E., pp. 587 *et seq.*; Robertson, Civil Proceedings by the Crown. As to bail before justices of the peace and in the High Court in criminal cases, *see ante*, pp. 89, 93 *et seq.*, and Short & Mellor, Cr. Pr. (2nd ed.) 280 *et seq.* Bail on the Crown side of the K. B. D. is justified before the judge in chambers, or, if he so orders, before the Master of the Crown Office; *see ib.* p. 287. "Acknowledgments" of deeds by married women are now rare, owing to the changes in the capacity of married women effected by the *Married Women's Property Acts*. *See Re Harkness and Allsopp* [1898] 2 Ch. 358; 65 L. J. (Ch.) 726: *Re Brooke and Fremlin* [1898] 1 Ch. 647; 67 L. J. (Ch.) 272.

Evidence.

Prove the document and that the signature is that of the defendant. Proof of lawful authority or excuse lies upon him. 24 & 25 Vict. c. 98, s. 34 (*supra*),

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PERSONATION OF VOTERS.

35 & 36 *Vict. c.* 33.—*Ballot Act*, 1872, *s.* 24.]—See post, tit. Corrupt, etc., Practices at Parliamentary Elections; Corrupt, etc., Practices at Municipal Elections.

CHAPTER II.

OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

SECT. 1.

HOMICIDE.

MURDER AND MANSLAUGHTER.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 1.—*Punishment of murder.*]—Whosoever shall be convicted of murder shall suffer death as a felon. [*This section re-enacts* 9 G. 4, c. 31, s. 3.]

Sect. 2.—*Sentence for murder.*]—Upon every conviction for murder the Court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon. (*As to the change in the law effected by this section*, see ante, p. 235.)

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 103.—*Persons under sixteen not to be sentenced to death.*]—Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the Court shall sentence the child or young person to be detained during his Majesty's pleasure,

and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct, and whilst so detained shall be deemed to be in legal custody. [*Child is a person under fourteen, and young person is a person of fourteen and under sixteen.* See ante, p. 248.]

31 & 32 *Vict. c.* 24 (*Capital Punishment Amendment Act*, 1868), *s.* 2.—*Judgment of death for murder to be executed within prison walls.*]—Judgment of death, to be executed on any prisoner sentenced after the passing of this Act on any indictment or inquisition for murder, shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution.

Sect. 3.—*Provision for presence of sheriff and certain prison officials and others at execution.*

24 & 25 *Vict. c.* 100, *s.* 3.—*Burial of offender executed.*]—The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the Court shall so direct. [*This section was framed from* 2 & 3 W. 4, c. 75, s. 16, *and* 4 & 5 W. 4, c. 26, s. 2.]

31 & 32 *Vict. c.* 24, *s.* 6.—*Burial of offender executed.*]—The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him: provided that if one of his Majesty's principal secretaries of state is satisfied, on the representation of the visiting justices of a prison, that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly.

Sect. 7.—*Power of Secretary of State to make regulations.*]—See Regulations of June 5, 1902. Statutory Rules and Orders Revised (ed. 1904), vol. 10, tit. Prison E., p. 65.

Sect. 15.—*Saving clause as to legality of execution.*]—The omission to comply with any provision of this Act shall not make the execution of judgment of death illegal in any case where such execution would otherwise have been legal.

Sect. 16.—*General saving.*]—Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if this Act had not passed.

44 & 45 *Vict. c.* 64 (*Central Criminal Court* (*Prisons*) *Act*, 1881), *s.* 2 . . . (5).]—Where judgment of death is passed at the Central Criminal Court upon a person convicted of any offence, the judgment may be carried into execution in any prison in the Central Criminal Court district, or in the county, if any, where the offence was committed, or is supposed to have been committed, which the justice or judge of the said Court passing sentence, or any other justice or judge of the Court subsequently may order, and if no order is made, then in the prison in which the convict is for the time being confined; and such sheriff as is ordered by any justice or judge of the said Court, or, if no order is made, the sheriff of

the county in which the offence was committed or is supposed to have been committed, or if the offence was committed or is supposed to have been committed on the high seas, or if the county in which the offence was committed does not clearly appear, the sheriff of Middlesex shall be charged with the execution of the judgment; and the sheriff charged with the execution of the judgment shall for that purpose have the same jurisdiction and powers and be subject to the same duties in the prison in which the judgment is to be carried into execution, although such prison is not situate within his county, as he has by law with respect to the common gaol of his county, or would have had if the *Prison Act*, 1865 (28 & 29 Vict. c. 126), and the *Prison Act*, 1877 (40 & 41 Vict. c. 21), had not been passed.

The coroner whose duty it is to hold an inquest on the bodies of persons dying in any prison shall hold an inquest in accordance with the *Capital Punishment Amendment Act*, 1868 (31 & 32 Vict. c. 24) on the body of any convict executed in that prison. *See also the Central Criminal Court Act*, 1837 (7 W. 4 & 1 Vict. c. 77). [*The provisions of the* Central Criminal Court Act, 1834 (4 & 5 W. 4, c. 36), *and of* 44 & 45 Vict. c. 64, *as to Newgate prison have lapsed with the demolition of that prison.*]

50 & 51 *Vict. c.* 55 (*Sheriffs Act*, 1887), *s.* 13.]—Where judgment of death has been passed upon a convict at any court of assize or any sessions of oyer and terminer or gaol delivery held for any county or riding or division or other part of a county, the sheriff of such county shall be charged with the execution of such judgment, and may carry such judgment into execution in any prison which is the common gaol of his county or in which the convict was confined for the purpose of safe custody prior to his removal to the place where such court was held, and shall, for the purpose of such execution, have the same jurisdiction and powers over and in the prison in which the judgment is to be carried into execution, whether such prison is or is not situate within his county, and over the officers of such prison, as he has by law over and in the common gaol of his county and the officers thereof, or would have had if the *Prison Act*, 1865 (28 & 29 Vict. c. 126), and the *Prison Act*, 1877 (40 & 41 Vict. c. 21), had not been passed, and shall be subject to the same responsibility and duties as if the said Acts had not been passed. [*For special provision as to sheriff of Cheshire, see* 30 & 31 Vict. c. 36, s. 4.]

(2.) This section shall be in addition to, and not in derogation of, any power authorized to be exercised by order in council under the *Winter Assizes Act*, 1876 (39 & 40 Vict. c. 57), and the *Spring Assizes Act*, 1879 (42 & 43 Vict. c. 1), or either of them, and of the provisions of the *Central Criminal Court (Prisons) Act*, 1881 (*ante*, p. 861).

24 & 25 *Vict. c.* 100, *s.* 5.—*Punishment of manslaughter.*]—Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the Court, to be kept in penal servitude for life, . . . or to pay such fine as the Court shall award, in addition to or without any such other discretionary punishment as aforesaid. [*And see s.* 71, *post*, p. 865. *This section re-enacts* 9 G. 4, c. 31, s. 9.]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 12 (4).—*Power to convict of cruelty on indictment for manslaughter of person under sixteen by person over sixteen.*] —Post, p. 980.

Sects. 27-32.—*Procedure and evidence in case of charge of manslaughter of person under sixteen.*]—Vide post, pp. 987-990.

Sects. 102, 104.—*Punishment of persons under the age of sixteen years.*]—*Vide ante*, pp. 248, 249.

24 & 25 *Vict. c.* 100, *s.* 7.—*Homicide not felonious.*]—No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. [*This section re-enacts* 9 G. 4, c. 31, s. 10. *As to former law*, see Fost. 188 : 1 Hawk. c. 29 : 1 Bl. Com. 188 : 52 H. 3, c. 25 : 6 Edw. 1, c. 9.]

Sect. 8.—*Petit treason to be treated as murder.*]—Every offence which before the commencement of the Act of the ninth year of King George the Fourth, chapter thirty-one [*i.e.*, 1 July, 1828], would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried and punished as principals and accessories in murder. [*This section re-enacts* 9 G. 4, c. 31, s. 2. *As to petit treason*, see 1 Hawk. c. 32; 3 Chit. Cr. L. 742.]

Sect. 9.—*Murder or manslaughter abroad.—Venue.*]—Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the King's dominions, or without, *and whether the person killed were a subject of his Majesty or not, every offence committed by any subject of his Majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place;* provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act. [*This section is framed on* 9 G. 4, c. 31, s. 7, *with the additions in italics. As to its effect*, see Greaves, Crim. Law. Cons. Acts (2nd ed.), p. 42, and ante, p. 30. *In R.* v. *Helsham*, 4 C. & P. 394, *on an indictment under* 9 G. 4, c. 31, s. 1 (rep.), *of which this is a re-enactment, it was held that the accused must be described as a British subject;* sed quære. *See R.* v. *De Mattos*, 7 C. & P. 458 : *R.* v. *Jameson* [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218; 1 Russ. Cr. (7th ed.) 29, 30.]

Sect. 10.—*Death within the realm of a person feloniously stricken outside the realm.—Venue.*]—Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of

England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place. [*This section re-enacts* 9 G. 4, c. 31, s. 8; see ante, p. 31.

25 & 26 *Vict. c.* 65.—*Jurisdiction in Homicides Act*, 1862.]—*Provisions for trial of persons subject to military law, for the murder or manslaughter of any person subject to military law, before the Central Criminal Court, where the offence has been committed in England or Wales, but out of the jurisdiction of that court.* (See ante, p. 40.)

24 & 25 *Vict. c.* 100, *s.* 66.—*Persons loitering at night and suspected of any felony against this Act, may be apprehended.*]—Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit *any felony in this Act* mentioned, and shall take such person *as soon as reasonably may be* before a justice of the peace, to be dealt with according to law. [*This section re-enacts* 9 & 10 Vict. c. 25, ss. 13, 14, *with the additions italicized.*]

Sect. 67.—*Accessories, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender. [*This section re-enacts* 9 G. 4, c. 31, s. 31; see post, *tit. Accessories, etc.*]

Sect. 68.—*Offences committed within Admiralty jurisdiction.—Venue.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have

been committed "on the high seas"; provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces. (*See ante*, pp. 31-36.)

Sect. 70.—*Whipping.*— . . .]—Whenever whipping may be awarded for any offence under this Act, the Court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence. (*See ante*, p. 244.)

Sect. 71.—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour;

And in case of any *felony* punishable under this Act otherwise than with death, the Court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; provided that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year. (*See ante*, p. 246).

Sect. 73.—*Prosecution by parish officers—costs.*]—*See ante*, p. 287.

Indictment for Murder.

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B., is charged with the following offence:—

STATEMENT OF OFFENCE.

Murder.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, murdered J. S.

[*Upon this indictment, if the evidence so warrants, the jury may acquit of murder, and return a verdict of manslaughter*, R. *v.* Greenwood, 7 Cox, 404: but see R. *v.* Maloney, 9 Cox, 6, and R. *v.* French, 14 Cox, 328: *cases where the judge directed the jury that there was no evidence on which they could find manslaughter*, and see post, p. 885. *The jury may also convict of attempt to murder*, R. *v.* White [1910] 2 K. B. 124: 79 L. J. (K. B.) 854: 22 Cox, 325: 26 T. L. R. 466, see post, pp. 908, 917.

On an indictment for murder of a newly-born child, the jury may convict of an attempt to conceal the birth thereof, post, p. 919.

On an indictment of two for the murder of the same person, separate trials may be ordered. R. *v.* Jackson, 7 Cox, 357 : *approved in* R. *v.* Taylor [1903] 37 Ir. L. T. R. 28.

Counts for other offences should not be included in an indictment for murder R. *v.* Jones, 87 L. J. (K. B.) 448; 13 Cr. App. R. 86.

Felony: death if the offender is sixteen or over. 24 & 25 Vict. c. 100, s. 1; 8 Edw. 7, c. 67, s. 102, ante, p. 860.—*The sentence of death must be pronounced, and cannot now be recorded* (24 & 25 Vict. c. 100, s. 2, and vide ante, p. 235). *The time and place of execution appear not to be part of the sentence,* R *v.* Doyle, 1 Leach, 67; *and are fixed by the sheriff* (50 & 51 Vict. c. 55, s. 13). *As to the mode of executing the sentence,* see 24 & 25 Vict. c. 100, s. 3; 31 & 32 Vict. c. 24, ss. 2, 6 (ante, p. 861). *The authority to the sheriff for the execution is the judgment of the Court, without any warrant or copy of the calendar.* R. *v.* Antrobus, 4 L. J. (N. S.) K. B. 91; 2 A. & E. 788, 798; 4 N. & M. 565. *The question who is the proper sheriff to execute the sentence depends in the Central Criminal Court District on* 44 & 45 Vict. c. 64, s. 2 (ante, p. 861), *and elsewhere on* 50 & 51 Vict. c. 55, s. 13 (Id.). *In* R. *v.* Garside, 2 A. & E. 266; 4 L. J. (M. C.) 3, *the sheriff of the city of Chester refused to execute the prisoners, who were removed by habeas corpus into the Court of King's Bench, and executed by the marshal of the Marshalsea, assisted by the sheriff of Surrey.* See now 30 & 31 Vict. c. 36, s. 4.

The offence of murder is not triable at quarter sessions. 5 & 6 Vict. c. 38, s 1 (ante, pp. 106 et seq.).

Indictment for Manslaughter.

Heading as on p. 865.

STATEMENT OF OFFENCE.

Manslaughter.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully killed J. S.

As to the cases in which homicide is manslaughter and not murder, see post, pp. 867 et seq. *A summary conviction for assault under* 24 & 25 Vict. c. 100, s. 42, *is not a bar to a subsequent indictment for manslaughter, upon the death of the man assaulted, consequent upon the same assault.* R. *v.* Morris, L R. 1 C. C. R. 90; 36 L. J. (M. C.) 84 : R. *v.* Dyson [1908] 2 K. B. 454 (C. C. A.); 77 L. J. (K. B.) 813. (And see ante, p. 161.) *On an indictment of a person over sixteen for the manslaughter of a person under sixteen who is in his custody, etc., the jury may convict for an offence against s.* 12 *of the*

Children Act, 1908 (8 Edw. 7, c. 67, s. 12 (4)), post, p. 980. See R. *v.* Chalker 4 Cr. App. R. 2 : R. *v.* Byers, Id. 5.

Felony: punishable in the case of a person of sixteen or over with penal servitude for life or for not less than three years, or imprisonment for not more than two years with or without hard labour, or with fine, in addition to or without such other punishment.—24 & 25 Vict. c. 100, s. 5; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865). *In the case of an offender under sixteen the punishment is regulated by* 8 Edw. 7, c. 67, s. 104 (ante, p. 249).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106.)

Evidence for the Prosecution.

The evidence on indictments of murder and manslaughter is the same except on the question of "malice aforethought" (*post*, p. 874). It is said that in manslaughter the prosecution must prove all the circumstances under which the homicide took place, and that in murder it is sufficient to prove the homicide. But in practice this distinction is not now made.

J. S.]—As to the description of persons in an indictment, *see* the *Indictments Act*, 1915, r. 7, set out, *ante*, p. 49. The person killed must be in the King's peace. This includes even persons under sentence of death. *See Commonwealth* v. *Bowen*, 13 Mass. 91.

If the deceased were an alien enemy, and killed in the actual heat and exercise of war, this is matter of justification, as the alien is not in the King's peace, which may be proved on the part of the defendant. *See* 1 Hale, 433; 3 Co. Inst. 50.

But killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder. 1 Hale, 433. The same rule applies where an alien enemy is charged with killing a British subject. *R.* v. *Depardo*, R. & R. 134; 1 Taunt. 26. And it is no matter either of excuse or justification, that the deceased was an outlaw, or one attainted of præmunire. 1 Hale, 433; *and see Commonwealth* v. *Bowen*, *supra*.

Malice.]—Under the *Indictments Act*, 1915, *ante*, p. 44, it is now unnecessary to allege malice in the indictment, but the Act does not "prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged." The law presumes every homicide to be murder until the contrary appears. On charges of murder a distinction is drawn by Coke (3 Inst. 51) and Hale (1 P. C. 451) between "express malice," or "malice in fact," and "implied malice," or "malice in law." *See* 1 Russ. Cr. (7th ed.) 655. For a criticism of this distinction, *see post*, p. 838, and Steph. Dig. Cr. Law (6th ed.), p. 407; *and see* 3 Steph. Hist. Cr. Law, p. 18. "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity are to

be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appeareth; " Foster, Cr. L. 255. *Cf. R.* v. *Noon*, 6 Cox, 137, Cresswell, J. Therefore the prosecutor is not bound to prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable or excusable, or that at most it amounted to manslaughter. *Id. R.* v. *Greenacre*, 8 C. & P. 35. Thus upon an indictment for manslaughter by negligent driving, on proof being given of the killing, it was held to lie on the accused to show that he had driven with proper skill and care. *R.* v. *Cavendish*, Ir. Rep. 8 C. L. 178. (*See post*, pp. 892 *et seq.*) But it is said to be proper to call as witnesses for the prosecution all persons present when the killing took place to give all available accounts of the circumstances of the killing. *R.* v. *Holden*, 8 C. & P. 606; *and see ante*, p. 485.

In cases of express malice, homicide is usually committed in secret, and it is rarely practicable to substantiate it by direct and positive testimony; in most cases, therefore, the guilt of the defendant can be established upon circumstantial evidence merely. Upon this subject it is only necessary to refer to what has already been said upon the doctrine of presumptions (*ante*, p. 396), repeating here merely the caution laid down by Hale, never to convict a man of murder or manslaughter on circumstantial evidence alone, unless the body has been found. 2 Hale, 290; 11 St. Tr. 464 n. This caution need not be followed where very strong circumstantial evidence of death can be given. (*a*) *See R.* v. *Hindmarsh*, 2 Leach, 569 : *R.* v. *Perry*, 14 St. Tr. 1312 : *and see* 3 Chit. Cr. Law, 738; 1 Russ. Cr. (7th ed.) 822, 823 : *R.* v. *Hopkins*, 8 C. & P. 591 : *R.* v. *Cheverton*, 2 F. & F. 833, Erle, J. : *R.* v. *Burton*, Dears. 282 : *R.* v. *Clewes*, 4 C. & P. 221 : *R.* v. *Kersey*, 21 Cox, 690.

The circumstantial evidence necessary to establish murder or manslaughter ought to lead the jury to " such certainty as they would act on in a matter of great consequence." *R.* v. *Franz*, 2 F. & F. 580, Blackburn, J. *See also R.* v. *Hodge*, 2 Lew. 227 : *R.* v. *Gardner*, 1 F. & F. 669, Bramwell, B. (*b*).

In cases of implied malice (*see post*, p. 874), the homicide is usually committed in the presence of others, who may prove it; if not, it must be proved by circumstantial evidence.

It must also be shown that the deceased died of the wound or other injury given him by the defendant, within a year and day after he received it : for if he died after that time, the law would presume that his death had proceeded

(*a*) In *Upington* v. *Solomon* [1879] 9 Buchanan, Cape Supreme Court Reports, 240, at p. 276, Sir H. de Villiers, C.J., said: " I never understood the law as to the *corpus delicti* to go so far as to hold that where witnesses swear that they saw the person shot by means of a gun, and where they saw the deceased actually dying, a jury may be called upon to say that there is no proof of death whatsoever. I have always understood this rule as to *corpus delicti* to apply to those cases in which death is relied upon from the fact of the disappearance of the deceased." *See also R.* v. *Kenniff* [1903] Queensland St. Rep. 17. *And see R.* v. *King*, 9 Canada Cr. Cas. 436.

(*b*) As to what constitutes "reasonable doubt," see the judgments of the High Court of Australia in *Brown* v. *R.* [1913] 17 C. L. R. 570, at pp. 584-6, 594-6.

from some other cause. 1 Hawk. c. 31, s. 9; 1 East, P. C. 344; *R.* v. *Dyson* [1908] 2 K. B. 454; 77 L. J. (K. B.) 813. In *R.* v. *McIntyre*, 2 Cox, 379, Coleridge, J., where a blow was given which in the opinion of the surgeon rendered a restorative necessary, and the injured person being unable to swallow was choked in administering the restorative, it was held that the death was caused by the blow. If a man is suffering from a disease, which in all likelihood would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this is such a killing as constitutes murder (1 Hale, 427), or at the least manslaughter. *R.* v. *Murton*, 3 F. & F. 492, Byles, J. Upon a trial for manslaughter, it appeared that the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner, but Parke, J., in summing up, said, "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as if the prisoner was so unfortunate as to accelerate her death, he must answer for it." *R.* v. *Martin*, 5 C. & P. 128, *approved in* R. *v.* Dyson, *supra*: R. *v.* Hayward [1908] 21 Cox, 692; *and see* R. *v.* Wall, 28 St. Tr. 51, 145, Macdonald, C. B.; 1 Russ. Cr. (7th ed.) 690.

If a man is wounded, and the wound turns to a gangrene or fever for want of proper applications, or from neglect, or leads to septic pneumonia or meningitis, and the man dies of the gangrene, fever, etc.: *see R.* v. *Flynn*, 16 W. R. 319 (C. C. R. Ir.); *Brintons, Ltd.* v. *Turvey* [1905] A. C. 230, 235: 73 L. J. (K. B.) 158; *R.* v. *Dyson* [1908] 2 K. B. 454; 77 L. J. (K. B.) 813; or if it becomes fatal from the refusal of the party to undergo a surgical operation (*R.* v. *Holland*, 2 M. & Rob. 351); or if death results from an operation rendered advisable by the act of the accused (*R.* v. *Davis*, 15 Cox, 174, Mathew, J.); this is homicide, and murder or not, according to the circumstances under which the wound is given. 1 Hale, 428. But if the man's death was caused by improper applications to the wound, and not by the wound itself, it would be otherwise. *Id.* Murder may be committed without any stroke or wound; *e.g.*, by neglect or ill-treatment. *R.* v. *Huggins*, 17 St. Tr. 309, 374; 2 Ld. Raym. 1574; *and see post*, pp. 870, 871.

Evidence for the Defendant.

The defendant has to prove, either that the murder was not committed by him, or that the offence actually committed does not amount to murder. This defence may be made out by the examination in chief of the witnesses for the prosecution; but if not, it may be proved from their cross-examination, or by witnesses called for the defence.

We have seen (*ante*, p. 867) that the prosecutor is not bound to prove that the homicide was committed from malice prepense. If he proves the homicide, the law presumes the malice; but the defendant may rebut the presumption, by proving that the homicide was *justifiable*, or *excusable* (*see* 24 & 25 Vict. c. 100, s. 7, *ante*, p. 863), or that at most it amounted to *manslaughter* only, and not to *murder*.

Justifiable homicide is of three kinds:—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of

justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime: as for instance, if a man attempts to murder or rob another, and is killed in the attempt, the slayer shall be acquitted and discharged. *See Bracton de Coronâ*, ff. 120 *b*, 121; 1 Hale, 487, 488; 1 Hawk. c. 28; 24 & 25 Vict. c. 100, s. 7, (*ante*, p. 863).

Excusable homicide is of two kinds:—1. Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as, for instance, where a man is working with a hatchet, and the head by accident flies off, and kills a person standing by. This is called homicide *per infortunium*, or by misadventure: *see Stanley* v. *Powell* [1891] 1 Q. B. 86; 62 L. J. (Q. B.) 52; Fost. 264. 2. Where a man kills another upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling; which is termed homicide *se defendendo*. *See* 24 & 25 Vict. c. 100, s. 7, *and note* (*ante*, p. 863).

Definitions of Murder and Manslaughter.

Murder is thus defined or described by Lord Coke (3 Inst. 47): "Where a person of sound memory and discretion—unlawfully killeth—any reasonable creature in being—and under the King's peace (*ante*, p. 867)—with malice afterthought, either express or implied" (*post*, p. 874).

Manslaughter is the unlawful and felonious killing of another without any malice either express or implied. *R.* v. *Taylor*, 2 Lew. 215; *and see* Steph. Dig. Cr. L. (6th ed.) 409. It is of two kinds:—(*a*) Involuntary manslaughter; where a man doing an *unlawful act* not amounting to felony, by accident kills another; or where a man, by *culpable neglect of a duty* imposed upon him, is the cause of the death of another. And it may be stated, generally, that that which constitutes murder, if done by design and of malice prepense in the eye of the law, constitutes manslaughter when arising from culpable negligence. *See R.* v. *Hughes*, Dears. & B. 248; 26 L. J. (M. C.) 202. (*b*) Voluntary manslaughter; where upon a sudden quarrel, two persons fight, and one of them kills the other; or where a man greatly provokes another, by some personal violence, etc., and the other immediately kills him.

1. *Murder* and *manslaughter* can be committed only by a person of sound memory and discretion. They cannot be committed by an idiot, lunatic, or infant, unless, indeed, he show a consciousness of doing wrong, and a discretion or discernment between good and evil. 4 Bl. Com. 195; 1 Hawk. c. 1. (*See ante*, pp. 10 *et seq.*) On the trial of a child of thirteen years of age for murder by poisoning, Pollock, C.B., in drawing the distinction between murder and manslaughter, laid it down that no one could commit murder unless he was conscious that the act done was one which would be likely to cause death. *R.* v. *Vamplew*, 3 F. & F. 520. But if any person procures a madman, etc., to murder another, the procurer is guilty of the murder; 1 Hawk. c. 31, s. 7; even though not present at the time it was committed. (*See post*, Part IV.) It

is no defence on behalf of a foreigner, charged in England with an offence committed here, that he did not know he was doing wrong, the act not being an offence in his own country. *R.* v. *Esop*, 7 C. & P. 456.

2. The killing must be unlawful and not excusable or justifiable. It may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. 4 Bl. Com. 193; 1 Hale, 431; 1 Hawk. c. 31, s. 4. Taking away a man's life by perjury is not, in law, murder; *see R.* v. *Macdaniel*, Fost. 131; 19 St. Tr. 745; 1 Leach, 44; 1 East, P. C. 333; *and see* 4 Bl. Com. 196 n.; although *in foro conscientiæ* it is as much so as killing with a sword. If a man, however, does any other act, of which the probable consequence may be and eventually is death, such killing may be murder, although no stroke were struck by himself; as was the case of the gaoler, who caused the death of a prisoner by imprisoning him in unwholesome air; *R.* v. *Huggins*, 17 St. Tr. 309, 376; 2 Ld. Raym. 1574, 1585; *cf. R.* v. *Acton*, 17 St. Tr. 462, 511, 526, 546: *R.* v. *Bambridge*, *Id.* 383, 397; of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died; 1 Hawk. c. 31, s. 5; of the harlot, who laid her child in an orchard, where a kite struck it and killed it, Crompton, 24; of the mother, who hid her child in a pig-stye, where it was devoured; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance. 1 Hale, 431, 433; 4 Bl. Com. 197; 1 Hawk. c. 31, s. 6. So, for a mother to throw her child on to a heap of ashes, and leave it there in the open air exposed to the cold, whereby it dies, may amount to murder. *R.* v. *Waters*, 1 Den. 356; 2 C. & K. 864; 18 L. J. (M. C.) 53; 3 Cox, 300; *and see R.* v. *Pinhorn*, 1 Cox, 70: *R.* v. *Hogan*, 2 Den. 277; 20 L. J. (M. C.) 219: *R.* v. *Cooper*, 1 Den. 459; 2 C. & K. 876; 18 L. J. (M. C.) 168: *R.* v. *Phillpot*, Dears. 179; 22 L. J. (M. C.) 113; *R.* v. *Walters*, C. & Mar. 164. So, where an apprentice died from harsh treatment, and want of care upon the part of his master, whilst he was labouring under disease, it was held to be murder in the master. *R.* v. *Squire*, 1 Russ. Cr. (7th ed.) 668. But where the death of an apprentice results rather from incautious neglect by the master, however culpable, than from actual malice or wilful intention to injure, or obstinate and reckless persistence in doing an act necessarily attended with danger, a verdict of manslaughter may properly be returned. *R.* v. *Self*, 1 East, P. C. 226; 1 Leach, 137; *and see R.* v. *Crumpton*, C. & Mar. 597. But if the charge is of a *nonfeasance*, as in neglecting to supply food, the prosecutor must not only show a duty in the defendant to supply food, but also that the apprentice (or child) was of tender years, and unable to provide for himself; *R.* v. *Friend*, R. & R. 20: *R.* v. *Marriott*, 8 C. & P. 425; and that the defendant was in the actual possession of means to provide for him; *R.* v. *Saunders*, 7 C. & P. 277: *R.* v. *Edwards*, 8 C. & P. 611: *R.* v. *Chandler*, Dears. 453; 24 L. J. (M. C.) 109; 6 Cox, 519; the mere fact that he might have obtained such means by application to the guardians of the poor or to a relieving officer was not sufficient. *R.* v. *Chandler*, *supra*: *R.* v. *Rugg*, 12 Cox, 16. In *R.* v. *Jones*, 19 Cox, 678, on a charge of manslaughter by neglect, it was held that presumptive evidence of means had been given by proof that the prisoner at a date prior to the offence had such means as, having regard to the circum-

stances, would presumably not be exhausted by the date of the neglect. Under s. 12 (1) of the *Children Act*, 1908 (8 Edw. 7, c. 67), *post*, p. 980, neglect to provide for the maintenance, etc., of a child is not excused by inability to do so without resort to the poor law. *See R.* v. *Mabbett*, 5 Cox, 339. If the death of a destitute person arises from neglect by a relieving officer to provide medical assistance, the officer may be convicted of manslaughter. *R.* v. *Curtis*, 15 Cox, 746, Hawkins, J. It has been held, on the authority of *R.* v. *Squire*, and *R.* v. *Saunders*, *supra*, that where a husband and wife are living together, the legal obligation to maintain is on the husband, and that the wife cannot be convicted of manslaughter by neglect to supply proper food or medical aid. *R.* v. *Forsyth*, Chester Summer Assizes, July 25, 1899, Kennedy, J.: *see R.* v. *Senior* [1899] 1 Q. B. 283; 68 L. J. (Q. B.) 175; 17 Cox, 602. If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be *wicked* negligence, that is, negligence so great as to satisfy a jury that the prisoner had a wicked mind in the sense that he was reckless and careless whether the creature died or not. *R.* v. *Nicholls*, 13 Cox, 75, Brett, J. If a person has the custody of another who is helpless, and leaves that other with insufficient food or medical attendance, and so causes his death, he is criminally responsible. *R.* v. *Marriott*, 8 C. & P. 425: *R.* v. *Instan* [1893] 1 Q. B. 450 (C. C. R.); 62 L. J. (M. C.) 86; 17 Cox, 602; *R.* v. *Senior* [1899] 1 Q. B. 283, 292; 68 L. J. (Q. B.) 175. But if a person, having the exercise of freewill, chooses to stay in a place where he receives insufficient food, and his health is injured, and death supervenes, the master is not criminally responsible. *R.* v. *Smith*, L. & C. 607, 625; 10 Cox, 82; 34 L. J. (M. C.) 153, 162, Erle, C.J.; *and see post*, p. 973. As to the facts necessary to support an indictment for killing or misusing a lunatic, *see R.* v. *Pelham*, 8 Q. B. 959; 15 L. J. (M. C.) 105. As to the obligation of a husband to supply necessaries for a wife living apart from him, and his liability if she dies for want of them, *see R.* v. *Plummer*, 1 C. & K. 600.

So, if one, under a well-grounded apprehension of personal violence, does an act which causes his death, as, for instance, jumps out of a window, or into a river, he who threatened is answerable for the consequences. *R.* v. *Evans*, 1 Russ. Cr. (7th ed.) 666: *R.* v. *Hickman*, 5 C. & P. 151: *R.* v. *Pitts*, C. & Mar. 284; *and see R.* v. *Curley*, 2 Cr. App. R. 109. *R.* v. *Evans* was followed in a colonial case (*R.* v. *Grimes* [1894] 15 N. S. W. Rep. (Law), 209), where a Chinaman had been robbed and brutally assaulted in a train, and thinking that his life was in danger, jumped from the train and was thereby killed. The principle of the English cases was approved in *R.* v. *Martin*, 8 Q. B. D. 54; 14 Cox, 633; and *R.* v. *Halliday*, 61 L. T. 701; 38 W. R. 256 (C. C. R.), in cases of assault. It seems immaterial whether the fear arises from actual violence or threat of it. *R.* v. *Evans*, *supra*. *See also R.* v. *Beech*, 23 Cox, 181; 76 J. P. 287; and *R.* v. *Coleman*, 84 J. P. 112. And frightening a person to death by an assault or otherwise seems to be

manslaughter at the least. *R.* v. *Towers*, 12 Cox, 530, Denman, J.: *R.* v. *Hayward*, 21 Cox, 692.

3. The person killed must be "a reasonable creature in being and under the King's peace." Therefore, to kill a child in its mother's womb is no murder; but if the child is born alive, and dies by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. 3 Co. Inst. 50: 1 Hawk. c. 31. s. 16: 1 Hale, 433. Thus, if a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world; the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder. *R.* v. *West*, 2 C. & K. 784; 2 Cox, 500. As to abortion, *see post*, p. 922. But a woman cannot be convicted even of manslaughter merely on evidence that, knowing she was near the time of delivery, she wilfully abstained from taking the necessary precautions to preserve the life of her child after its birth, in consequence of which it died. *R.* v. *Knights*, 2 F. & F. 46, Cockburn, C.J., and Williams, J.; *and see R.* v. *Middleship*, 5 Cox, 275, Erle, J. *R.* v. *Knights* was followed in *R.* v. *Izod*, 20 Cox, 690, by Channell, J., who held that to warrant the conviction of a woman for the manslaughter of her newly-born child, she must be proved to have been guilty of negligence towards the child after it was completely born. In the latter case the correctness of the ruling of Brett, J., in *R.* v. *Handley*, 13 Cox, 79, as cited on p. 752 of the 22nd edition of this work (p. 785 of the 23rd edition), was doubted by Channell, J., and it is pointed out in the note to the report of *R.* v. *Izod* that the exact words of the direction of Brett, J., to the jury in *R.* v. *Handley* (13 Cox, at p. 81) were: "But supposing that the prisoner had not made up her mind that the child should die, yet had determined that none but herself should be present at its birth, without intending final concealment, but only for the purpose of hiding her shame for a time, and had to that intent delivered herself, she would, in the eye of the law, have invested herself with a responsibility from the moment of birth, viz., that of the care and charge of a helpless creature: and if, after having assumed such care and charge, she allowed the child subsequently to die from her wicked negligence, that would make her guilty of manslaughter. . . . If they (the jury) were satisfied that the mother, having made up her mind to be alone at the birth, caused its death by wicked negligence after its birth, they would return a verdict of guilty." In *R.* v. *Pritchard* [1901] 17 T. L. R. 310: 36 L. J. Newsp. 119. Wright, J., stated that the third proposition in *R.* v. *Handley* was not a full statement of the law. So, if a mortal wound is given to a child whilst in the act of being born, for instance, upon the head as soon as the head appears and before the child has breathed, it may be murder, if the child is afterwards born alive and dies thereof. *R.* v. *Senior*, 1 Mood. 346; 1 Lew. 183 n. But it must be proved that the entire child has actually been born into the world in a living state; *R.* v. *Poulton*, 5 C. & P. 329; and the fact of its having breathed is not

conclusive proof thereof. *R.* v. *Sellis*, 7 C. & P. 850 : *R.* v. *Crutchley*, 7 C. & P. 814. There must be an independent circulation in the child before it can be accounted alive. *R.* v. *Enoch*, 5 C. & P. 539 : *R.* v. *Wright*, 9 C. & P. 754. A child is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother. *R.* v. *Handley*, 13 Cox, 79, Brett, J. But the fact of the child's being still connected with the mother by the umbilical cord will not prevent the killing from being murder. *R.* v. *Crutchley supra: R.* v. *Reeves*, 9 C. & P. 25 : *R.* v. *Trilloe*, 2 Mood. 260; C. & Mar. 650 : *R.* v. *Pritchard* [1901] 17 T. L. R. 310, Wright, J.

As to killing alien enemies, *see ante*, p. 867.

4. **Malice aforethought. Express malice.**]—To amount to murder, the killing must be committed with malice aforethought. " Aforethought " does not necessarily imply premeditation, but it implies intention which must necessarily precede the act intended. *R.* v. *Doherty*, 16 Cox, 306, Stephen, J. (See *as to proof of malice and intent*, ante, pp. 867 *et seq.*) According to the early writers, malice is express or implied. *Express malice* is when one, with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 Hale, 451. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to mankind in general; as going deliberately with a horse used to strike, or discharging a gun amongst a multitude of people. 1 Hawk. c. 29, s. 12 : c. 31, s. 8. So, if a man resolves to kill the next person he meets, and does kill him, it is murder, although he knew him not, for it is universal malice, 4 Bl. Com. 200. And it may be necessary here to observe, that no provocation, however great, will extenuate or justify homicide, where there is evidence of express malice. *See R.* v. *Mason*, Fost. 132. So, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. thereupon killed him; this was held to be murder. 1 Hawk. c. 31, s. 24. For criticism of these definitions, *see* Steph. Dig. Cr. Law (6th ed.) 407. As to the effect of proof that the defendant was drunk when he committed the homicide on the question of his malice *see R.* v. *Doherty*, 16 Cox, 306, Stephen, J. : *Director of Public Prosecutions* v. *Beard* [1920] A. C. 479, *ante*, p. 19. As to the effect of proving that the prisoner is insane, *see ante*, pp. 13-19; 217 (*a*).

Implied malice.]—In many cases, where no malice is expressed or openly indicated, the law will imply it. Thus, where a man wilfully poisons another—in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 Hale, 455. So if a man kills another suddenly, without any, or without a considerable provocation; if he kills an officer of justice in the legal execution of his duty; or if, intending to commit another *felony* (*see*

(*a*) The defence of uncontrollable impulse is not accepted in England. See *ante*, p. 17; and see *R.* v. *Creighton*, 14 Canada Cr. Cas. 349; Kenny, Cr. L. (10th ed.) 56.

post, p. 888), he undesignedly kills a man; in all these cases the law implies malice, and the offence is murder. But in all but the last of these cases there seems to be an intent to do bodily harm. Steph. Dig. Cr. Law (6th ed.) 409; 1 Russ. Cr. (7th ed.) 656.

If two persons mutually agree to commit suicide together, and accordingly take poison or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. *R.* v. *Dyson*, R. & R. 523: *R.* v. *Alison*, 8 C. & P. 418, Patteson, J.; *R.* v. *Jessop*, 16 Cox, 204, Field, J.: *R.* v. *Stormonth*, 61 J. P. 729, Ridley, J.: *R.* v. *Abbott*, 67, J. P. 151, Kennedy, J. In like manner, where A. procures a drug, and gives it to B. with her assent, in order that she may take it to procure abortion, and B., believing herself (though not being) pregnant, takes it for that purpose, and dies from its effects, this, it seems, is *murder* in A. In such a case, however, a conviction for *manslaughter* (for which offence only the grand jury had found a bill) was upheld. *R.* v. *Gaylor*, Dears. & B. 288; 7 Cox, 253. So where an indictment charged W. with murdering herself with arsenic, and the prisoner with inciting her to commit the said murder, and it appeared on the trial that W., who was pregnant, was persuaded by the prisoner to take arsenic for the purpose of procuring miscarriage, that she received the arsenic from him and took it, in his absence, with intent to procure miscarriage, it was held that the prisoner was an accessory before the fact to the self-murder of W. *R.* v. *Russell*, 1 Mood. 356. But where the prisoner, at the request of a pregnant woman who wished to procure abortion, obtained for her a poisonous drug, knowing the purpose for which she wanted it, but being unwilling that she should use it, but she did use it and died in consequence, it was held that the prisoner was not guilty of murder. *R.* v. *Fretwell*, L. & C. 161; 31 L. J. (M. C.) 145; 9 Cox, 152: *but see* 24 & 25 Vict. c. 100, ss. 58, 59 (*post*, p. 922); and as to unintentional homicide in consequence of criminal acts, *see post*, pp. 888 *et seq.*

As there are very many nice distinctions, however, upon this subject of malice prepense, express and implied, it may be desirable to consider the subject more fully under the following heads.

Killing by poison, or by surgical instruments.]—Of all the forms of death by which human nature may be overcome, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 Co. Inst. 48. And therefore, in all cases where a man wilfully administers poison to another, 1 Hale, 455, or lays poison for him, and either he or another takes it, and is killed by it (*Id.* 431), the law implies malice, although no particular enmity can be proved. 4 Bl. Com. 34. This rule applies where a man is plied with excessive quantities of drink with intent to kill him, or knowledge that it is likely to kill him. *R.* v. *Packard*, C. & Mar. 236. And if a person knowingly gives poison to A. to administer as a medicine to B., but A. neglecting to do so, it is accidentally given to B. by a child or other unconscious agent, this is in law a poisoning by the party himself, as much as if he had administered it with his own hands. *R.* v. *Michael*, 2 Mood. 120; 9 C. & P. 356. If, however, it were administered by mistake

and without gross negligence, or if it were laid with an innocent intention in the place from which the deceased took it, it is merely homicide by misadventure. So, if a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this also is neither murder nor manslaughter, but misadventure. Mirror, Book IV., c. 16 (Seld. Soc. Publ. Vol. VII., pp. 135-139). But the medical man must, at his peril, use proper skill and caution in administering a poisonous drug. *R.* v. *Macleod*, 12 Cox, 534. A distinction, indeed, has been taken between the administering of a potion, etc., by a regular physician, etc., and one who is not so, and the death in the latter case is said to be manslaughter at the least; *Britton*, c. 5; 4 Co. Inst. 251; but Hale very much questions the soundness of this distinction. 1 Hale, 430; *and see* 1 Russ. Cr. (7th ed.) 681 *et seq.* And it seems that if a person, whether he be a regular practitioner or not, honestly and *bonâ fide* performs an operation, or uses a dangerous instrument, which causes the patient's death, he is not guilty of manslaughter; *R.* v. *Van Butchell*, 3 C. & P. 629; but if he is guilty of criminal misconduct, arising from gross ignorance or criminal inattention, and not from mere error of judgment, then he will be guilty of manslaughter. *R.* v. *Williamson*, 3 C. & P. 635: *R.* v. *Spiller*, 5 C. & P. 333: *R.* v. *Chamberlain*, 10 Cox, 486: *R.* v. *Simpson*, 1 Lew, 172: *R.* v. *Ferguson*, *Id.* 181; *R.* v. *Spilling*, 2 M. & Rob. 107: *R.* v. *Macleod*, 12 Cox, 534. *R.* v. *Spiller*, *supra*, was approved in *R.* v. *Burdee*, 25 Cox 598; 12 Cr. App. R. 153, where an ignorant man had accelerated death by his treatment of the deceased. In *R.* v. *Long*, 4 C. & P. 398, 423, where the defendant, not a regular physician, killed a woman by an application, and the jury found that he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. *See R.* v. *Senior*, 1 Mood. 346: 1 Lew. 183 n.: *R.* v. *Ellis*, 2 C. & K. 470. In *R.* v. *Webb*, 1 M. & Rob. 405; 2 Lew. 196: Lord Lyndhurst laid down the following rule: "In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without licence. In either case, if a party having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in *R.* v. *Williamson* (*supra*). I shall leave it to the jury to say, first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence." *See also R.* v. *Crick*, 1 F. & F. 519: *R.* v. *Crook*, *Id.* 521: *R.* v. *Bull*, 2 F. & F. 201: *R.* v. *Markuss*, 4 F. & F. 356: *R.* v. *Chamberlain*, 10 Cox, 486: *R.* v. *Macleod*, 12 Cox, 534. Upon such a charge, evidence cannot be gone into, on either side, of former cases treated by the prisoner,

but experts can be asked their opinion as to the state of the accused, as shown by his treatment of the case in question. *R.* v. *Whitehead*, 3 C. & K. 202, Maule, J. Evidence is admissible of the effect on other patients of a drug said to have been used with fatal effects. *R.* v. *Long*, 4 C. & P. 398. The prisoner, a druggist, was in the habit of using bottles of a peculiar make and colour in which to send out poisons from his shop. The deceased sent to the prisoner for aconite, to be used as a liniment, and henbane to be taken internally. He sent two bottles, one for the aconite and one for the henbane, both being bottles of the ordinary kind, but the bottle for the henbane being labelled "henbane," and also with the words "30 drops at a time." The prisoner, by mistake, put the aconite in the henbane bottle, deceased took a dose of it, and was poisoned. On the trial of the prisoner for manslaughter, Erle, C.J., put it to the jury that they ought not to call upon the prisoner for his defence, and that they could not convict, unless there was such a degree of complete negligence as the law meant by the word felonious. The prisoner had been put out of his ordinary course by the deceased's sending his own bottles, and although there was no doubt negligence in not observing the label on the bottle, yet the deceased had for years been sending to the shop for aconite, and only rarely for henbane. *R.* v. *Noakes*, 4 F. & F. 920. And on an indictment for manslaughter against a medical man by administering poison by mistake for some other drug, it is not sufficient for the prosecution merely to show that the prisoner, who dispensed his own drugs, supplied a mixture which contained a large quantity of poison; they are bound also to show that this happened through the gross negligence of the prisoner. *R.* v. *Spencer*, 10 Cox, 525, Willes, J.

Killing by fighting.]—Killing by fighting may be either murder, or manslaughter, or homicide *se defendendo*, according to circumstances.

1. **Quarrels.**]—If two persons quarrel and afterwards fight, and one of them kills the other—in such a case, if there intervened, between the quarrel and the fight, a sufficient cooling time for passion to subside and reason to interpose, the killing will be murder: Fost. 296; 1 Hale, 453: *Lord Morley's case*, 6 St. Tr. 769, 771: *R.* v. *Oneby*, 17 St. Tr. 29, 48; 2 Str. 766; but if such time had not intervened—if the parties, in their passion, fought immediately, or even if, immediately upon the quarrel, they went out and fought in a field (for this is deemed a continued act of passion), the killing in such a case would be manslaughter only, 3 Co. Inst. 51; 1 Hale, 453; 1 Hawk. c. 31. s. 29; Fost. 295, whether the party killing struck the first blow or not. Fost. 295: 1 Hale, 456; *and see R.* v. *Snow*, 1 Leach, 151; 1 East. P. C. 244: *Re Barronet*, 1 E. & B. 1; *and* 1 East. P. C. 241, 270; *Lord Byron's case*, 19 St. Tr. 1177: *R.* v. *Walters*, 12 St. Tr. 113.

Therefore, if two persons deliberately fight a duel, and one of them is killed, the other and his second are guilty of murder, 1 Hale, 443, 453: 1 Hawk. c. 31. s. 31: 1 East, P. C. 225-241; *see R.* v. *Oneby*, *supra*, no matter how grievous the provocation, or by which party it was given. *R.* v. *Rice*, 3 East. 581: *R.* v. *Kinnear*, 2 B. & Ald. 462. The second of the deceased also is

deemed guilty of murder, as being present aiding and abetting; although Lord Hale seems to think the rule of law, as to principals in the second degree, too far strained in that case. 1 Hale, 443, 453. *See R. v. Murphy*, 6 C. & P. 103: *R.* v. *Young*, 8 C. & P. 644; *R.* v. *Cuddy*, 1 C. & K. 210.

Chance medley.]—Killing in chance medley was by 22 H. 8, c. 14 and 24 H. 8, c. 5, distinguished from murder by *malice prepense*. *See* 1 Hawk. c. 31, ss. 28, 29; 4 Bl. Com. 184; *Woodburn's case*, 16 St. Tr. 54, 80. But even in the case of a sudden quarrel, where the parties immediately fight, the case may be attended with such circumstances as will indicate malice on the part of the party killing; and the killing then would be murder, and not merely manslaughter. If, for instance, the party killing began the attack under circumstances of undue advantage,—as if A. and B. quarrel, and A. draws his sword and makes a pass at B., and B. therefore draws his sword and they fight and B. is killed; A. would be guilty of murder; for his making the pass before B. had drawn his sword shows that he sought his blood. Fost. 295. So, where A. and B. quarrelled, and A. threw a bottle at B. and then drew his sword, and B. then threw the bottle back at A. and wounded him, upon which A. immediately stabbed him; this was held to be murder. *R.* v. *Mawgridge*, 17 St. Tr. 57; Kel. (J.) 119. But if the parties at the commencement attack each other upon equal terms, and afterwards, in the course of the fight, one of them in his passion snatches up a deadly weapon and kills the other with it; this would be manslaughter only. *R. v. Snow*, 1 Leach, 151; 1 East, P. C. 244: *R.* v. *Taylor*, 5 Burr. 2793: *R.* v. *Anderson*, 1 Russ. Cr. (7th ed.) 715. But if use of a deadly weapon was intended from the first, the killing is murder. *R.* v. *Kessal*, 1 C. & P. 437: *R.* v. *Anderson*, *supra*. So, also, use of a deadly weapon used after a feigned reconciliation. *R.* v. *Selten*, 11 Cox, 674, Hannen, J. Where a third person interferes to stop a fight or assault, and is killed, the killing is murder, unless the deceased were doing more than was necessary to stop the fight or assault. *R.* v. *Bourne*, 5 C. & P. 120.

The proper direction for the jury in such cases seems to be that given in *R.* v. *Smith*, 8 C. & P. 160, 162, by Bosanquet, J., with the concurrence of Bolland, B., and Coltman, J:—"Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? If he did, it will amount to murder. But if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? If he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his own life? Before a person can avail himself of that defence he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified." Where after mutual blows between the defendant and the deceased the defendant knocked the deceased down, and

after he was upon the ground, stamped upon his stomach and belly with great force, and thereby killed him; this was held to be only manslaughter. *R.* v. *Ayes*, R. & R. 166 : *cf. R.* v. *Rankin*, R. & R. 43 : *R.* v. *Brown*, 1 Leach, 148. But where two men fought, and one overpowered the other, and put a rope round his neck and strangled him, it was held murder. *R.* v. *Shaw*, 6 C. & P. 372 : *and see R.* v. *Thorpe*, 1 Lew. 171.

2. **Unlawful contests.**]—A tilt or tournament, the martial diversion of our ancestors, was nevertheless an unlawful act, unless held under the commandment of the King : *see R.* v. *Coney*, 8 Q. B. D. 534, 549; 51 L. J. (M. C.) 66; and so are boxing and sword-playing, the succeeding amusements of their posterity : *see* 1 East, P. C. 270 : *R.* v. *Perkins*, 4 C. & P. 537 : *R.* v. *Hargrave*, 5 C. & P. 170; *R.* v. *Murphy*, 6 C. & P. 103; therefore, if a knight in the former case, or a gladiator in the latter, is killed, such killing is manslaughter. 4 Bl. Com. 183. And in cases of this kind, however " fair " the fight may have been, all who are present at it and parties to it are equally guilty of manslaughter. *R.* v. *Turner*, 4 F. & F. 339. It is said, however, that if the King commands or permits such diversion, the act being in that case lawful, the killing would be misadventure only. Fost. 259; *contra*, Hale, 473. And a sparring match with gloves fairly conducted is not unlawful, and therefore death caused by an injury received during such a match, does not amount to manslaughter. *R.* v. *Young*, 10 Cox, 371, Bramwell, B. If, however, parties meet, intending to fight till one gives in from exhaustion or injury received, such fighting is unlawful, whether the combatants fight in gloves or not. *R.* v. *Orton*, 14 Cox, 226. So also a sparring match with gloves fairly conducted at its commencement may become unlawful if the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. *R.* v. *Young*, *supra*. All these cases are fully discussed in *R.* v. *Coney*, 8 Q. B. D. 534; 51 L. J. (M. C.) 66. And if, while engaged in a friendly game, as football, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter. And the act, although in accordance with the rules of the game, would be unlawful if the person committing it intended to produce serious injury to another, or if, committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences. *R.* v. *Bradshaw*, 14 Cox 83, Bramwell, L.J. : *R.* v. *Moore*, 14 Times L. R. 229. In the latter case Hawkins, J., refused to allow the rules of the game to be put in evidence, and ruled that the only question for the jury was whether the accused was guilty of illegal violence. *See* 1 Russ. Cr. (7th ed.) 785 *et seq.*

All struggles *in anger*, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. *R.* v. *Canniff*, 9 C. & P. 359.

3. **Self-defence.**]—If two men fight upon a sudden quarrel, and one of them after a while endeavours to avoid any further struggle, and retreats as far as he can, until at length no means of escaping his assailant remain to him, and he then turns round and kills his assailant in order to avoid destruction; this

homicide is excusable, as being committed in self-defence; Fost. 277; and, malice apart, it is little matter, in such a case, which struck the first blow at the beginning of the contest. *Id.*; 1 Hale, 479, 482; *but see* 1 Hawk. c. 29, s. 17; 63 J. P. 769: *R.* v. *Smith*, 8 C. & P. 160. And the same, of course, where one man attacks another, and the latter, without fighting, flies (*see note, post*, p. 886), and then turns round and kills his assailant, as above mentioned. But, in either of these cases, to show that it was homicide, *se defendendo*, it must appear that the party killing had retreated either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him; 1 Hale, 481, 483; for the assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, if there is no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter, is, that here the slayer could not otherwise escape, although he would; in manslaughter he would not escape if he could. "If," said Lindley, J., in *R.* v. *Knock*, 14 Cox, 1, 2, "a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then, supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting—in one sense—to defend myself, and I knock him down, and thereby unintentionally kill him, that killing is accidental." *See R.* v. *Deana*, 73 J. P. 255; 25 T. L. R. 399.

And, as the manner of the defence, so is also the time, to be considered; for if the person assaulted does not fall upon the aggressor until the affray is over, or when he is running away, that is revenge and not defence. 4 Bl. Com. 185. Neither, under the cover of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if A. and B. agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A., this is murder, because of the previous malice and concerted design. 1 Hale, 479.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused, the act of the relation assisting being construed the same as the act of the party himself. 1 Hale, 484; 4 Bl. Com. 182. And where under circumstances that might reasonably have induced the belief that a man was cutting his wife's throat their son shot at and killed his father, it was held that if the son had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable. *R.* v. *Rose*, 15 Cox, 540, Lopes, J.

Lord Bacon (Elem. c. 5; *see also* 1 Hawk. c. 28, s. 26) mentions a case where two persons being shipwrecked got on the same plank, but, finding it not able to save them both, one of them thrust the other from it, and he was drowned, and says that this homicide is excusable through unavoidable necessity, and upon the principle of self-defence. This dictum is, however, unsupported by

authority, and if Lord Bacon meant to lay down the broad proposition that a man may save his own life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not now law. *R.* v. *Dudley*, 14 Q. B. D. 273, 286; 54 L. J. (M. C.) 32; 15 Cox, 624. Therefore a man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes, and has reasonable ground for believing, that it affords the only chance of preserving his own life. *Id.* Bishop (American Criminal Law (8th ed.), vol. 1, s. 348 *a*) suggests that the offence was manslaughter only. On the subject of "choice of evils," *see* Mayne, Indian Criminal Law (ed. 1896), 364; *R.* v. *Stratton*, 21 St. Tr. 1046, 1224; 1 Doug. 239.

If, when two persons are fighting, a third comes up, and takes the part of one of them, and kills the other; this will be manslaughter in the third party; 1 Hawk. c. 31, ss. 35, 36; and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. *Id.* s. 55. If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he interfered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted. 1 East, P. C. 291, 292. If, on the other hand, the third party who thus interferes is killed, it is only manslaughter. *Id.; and see Anon.*, 12 Co. Rep. 87; Kel. (J.) 60.

Killing upon provocation.]—No provocation whatever can render homicide justifiable, or even excusable; but provocation may reduce the offence to manslaughter. If a man kills another suddenly, without any, or, indeed, without a considerable provocation, the law implies malice, and the homicide is murder; *R.* v. *Noon*, 6 Cox, 137: *R.* v. *Welsh*, 11 Cox, 336; but if the provocation were great, and such as must have greatly excited him, the killing is manslaughter only. *R.* v. *Mawgridge*, 17 St. Tr. 57; Kel. (J.) 119, 135; 1 Hale, 466; Fost. 290, 296, 299. The test to be applied is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive of his self-control the particular person charged; *e.g.*, a person afflicted with want of mental balance or defective self-control. *R.* v. *Lesbini* [1914] 3 K. B. 1116; 24 Cox, 516; 11 Cr. App. R. 24. *See also R.* v. *Alexander*, 23 Cox, 604; 9 Cr. App. R. 139. In considering, however, whether the killing upon provocation amounts to murder or manslaughter, the nstrument with which the homicide was effected must also be taken into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter. Where ome provoking words being used by a soldier to a woman, she gave him a ox on the ear, and the soldier immediately gave her a blow with the pommel f his sword on the breast, and then ran after her, and stabbed her in the back, his was at first deemed murder, but it appearing afterwards that the blow given the soldier was with an iron patten, and that it drew a great deal of blood,

the offence was held to be manslaughter only. *R.* v. *Stedman*, Fost. 292. Where two soldiers demanded to be admitted to a public-house to drink, and the landlord refused, because it was eleven o'clock at night; one of them, however, upon the door being afterwards opened to let out company, rushed in, and whilst the landlord was struggling to get him out, the other soldier struck the landlord on the head with a sharp instrument and killed him: this was held to be murder, notwithstanding the struggle with the other soldier; besides, the landlord had a right to put him out of his house. *R.* v. *Willoughby*, 1 East, P. C. 288; 1 Russ. Cr. (7th ed.) 696, 697. So, where a park-keeper, having found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he thereby received: this was held to be murder. *R.* v. *Holloway*, Cro. Car. 131; 1 Hale, 454. So, in all other cases where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, it is murder. 4 Bl. Com. 199; 1 Hawk. c. 31, s. 33; *and see R.* v. *Reason and Tranter*, 16 St. Tr. 1; 1 Str. 499; Fost. 292. An unwarrantable imprisonment of a man's person, however, has been held sufficient provocation to make a killing, even with a sword, manslaughter only. *Protector* v. *Buckner*, Sty. 467: *R.* v. *Withers*, 1 East, P. C. 233. Therefore, where a constable arrested a man without a warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and J. S., who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed J. S.; it was held to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge, because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. *R.* v. *Curvan*, 1 Mood. 132. *See R.* v. *Thompson*, *Id.* 80 (*post*, p. 899). An order by a policeman to move on given to a person playing music in a street, followed by a push to give effect to the remonstrance, is not a provocation excusing use of a dangerous weapon. *R.* v. *Hagan*, 8 C. & P. 167. Where A., to prevent B. from fighting with his brother, laid hold of him and held him down, but struck no blow, upon which B. stabbed A.; it was held, that if A. did nothing more than was necessary to prevent B. from beating his brother, and had died of the stab, the offence of B. would have been murder: but that if A. did more than was necessary to prevent the beating of his brother, it would have been manslaughter only. *R.* v. *Bourne*, 5 C. & P. 120. If a man pulls another's nose, or offers him any other great personal indignity, and the other thereupon immediately kills him, it is manslaughter only. Kel. (J.) 135; 4 Bl. Com. 191. Or if a man takes another in adultery with his wife, and kills him directly upon the spot, this is manslaughter merely. 1 Hale, 486: *R.* v. *Manning*, Sir T. Raym. 212: *R.* v. *Maddy*, 1 Ventr. 158: *R.* v. *Pearson*, 2 Lew. 216: *R.* v. *Kelly*, 2 C. & K. 814. And if a father sees another person in the act of committing an unnatural crime with his son, and instantly kills him, it is manslaughter only: but if, hearing of it, he goes in quest of the party and kills him, it is murder. *R.* v. *Fisher*, 8 C. & P. 182. Where a boy, after fighting with another, ran home bleeding to his father, and the father immediately took a small cudgel, and ran three-quarters of a mile to the place where

the other boy was, and struck him a single blow of the stick, of which blow the boy afterwards died; this was held to be manslaughter only. *Anon.*, 12 Co. Rep. 87; *and see* Fost. 294. Where a man was indicted for the murder of his wife, and evidence was given that she assaulted him, to prove the nature of the assault which the accused had reason to apprehend, evidence was admitted of previous assaults and their character and effect. *R.* v. *Hopkins*, 10 Cox, 229, Byles, J. And where a father, seeing his daughter violently assaulted by her husband, struck the latter a fatal blow in strong resentment, it was held manslaughter. *R.* v. *Harrington*, 10 Cox, 370, Cockburn, C.J. Where a mob threw a pickpocket into a pond for the purpose of ducking him, but he was unfortunately drowned; this was held to be manslaughter. R. v. *Fray*, 1 East, P. C. 236.

Insufficient provocation.]—As a general rule, no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing is effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm is otherwise manifested; *R.* v. *Welsh*, 11 Cox, 336; *and see Lord Morley's case*, 6 St. Tr. 769, 771: *R.* v. *Mawgridge*, 17 St. Tr. 57, 66; Kel. (J.) 119: *R.* v. *Chetwynd*, 18 St. Tr. 289, 312; Steph. Dig. Cr. Law (6th ed.) 185; but if effected with a blow of a fist, or with a stick, or other weapon not likely to kill, it is manslaughter only. Fost. 290. 291; 1 Hale, 456. And if there is a provocation by blows, which are not sufficiently violent in themselves to reduce the killing below the crime of murder, yet if they are accompanied by very aggravating words and gestures, this may make it manslaughter only. *R.* v. *Sherwood*, 1 C. & K. 556: *R.* v. *Smith*, 4 F. & F. 1066. In the case last named the assault was very slight, although of a very offensive nature, spitting in the prisoner's face, but accompanied by words of great provocation. In a similar case the Court of Criminal Appeal said: "Mere words of provocation or abuse could not, but words of provocation coupled with such an act as spitting upon the appellant might (though they need not necessarily) have the effect of reducing the crime from murder to manslaughter." *R.* v. *Mason*, 8 Cr. App. R. 121. And under special circumstances there may be such a provocation by words as will reduce a killing which would otherwise be murder to manslaughter; for instance, if a husband suddenly hearing from his wife that she had committed adultery, he having had no idea of such a thing before, were thereupon to kill his wife, it *might* be manslaughter. *R.* v. *Rothwell*, 12 Cox, 145, Blackburn, J.: *and see R.* v. *Jones*, 72 J. P. 215, Bucknill, J. But this does not apply in the case of persons engaged to be married. *R.* v. *Palmer* [1913] 2 K. B. 29; 82 L. J. (K. B.) 531; 23 Cox, 377; 108 L. T. 814; 77 J. P. 340; 92 T. L. R. 349. Where the prisoner, while under the influence of drink and under an unfounded impression that his wife had committed adultery with his brother, accused his brother of the adultery suspected, and, receiving an answer which he considered evasive, stabbed his brother and killed him, it was held that the circumstances in which the crime was committed did not reduce it from murder to manslaughter. *R.* v. *Birchall*, 109 L. T. 478; 29 T. L. R. 711 (C. C. A.). In this case, *R.* v. *Rothwell* (*supra*) was declared to be an extreme case and one which should not be extended. Where the prisoner, upon finding

the woman with whom he had been cohabiting for some time drunk in a house of ill-fame, killed her, it was held that the circumstances were not comparable to a man finding his wife in the act of committing adultery, and that the crime was not reduced from murder to manslaughter. *R.* v. *Greening* [1913] 3 K. B. 846; 29 T. L. R. 732; 25 Cox, 269. Nor is a statement by a wife that she is about to live with another or to commit adultery sufficient provocation. *R.* v. *Ellor*, 85 J. P. 107; 36 T. L. R. 840. Provocation by one person cannot affect the crime of killing another. *R.* v. *Simpson*, 114 L. T. 238; 31 T. L. R. 560; 11 Cr. App. R. 218.

But in all cases, to reduce homicide upon provocation to manslaughter, it is essential that the battery, wounding, etc., appear to have been inflicted immediately upon the provocation being given; for if there is a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. Fost. 296: *R.* v. *Thomas*, 7 C. & P. 817. The prisoner and the deceased, who were previously on intimate terms, were at a public-house drinking, when a scuffle ensued, and the deceased struck the prisoner in the eye and gave him a black eye; the prisoner called for the police and went away upon the policeman coming up; in about five minutes, however, he returned and stabbed the deceased with a knife which he usually carried about him: Lord Tenterden, C.J., said that it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; and that, if there had been any evidence of an old grudge between the parties, the crime would probably be murder: but he left it to the jury to say, whether in the interval during which the prisoner was absent, there was time for his passion to cool and reason to gain dominion over his mind; if not, they should find him guilty of manslaughter only. *R.* v. *Lynch*, 5 C. & P. 324; *cf.* *R.* v. *Eagle*, 2 F. & F. 827, Erle, C.J. Again, where the prisoner was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about 300 yards, passed through his bedroom to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily, and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two places, saying he had served him right: after this the prisoner ran home, repassed through the rooms to the pantry, and then went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry; Tindal, C.J., told the jury, that the principal question was, whether the wounds were given by the prisoner whilst smarting under a provocation so recent, as showing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only; or whether, after the provocation, there had been time for the blood to cool and reason to resume its sway, before the wound was inflicted, in which case the offence would be murder; the jury found the prisoner guilty of murder. *R.* v. *Hayward*, 6 C. & P. 157. If there is evidence of express

malice, the killing will be murder, however great the provocation. *R.* v. *Mason*, Fost. 132; 1 East, P. C. 239; *and see* Fost. 296; *R.* v. *Kirkham*, 8 C. & P. 115.

Direction of judge.]—Where there is evidence of such provocation as would, if the jury believed it, justify them in finding a verdict of guilty of manslaughter, the judge must leave the question of manslaughter to the jury, even though counsel for the accused has not relied upon that defence or has conducted his defence mainly on lines opposed to provocation. *R.* v. *Hopper* [1915] 2 K. B. 431; 25 Cox, 34; 79 J. P. 335; 31 T. L. R. 360; 11 Cr. App. R. 136; *cf. R.* v. *Gorges*, 85 L. J. (K. B.) 1049; 114 L. T. 97; 25 Cox, 218; 11 Cr. App. R. 259. But where there is no such evidence the judge may direct the jury that they cannot find a verdict of guilty of manslaughter. *R.* v. *Phillis*, 32 T. L. R. 414. *See also R.* v. *Clinton*, 12 Cr. App. R. 215.

Killing by correction.]—The right of parents, schoolmasters, etc., to inflict chastisement on children or apprentices, is recognized at common law. *Halliwell* v. *Counsell*, 38 L. T. (N. S.) 176 : *Cleary* v. *Booth* [1893] 1 Q. B. 465; 62 L. J. (M. C.) 87. The right to chastise servants was also recognized at common law. *See R.* v. *Mawgridge*, 17 St. Tr. 57, Kel. (J.) 133; 33 H. 8, c. 12, ss. 6, 12. And shipmasters are said to be entitled to inflict reasonable corporal punishment at sea on seamen for disobeying orders. *The Agincourt*, 1 Hagg. Adm. 271 : *Lamb* v. *Burnett*, 1 Cr. & J. 291; 1 Russ. Cr. (7th ed.) 767. As to servants who are not apprentices, the right is in desuetude. As to parents, guardians, etc., it is preserved by 8 Edw. 7, c. 67, s. 37 (*post*, p. 990). Where a parent or person *in loco parentis* is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and he happens to occasion his death, it is only misadventure; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at the least, and in some cases (according to the circumstances) murder. 1 Hale, 474 : *R.* v. *Grey*, Kel. (J.) 64. *And see R.* v. *Wall*, 28 St. Tr. 51, 144, 145, Macdonald, C.B. : *R.* v. *Bird*, 5 Cox, 1, 10 : *R.* v. *Drake* [1903] 22 N. Z. L. R. 478, *and see R.* v. *Woods*, 85 J. P. 276. Where a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died, these were held to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of killing. Kel. (J.) 133, 134; Fost. 262; 1 Hawk. c. 29, s. 5. So, in all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. Fost. 262. *See R.* v. *Hopley*, 2 F. & F. 201. Beating a child for theft so severely as to cause death has been held manslaughter. *Anon.*, 1 East, P. C. 261; 1 Russ. Cr. (7th ed.) 769, 770. A mother being angry with one of her children, took up a poker, and on his running to the door of the room, which was open, threw it after him and killed another child who was entering the room at the time; and it was held to be manslaughter, although she did not intend to hit the child she threw the poker at, but merely to frighten him;

because it was an improper mode of correction. *R.* v. *Conner*, 7 C. & P. 438. In *R.* v. *Cheeseman*, 7 C. & P. 455, maltreatment and cruel and excessive correction of a child with fatal results by a person *in loco parentis* was held manslaughter only where the defendant honestly believed the child to be malingering. Where the father of a child two years and a half old beat it with a strap on the lower part of its back and on its thighs on its committing some childish fault, and the death of the child was accelerated by the beating, this was held to be manslaughter. *R.* v. *Griffin*, 11 Cox, 402. For the prisoner it was urged that there was no case to go to the jury, as the father had a right to correct his child; but Martin, B., after consulting Willes, J., ruled that the law as to correction had reference only to a child capable of appreciating correction, and not to an infant two years and a half old, and that although a slight slap might be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable. *Id.* Where a master struck his servant with one of his wife's clogs, because he had not cleaned them, and death unfortunately ensued, it was held to be manslaughter only, because the clog was very unlikely to cause death, and the master consequently could not have the intention of taking away the servant's life by hitting him with it. *R.* v. *Turner*, Comb. 407, 408, *cit.: and see R.* v. *Wiggs*, 1 Leach, 378 n.; 1 Russ. Cr. (7th ed.) 768, where the defendant threw a stick at his sheep-boy for his negligence, and killed him; *R.* v. *Leggett*, 8 C. & P. 191, a case of alleged maltreatment of a seaman by the captain and mate of his ship. As to corporal punishment by order of a court martial, *see R.* v. *Wall*, 28 St. Tr. 51, 145.

Killing in defence of person or property.]—If any person attempts to rob or murder another in or near the highway (*R.* v. *Bull*, 9 C. & P. 22) or in a dwelling-house, or attempts burglariously to break into a dwelling-house in the night-time, and is killed in the attempt, the slayer is entitled to acquittal, for the homicide is justifiable, and the killing is without felony. *See* 24 & 25 Vict. c. 100, s. 7 (*ante*, p. 863), and 1 Hale, 481, 482. The same rule applies where a man is killed in attempting to burn a house; 1 Hale, 488; or where a woman kills a man who attempts to ravish her; Bac. Elem. 34; 1 Hale, 485; 1 Hawk. c. 28, s. 21; or where a man is killed in attempting to break open a house in the daytime, with intent to rob; 1 Hale, 488; or to commit any other forcible and atrocious crime. Bracton, Pl. Cor. 155; Fost. 273; 1 Hale, 484: *R.* v. *Levett*, Cro. Car. 538, *cit.*; Fost. 299: *R.* v. *Cooper*, Cro. Car. 544: *R.* v. *Ford*, Kel. (J.) 51; Fost. 274: *see R.* v. *Symondson*, 60 J. P. 645, Kennedy, J. The killing need not be in self-defence, but may be in defence of another against whose person or property serious felony is threatened. *R.* v. *Rose*, 15 Cox, 540, Lopes, J.: *and see Handcock* v. *Baker*, 2 B. & B. 260. Thus not only the party whose person or property is thus attacked, but his servants or other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 Hale, 483; Fost. 274; *R.* v. *Rose*, *supra*. (*a*) The above rule, however, does not extend to felonies without force,

(*a*) In a colonial case, *R.* v. *Theriault* [1894] 32 New Brunswick, 504, where, on an indictment for murder, there was evidence that the accused acted under a reasonable

such as picking pockets, 1 Hale, 488, nor to misdemeanors of any kind: and even in cases within the rule it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 Hale, 484, otherwise the homicide will be manslaughter at least, if not murder. Where a servant set to watch in his master's garden at night, shot a person whom he saw going into his master's hen-roost, it was held that he was not justified in so doing, unless he had fair ground to believe his own life to be in actual danger. *R.* v. *Scully*, 1 C. & P. 319: *and see R.* v. *Weston*, 14 Cox, 346, Cockburn, C.J., as to use of firearms. A constable found a man wrongfully carrying off wood (a misdemeanor); he did not know that the man had been twice before convicted, which made the offence felony. He fired at him and wounded him. Held that he had no justification. *R.* v. *Dadson*, 2 Den. 35; 3 C. & K. 148; 20 L. J. (M. C.) 57. In cases within the rule, it may be necessary to observe, that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he find himself or his property out of danger. 1 East, P. C. 27; Fost. 273; *and see Aldrich* v. *Wright*, 53 New Hampshire, 398, where the English authorities are collected. But he must not strike blows except in self-defence. *See R.* v. *Knock*, 14 Cox, 1 (*a*): *R.* v. *Deana*, 73 J. P. 255.

What we have now said relates to *felonies* by force. In the case of forcible misdemeanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet, if it kills him, it will be manslaughter. 1 Hale, 485, 486. Where the defendant had kicked a trespasser out of his house and the injuries received caused the death of the trespasser, this was held to be manslaughter. *R.* v. *Wild*, 2 Lew. 214. Or if, instead of beating him, he attacks him with a deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from the trespass. 1 Hale, 473. *See R.* v. *Smith*, 1 Russ. Cr. (7th ed.) 764, where a man was shot while masquerading as a ghost. But in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his house he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary. 1 Hale, 485, 486.

Personal assaults, where the party assaulted kills his adversary, are considered *ante*, pp. 877-881. The right of killing another in self-defence does not extend to cases where a man is killed at sea, and eaten to save his comrades

apprehension of grievous bodily harm to his wife and family, it was held that this belief was a justification for the homicide on the authority of *R.* v. *Bull* (*supra*), and *R.* v. *Smith*, 8 C. & P. 160 (*ante*, p. 880).

(*a*) In *Beard* v. *U. S.* [1894] 158 U. S. 550, 560, it was held that a man assailed *on his own land* without provocation by a person armed with a deadly weapon and apparently seeking his life was not bound to retreat, but might stand his ground: and is not guilty of murder or manslaughter if he kills his adversary by a blow given simply with the object of protecting himself.

In *Alberty* v. *U. S.*, 162 U. S. 499, where the accused had found a man attempting in the night-time to get into his wife's room by a window, it was held that he was right to repel the attempt by force, and was under no obligation to retreat if attacked.

from otherwise inevitable starvation. *R.* v. *Dudley*, 14 Q. B. D. 273; 54 L. J. (M. C.) 32; 15 Cox, 624 (*ante*, p. 880).

Killing without intention whilst doing another act.]—If a person, whilst doing or attempting to do another act, undesignedly kills a man—if the act intended or attempted were a felony, the killing is murder; *R.* v. *Beard*, 14 Cr. App. R. 110; *Director of Public Prosecutions* v. *Beard* [1920] A. C. 479; if unlawful, but not amounting to felony, the killing is manslaughter (*R.* v. *Hodgson*, 1 Leach, 6; S. C. *sub nom. R.* v. *Hubson*, 1 East, P. C. 258): if lawful, homicide by misadventure merely. *R.* v. *Woodburn*, 16 St. Tr. 54, 80. A distinction appears to have been taken at one time between unlawful acts which are *mala in se*, and *mala prohibita*. But it is doubtful whether this distinction is now of any value, and the unlawfulness of the act would now be determined by the law of England, and not by reference to the law of nature, or any moral standard. *See R.* v. *Senior* [1899] 1 Q. B. 283; 68 L. J. (Q. B.) 175: *R.* v. *Instan* [1893] 1 Q. B. 450; 62 L. J. (M. C.) 86. Thus, homicide in consequence of unlawful assembly is manslaughter; *R.* v. *McNaughten*, 14 Cox, 576 (Ir.); as is homicide due to an unlawful act in a game of football; *R.* v. *Bradshaw*, 14 Cox, 83 (*and see ante*, p. 879); or by kicking out a trespasser. *R.* v. *Wild*, 2 Lew. 214: *R.* v. *Bruce*, 2 Cox, 262, Erle, J.; and a person selling unwholesome food is liable for manslaughter of persons dying in consequence of eating it: *R.* v. *Stevenson*, 3 F. & F. 106; *R.* v. *Kempson*, 28 L. J. Newsp. 477 (*and see ante*, p. 2.) If a man shoots at another's poultry, with intent to steal them, and by accident kills a man, it has been said to be murder (*see R.* v. *Woodburn*, 16 St. Tr. 57, 80); if without such intent, it is manslaughter, the act of shooting at the poultry being unlawful and not felonious; Fost. 258; but in *R.* v. *Keate* [1697] Comb. 406, 409, Holt, C.J., says that Coke's dictum on this subject (3 Inst. 56) is "too large. There must be a design of mischief to the person, or to commit a felony or great riot." And considerable doubt was expressed by Stephen, J., whether the rule that if a person whilst committing or attempting to commit a felony undesignedly kills a man—as in the case put above, of a person shooting at poultry with intent to steal them—such killing is murder, is not too broadly stated, and whether it ought not to be limited to cases where a person whilst committing or attempting to commit a felony does an act which is known to be dangerous to life, and likely in itself to cause death —as in the case of a person setting fire to a house with intent to defraud—and thus undesignedly killing a man. *R.* v. *Serné*, 16 Cox, 311; *and cf. R.* v. *Horsey*, 3 F. & F. 287, Bramwell, B. Where the prisoner was charged with the murder of a woman as the result of a felonious operation performed by him upon her (24 & 25 Vict. c. 100, s. 58), Bigham, J., told the jury that if they were of opinion that the deceased died as a result of the prisoner's unlawful operation, he was guilty of murder, but added that if they should be of opinion that the prisoner could not as a reasonable man have expected death to result, they might find a verdict of manslaughter. *R.* v. *Whitmarsh*, 62 J. P. 711; followed by Lawrence, J., in *R.* v. *Bottomley* [1903] Liverpool Assizes, 38 L. J. Newsp. 270; 115 L. T. J. 88. In a similar case Avory, J., directed the jury that if, when the prisoner did the act, he must as a reasonable man have con-

templated that death or grievous bodily harm was likely to result, he was guilty of murder; but that if he could not as a reasonable man have contemplated either of those consequences, he was guilty only of manslaughter. *R.* v. *Lumley*, 22 Cox, 635; 76 J. P. 208. *Cf. R.* v. *Radyalski*, 24 Victoria L. R. 687: *R.* v. *Dowdle*, 26 Victoria L. R. 637. In *R.* v. *Greenwood*, 7 Cox, 404, Wightman, J., told the jury that they might ignore the doctrine of constructive malice and return a verdict of manslaughter in a case where a child had died in consequence of a felony committed on her by the prisoner. And there appears to be considerable divergence of opinion amongst the judges as to the proper direction to the jury in these cases; *see* 33 L. J. Newsp. 546, 615.

If a man deliberately shoots at A., and misses him, but kills B., this is murder. Fost, 261; 1 Hale, 438, 441. Or if he intentionally fires at himself for the purpose of killing himself, but kills another person, it is murder. *R.* v. *Hopwood*, 8 Cr. App. R. 143. So, if he stabs at A., and by accident strikes and kills B., it is murder. *R.* v. *Hunt*, 1 Mood. 93: *and see R.* v. *Latimer*, 17 Q. B. D. 359; 55 L. J. (M. C.) 135. But if he fires at A. in such circumstances as would make the killing of A. manslaughter, and by accident hits and kills B. whom he never intended to hit at all, he is guilty of manslaughter. *R.* v. *Gross*, 23 Cox, 455; 77 J. P. 352. If a man lays poison for A., and B. (against whom he had no malicious intent) takes it, and it kills him, this is likewise murder. 1 Hale, 436; *R.* v. *Saunders*, Plowd. 473: *R.* v. *Gore*, 9 Co. Rep. 81. So, if whilst two men are deliberately fighting, a third goes between them to part them, and is killed by one of them, it is murder, 1 Hale, 441, whether he were killed accidentally or designedly. If a man throws a stone at a horse, and it hits the rider and kills him, it is manslaughter. 1 Hale, 39, 475. If, when engaged in an unlawful or dangerous sport, a man kills another by accident, it is manslaughter; Fost. 259, 260, 261; 1 Hale, 472, 473; 1 Hawk. c. 29, s. 6; if the sport were lawful and not dangerous, it would be homicide by misadventure merely. Fost. 260; *and see* 1 Russ. Cr. (7th ed.) 785, 786. So, if a man, intending to kill a person attempting to commit a forcible and atrocious crime against his person or property (*see ante*, pp. 886, 887), by mistake kills one of his own family, it is homicide by misadventure merely. *See* Cro. Car. 538; Fost. 299. Where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide by misadventure. 1 Hawk. c. 29, s. 2. So, if a man, shooting at game, by accident kills another, it is homicide by misadventure merely, even although the party be unqualified; Fost. 259; for the use of firearms by an unqualified person was merely a prohibited act, and not *malum in se* (*vide supra*).

There are two seeming exceptions, however, to the above rule.

First. If two persons are fighting under such circumstances, that if one were killed it would be manslaughter only in the other; if in such a case an innocent party is unintentionally killed by one of them, it is manslaughter only. Fost. 262: *R.* v. *Brown*, 1 Leach, 148; 1 East, P. C. 231, 245, 274. This perhaps is not strictly an exception: for the act in which the parties are engaged, namely, the fighting, is not in itself felonious, although the result of it may be so. *See ante*, p. 879.

Secondly. Where an act of omission or commission, in itself lawful, is at

the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party whilst doing the act, acted without gross negligence, in that he used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least, the doctrine being well established that act or omission arising from culpable neglect of duty and having a fatal result is manslaughter, and if done by design or of malice prepense would be murder. *R.* v. *Hughes*, Dears. & B. 248; 26 L. J. (M. C.) 202; 7 Cox, 301. Where a dangerous and unlawful act is done, even in sport, if death results it is manslaughter: *e.g.*, where the prisoners in sport had thrown stones down a coal mine, which broke a scaffolding therein and overturned a corf in which the deceased was, and precipitated him to the bottom of the mine. *R.* v. *Fenton*, 1 Lew. 179, Tindal, C.J. If a workman throws stones or rubbish, etc., from a house, and thereby kills a person passing underneath it, it is murder, manslaughter, or homicide by misadventure, according to the degree of precaution taken by him that no person should be injured by them, and to the necessity of such precaution. *R.* v. *Hull*, Kel. (J.) 40. If he did it without previously warning the person beneath, and at a time when it was likely that persons were passing, it would be murder; 3 Co. Inst. 57; if at a time when it was not likely that any persons were passing, it would be manslaughter; Fost. 262; if in a retired place, where no persons were in the habit of passing, or likely to pass, it would be misadventure merely. Fost. 262; 1 Hale, 472, 475. But if he previously gave warning to the persons beneath,—then, if it happened in a country village, where few persons pass, it is misadventure only: Fost. 263; 1 Hale, 472, 475: if in London, or other populous towns, Kel. (J.) 40, at a time when the streets are full, Fost. 263, it would be manslaughter.

Where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability. *See R.* v. *Noakes*, 4 F. & F. 920: *R.* v. *Markuss*, *Id.* 356, Willes, J.: *R.* v. *Finney*, 12 Cox, 625, Lush, J.: *R.* v. *Doherty*, 16 Cox, 306, Stephen, J.: *Hammack* v. *White*, 31 L. J. (C. P.) 131, Willes, J. And it is not sufficient to create criminal liability to show that the act which caused death constituted a tort. *R.* v. *Lowe*, 3 C. & K. 123; 4 Cox, 449, Campbell, C.J.: *R.* v. *Franklin*, 15 Cox, 163, Field, J.: *R.* v. *Doherty*, *supra.*

In all such cases it must appear that the death was the direct and immediate result of the personal neglect or default of the defendant. For instance, where trustees appointed under a local Act for the purpose of repairing roads within a particular district, with a power to contract for executing such repairs, neglected so to contract, and by reason of such neglect one of such roads became out of repair, and a person using it was accidentally killed in consequence of its so being out of repair, it was held that the trustees were not chargeable with manslaughter. *R.* v. *Pocock*, 17 Q. B. 34; 6 Cox, 172. *And see R.* v. *Ledger*, 2 F. & F. 857: *R.* v. *Haines*, 2 C. & K. 368 (*post*, p. 893).

Contributory negligence.]—It is no defence to an indictment for manslaughter, where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death. *R.* v. *Swindall*, 2 C. & K. 230; 2 Cox, 141. In summing up, Pollock, C.B., said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction beween civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view: for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person." *Id.* This ruling was cited by Mellor, J., apparently with approval, in *R.* v. *Dant*, L. & C. 567; 10 Cox, 102; 34 L. J. (M. C.) 119; and Byles, J., so laid down the law to the grand jury in directing them in the case of *R.* v. *Hutchinson*, 9 Cox, 555, where a major-general was indicted for manslaughter of a man who was killed by a shot from a cannon fired by an artilleryman acting under a superior officer, who was practising under general orders from the major-general. *See* 1 Russ. Cr. (7th ed.) 807, *and R.* v. *Longbottom*, 3 Cox, 439: *R.* v. *Walker*, 1 C. & P. 320. In *R.* v. *Birchall*, 4 F. & F. 1087, however, Willes, J., ruled that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing, that until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. But in *R.* v. *Jones*, 11 Cox, 544, the facts of which are set forth *post*, p. 892, Lush, J., ruled that contributory negligence on the part of the deceased was not allowed as an excuse in a criminal case, and upon the case of *R.* v. *Birchall*, *supra*, being cited, stated that that case was quite at variance with what he had always heard laid down. And in *R.* v. *Kew*, 12 Cox, 355, Byles, J., held that contributory negligence on the part of the deceased was no answer to a charge of manslaughter. But it is submitted that evidence which in a civil case might be given to prove contributory negligence, might in a criminal case be relevant to show that the death of the deceased was not due to the culpable negligence of the accused. *See R.* v. *Bunney* [1894] 6 Queensland L. J. 80, 82, Griffith, C.J.

Animals.]—If a man owns an animal which is used to do mischief, and he, knowing it, allows it to go abroad, and it kills a man, this is manslaughter in the owner. Thus, if a commoner turns out on a common, across which there are public footpaths, a horse which he knows to be vicious, and the horse kicks and kills a child, the commoner is liable to be convicted of manslaughter, even though the child has strayed on to the common a little off the path. *R.* v. *Dant* (*supra*). But if he had purposely turned it loose, though merely to

frighten people, and to make what is called sport, it is as much murder as if he had incited a bear or a dog to worry them. 1 Hale, 431; 4 Bl. Com. 197.

If a man, breaking an unruly or vicious horse, rides him amongst a crowd, and the horse kicks a man and kills him, this is murder, if the rider brought the horse into the crowd with intent to do mischief, or even to divert himself by frightening the crowd; 1 Hawk. c. 31, s. 68; manslaughter, if done heedlessly and incautiously only. 1 East, P. C. 231. *See* 1 Hale, 475; 1 Hawk. c. 29, s. 12.

Carriages.]—If a man, driving a cart or other carriage, drives it over another man and kills him—if he saw or had timely notice of the probable mischief, and yet drove on, it would be murder; 1 Hale, 476; Fost. 263; if he purposely drove it furiously in amongst a crowd, it would probably be murder; and *semble*, if in a street where persons were much in the habit of passing, it would be manslaughter; *Anon.*, 1 East, P. C. 263, *per* Holt, C.J.; if in a place where people did not usually pass, misadventure merely, provided he took that care which persons in similar situations are accustomed to do. *Id.* The degree of care to be used in driving depends on the number of persons or vehicles in the street; *R.* v. *Murray*, 5 Cox, 509 (Ir.); and if reasonable care and diligence is used, no criminal liability is incurred. Upon an indictment for manslaughter, it appeared that the deceased was walking in the road drunk, when the prisoner, who was in a cart driving two horses without reins, and going at a furious pace, ran over him and killed him; the prisoner had called out twice to the deceased, who, from the state in which he was, and the pace of the horses, could not get out of the road: Garrow, B., held this to be manslaughter. *R.* v. *Walker*, 1 C. & P. 320. Two persons were riding furiously on horseback along the road; one passed the deceased, who was also on horseback, but the other rode against him, and both fell, the deceased being killed by the concussion: Patteson, J., directed an acquittal of the first who passed; and as to the second, told the jury to find him guilty of manslaughter, if they thought that by furious riding he ran against the deceased; but to acquit him if they thought that the deceased's horse was unruly, and ran against the horse of the prisoner. *R.* v. *Maston*, 6 C. & P. 396. A foot-passenger was walking along the road by lamplight, when the defendant, who was near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time at the bottom of his cart, and ran over the foot-passenger and killed him; and it was held to be manslaughter. *R.* v. *Grout*, 6 C. & P. 629. The prisoner drove the deceased (a friend of his) in a trap to some races. At the races the former became drunk. This was noticed by the deceased, and before commencing the journey home together, he proposed to drive. This, however, the prisoner declined, and insisted upon driving himself. He did so, setting off at a furious rate, standing up and flogging the horse, and finally the trap was upset and the deceased was thrown out and killed: Lush, J., directed the jury to find the prisoner guilty of manslaughter if they thought that the carriage was overturned by the prisoner's culpably negligent driving, and that that caused the death of the deceased. *R.* v. *Jones*, 11 Cox, 544. If the driver of a carriage races with another carriage and urges his horses to so

rapid a pace that he cannot control them, it is manslaughter in both drivers if in consequence the carriage upset and a passenger is killed. *R.* v. *Timmins*, 7 C. & P. 499 : *R.* v. *Swindall*, 2 C. & K. 230; 2 Cox, 141 (*ante*, p. 891) : *R.* v. *Dalloway*, 2 Cox, 273. A lad out of frolic took the trapstick out of the front part of a cart, in consequence of which it upset, and the carman, who was loading sacks therein, was killed; and this was held to be manslaughter. *R.* v. *Sullivan*, 7 C. & P. 641. The law as stated applies to bicycles and motor cars as well as to other carriages. *R.* v. *Parker*, 59 J. P. 793 : *R.* v. *Thirgood*, 63 J. P. 442 : *R.* v. *Gylee*, 73 J. P. 72 : *R.* v. *Dalloz*, 1 Cr. App. R. 258.

Engines and trains.]—Persons in charge of trains are guilty of manslaughter if a fatal accident results from gross and culpable negligence or recklessly negligent conduct. *R.* v. *Trainer*, 4 F. & F. 105 : *R.* v. *Birchall*, *Id.* 1087 : *R.* v. *Gray*, *Id.* 1098 : *R.* v. *Elliott*, 16 Cox, 710 (Ir.). Deliberate or gross neglect of the rules of the railway would amount to gross negligence, but honest errors of judgment would not. *Id.* A man was held not guilty of manslaughter who stopped a steam engine and left it, and in his absence another set it in motion, whereby a man was killed. *R.* v. *Hilton*, 2 Lew. 214. But it was held manslaughter where a man in charge of an engine left it in the care of an ignorant boy, by whose lack of skill another was killed. *R.* v. *Lowe*, 3 C. & K. 123; 4 Cox, 449, Campbell, C.J. Where a fatal accident was caused by a train running off the line at a place where the rails had been taken up without allowing sufficient time to replace them, and without giving sufficient warning to the engine driver, it was held that the foreman of platelayers was liable if his negligence was a material and substantial cause of the accident, although he was under the general directions of an inspector, and though the engine driver had not kept a good look-out. *R.* v. *Benge*, 4 F. & F. 504. Where the prisoner was employed by the owner of a tramway crossing a public road to warn persons when trucks were crossing the road, with strict orders never to be absent from his post, and the deceased was killed by some trucks, which were travelling on the tramway and crossing the road, of the approach of which he had received no notice from the prisoner, who was absent from his duty; it was held, that there being no duty imposed by statute upon the owner of the tramway to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of such owner, and that, consequently, his negligence did not constitute such a breach of duty as to make him guilty of manslaughter. *R.* v. *Smith*, 11 Cox, 210, Lush, J. In *R.* v. *Pittwood*, 19 T. L. R. 37; 47 Sol. J. 42, 182, Wright, J., the prisoner, a gatekeeper on a railway, forgot to close the gates. A man drove over the line and was killed by a train. A contention that the defendant owed no duty to deceased, but only to the railway company, was overruled, and the prisoner was convicted of manslaughter.

Vessels.]—To make the captain of a vessel liable for manslaughter in causing a person to be drowned by running down a boat in which he was, it was held that it must be shown that the captain did some act which conduced to the death; and that a mere omission to do the whole of his duty was not sufficient.

R. v. *Green*, 7 C. & P. 156 : *R.* v. *Allen*, *Id.* 153; *see R.* v. *Barrett*, 2 C. & K. 343 : *R.* v. *Haines*, *Id.* 368. In the case of navigation of a river, the same care must be taken as on a public highway on land. *R.* v. *Taylor*, 9 C. & P. 672. Gross mismanagement of a boat by the person in charge, whereby it is upset and an occupant drowned, is manslaughter. *R.* v. *Williamson*, 1 Cox, 97; *and cf. R.* v. *Waters*, 6 C. & P. 328.

Explosives.]—The defendant made fireworks contrary to 9 & 10 W. 3, c. 7 (*rep.*), and kept upon his premises a quantity of combustibles for the purpose of his business as a maker of fireworks. In his absence, by the negligence of one of his servants, a fire broke out amongst such combustibles, and a rocket ignited thereby flew across the street, set fire to the opposite house, and caused the death of a person therein. The defendant was held not to be guilty of manslaughter, because the death did not happen by any personal interference or negligence on his part. *R.* v. *Bennett*, Bell, 1; 28 L. J. (M. C.) 27; 8 Cox, 74. 9 & 10 W. 3, c. 7, is repealed, but similar provisions are made by the *Explosives Act*, 1875 (38 & 39 Vict. c. 17), and the regulations made thereunder.

Mines.]—Where it appeared that the deceased was employed with others in walling the inside shaft of a colliery, and that it was the duty of the defendant to place a stage at the mouth of the shaft, and the death of the deceased was the direct consequence of the negligent omission on the part of the defendant to perform that duty, he was held to have been properly convicted of manslaughter. *R.* v. *Hughes*, Dears. & B. 248; 26 L. J. (M. C.) 209; 7 Cox, 301 : *see R.* v. *Gregory*, 2 F. & F. 153. Neglect of a duty to ventilate a mine leading to a fatal explosion of fire-damp renders the person on whom the duty lay liable to conviction of manslaughter. *R.* v. *Haines*, 2 C. & K. 368.

Neglect of the helpless.]—Premeditated neglect or ill-treatment by persons having custody, charge, or control of helpless persons, whether children, imbeciles, or lunatics, or sick or aged, by deliberate omission to supply them with necessary food, etc., if attended with fatal results, may be murder. *R.* v. *Condé*, 10 Cox, 547 : *R.* v. *Bubb*, 4 Cox, 455, cited with approval in *R.* v. *Gibbins and Proctor*, 82 J. P. 287; 13 Cr. App. R. 134, 138 : *R.* v. *Self*, 1 Leach, 137; 1 East, P. C. 226, and if the same result flows from gross neglect in such a case, the offender is guilty of manslaughter. *R.* v. *Instan* [1893] 1 Q. B. 450; 62 L. J. (M. C.) 86; *and see ante*, p. 872. As to the distinction drawn in such cases between misfeasance and mere nonfeasance, *see ante*, p. 871.

By s. 12 of the *Children Act*, 1908 (8 Edw. 7, c. 67), *post*, p. 980, any person over sixteen who, having the custody, charge, or care of a person under sixteen, wilfully neglects such person in a manner likely to cause injury to the health of the younger person, is guilty of a misdemeanor. In *R.* v. *Senior* [1899] 1 Q. B. 283, the prisoner was charged with the manslaughter of his infant child, of which he had the custody. It was proved that he belonged to a sect known as the Peculiar People, who objected on religious grounds to calling in medical aid and to the use of medicine, and that he had wilfully and deliberately

abstained from providing medical aid and medicine necessary for the child, though he knew it to be dangerously ill, but that in other respects he had done all he could in the best interests of the child; and that the prisoner had the means to procure medical aid which would have prolonged and probably saved the child's life. Upon these facts, it was held that there was evidence that the prisoner had wilfully neglected the child in a manner likely to cause injury to its health within the meaning of the Act, and that having thereby caused or accelerated the death of the child the prisoner was rightly convicted of manslaughter (*a*): and Russell, L.C.J., was inclined to the opinion that at common law, and apart from the statute, the result would have been the same. *R.* v. *Senior* [1899] 1 Q. B. at p. 292; 68 L. J. (Q. B.) 175 (*b*). Refusal to allow an operation may be, but is not necessarily, such a failure to provide adequate medical aid as to amount to wilful neglect causing injury to health. The question is one of fact to be decided in each case on the evidence. *Oakey* v. *Jackson* [1914] 1 K. B. 216; 83 L. J. (K. B.) 712; 110 L. T. 41; 78 J. P. 87; 30 T. L. R. 92. As to evidence of means, *see R.* v. *Jones*, 19 Cox, 678. Under s 12 (1) of the *Children* Act, 1908 (8 Edw. 7, c. 67, *post*, p. 980), failure to provide adequate medical aid may be evidence of cruelty under the section, and want of means to obtain the aid without resort to the poor law is no defence.

A young unmarried woman being about to be confined, returned to the house of her stepfather and mother. There she was taken in labour, during her stepfather's absence, and the mother did not take ordinary care to procure the assistance of a midwife, though she could have got one had she wished to do so. In consequence of such want of assistance the daughter died in her confinement. There was no evidence that the mother had any means of paying for the midwife's services. It was held, under these circumstances, that there was no legal duty on the part of the mother to call in a midwife, and consequently no such breach of duty as to render her liable to be convicted of manslaughter. *R.* v. *Shepherd*, L. & C. 147; 31 L. J. (M. C.) 102; 9 Cox, 123. A woman living with a man to whom she is not married and receiving money from him for the purpose of supplying food to her children is under a duty to see that they are properly fed and looked after and may be guilty of manslaughter when death results as an effect of her neglect so to do, or even of murder if she deliberately withholds food from them. *R.* v. *Gibbins and Proctor*, 82 J. P. 287; 13 Cr. App. R. 134, 139.

Poison.]—Where a man lays poison to kill rats, and another man takes it, and it kills him, if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter; 1 Hale, 431; if otherwise, misadventure only. *Id.* If an improper quantity of spirituous liquors is given

(*a*) The judgment contains a history of prior legislation and decisions on this subject, and refers particularly to *R.* v. *Wagstaffe*, 10 Cox, 530; 31 & 32 Vict. c. 122, s. 37 (*rep.*): *R.* v. *Downes*, 1 Q. B. D. 25; 45 L. J. (M. C.) 8; 13 Cox, 111; and *R.* v. *Morby*, 8 Q. B. D. 571; 51 L. J. (M. C.) 65; and definitely dissents from *R.* v. *Hines*, 80 Cent. Crim. Ct. Sess. Pap. 309, Pigott, B. The decision was on the *Prevention of Cruelty to Children Act*, 1894, but is equally applicable to s. 12 of the *Children Act*, 1908, *post*, p. 980.

(*b*) *Cf.* the case of the Zionites. *R.* v. *Brookes* [1902] 9 British Columbia, 13.

to a child of tender years heedlessly and for brutal sport, if death ensues it will be manslaughter. *R.* v. *Martin*, 3 C. & P. 211: *and see R.* v. *Packard*, *ante*, p. 875. 8 Edw. 7, c. 67, s. 119, prohibits the giving of intoxicating liquor to a child under five except on the order of a qualified medical practitioner, or in case of sickness or apprehended sickness, or other urgent cause.

Weapons.]—If a man knowing that people are passing along the street throws a stone, or shoots an arrow over the house or wall with intent to do hurt to people, and one is thereby slain, this is murder, and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful: 1 Hale, 474; 1 Hawk. c. 29, s. 9; 3 Co. Inst. 57. If he discharges a gun merely for the purpose of unloading it, or the like, and death ensues—then, if it were in a place where persons were likely to pass, it is manslaughter; *R.* v. *Burton*, 1 Str. 481; otherwise, misadventure only. As to death occasioned by spring-guns, *see Ilott* v. *Wilks*, 3 B. & Ald. 304: *Bird* v. *Holbrook*, 4 Bing. 628: *R.* v. *Heaton*, 60 J. P. 508; 24 & 25 Vict. c. 100, s 31 (*post*, p. 951). Where a man gave a loaded gun to his servant to protect a corn-field from deer during the night, with instructions to fire when he heard any bustle in the corn by the deer; and the master himself unfortunately rushed into the corn during the night, and the servant imagining it to be deer, fired, and shot his master; this was held to be misadventure. 1 Hale, 476; 1 East, P. C. 266. Where a man, finding a pistol in the street, brought it home, and imagining (from having tried it with a rammer) that it was not loaded, presented it in sport at his wife, drew the trigger and killed her; this was held to be manslaughter; *R.* v. *Rampton*, Kel. (J.) 41; but Mr. Justice Foster doubts the propriety of the decision, as the defendant took the usual precaution to ascertain that the pistol was not loaded; *see* Fost. 263, 264, 265; but clearly, if he took not this or other reasonable precaution, it would be manslaughter. *R.* v. *Campbell*, 11 Cox, 323: *R.* v. *Jones*, 12 Cox, 628. It has been held that killing by accidental discharge of a gun used without legal excuse, is manslaughter; *R.* v. *Weston*, 14 Cox, 346, Cockburn, C.J.: *and see R.* v. *Skeet*, 4 F. & F. 931, where the gun of a poacher, who was resisting lawful arrest by a keeper, accidentally went off and killed the keeper. If a man shooting at butts, or a target, by accident kills a bystander, it is misadventure; 1 Hale, 472; but this must be understood of cases where a proper precaution to prevent accidents has been taken; for if the target, etc., is placed near a highway or path, where persons are in the habit of passing, the killing would probably be held to be manslaughter. A., B., and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, and all three practised firing with it at a target which they erected in the field, from a distance of about 100 yards. They took no precautions of any kind to prevent danger from the firing. One of the shots, thus fired by one, though it was not proved by which one, of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yards from the firing-point. It was held that A., B., and C. had been guilty of a breach of duty in firing at the place in question, without taking proper precautions to prevent injury to others, and were guilty

of manslaughter. (*a*) *R.* v. *Salmon*, 6 Q. B. D. 79; 50 L. J. (M. C.) 25; 14 Cox, 494; *and see R.* v. *Hutchinson* (*ante*, p. 891) and *R.* v. *Martin*, Times, Nov. 7, 1867; Steph. Dig. Cr. L. (6th ed.) 414 *et seq.* A cannon which had burst and had been returned to an ironfounder was sent back by him in so imperfect a state that on being fired it burst against and killed a person: and it was held to be manslaughter. *R.* v. *Carr*, 8 C. & P. 163. The defendant having a right to the possession of a gun which was in the hands of the deceased, and which he knew to be loaded, attempted to take it away by force, and in the struggle which ensued the gun accidentally went off, and caused the death of the deceased. This was held by Campbell, C.J., to be manslaughter, inasmuch as the discharge of the gun was the result of the defendant's unlawful act in attempting to retake the gun *by force*. *R.* v. *Archer*, 1 F. & F. 351.

Killing officers of justice, and the like.]—If a man kills an officer of justice, either civil or criminal, such as a bailiff, constable, watchman, etc., in the legal execution of his duty, or any person acting in aid of him (whether specially called thereunto or not, 1 Hale, 462), or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the offender will be guilty of murder. 1 Hale, 457, 460; Fost. 270, 308, *et seq.*; *R.* v. *Porter*, 12 Cox, 444. And the officer and persons acting in aid of him enjoy this protection, *eundo*, *morando*, *et redeundo:* therefore, if an officer, on his way to do his duty, is opposed and killed, or if he arrives at the place, and in consequence of opposition retreats, and on his retreat is killed, it is murder. Fost. 308, 309; 9 Co. Rep. 68 a and b; 1 Hale, 462; *R.* v. *Phelps*, C. & Mar. 180. Three things are to be attended to in matters of this kind: the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer is killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could legally be executed or if a private person interferes and acts in a case where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person is resisted and killed; the killing will be manslaughter only: *see* Fost. 311, 312.

1. *As to the legality of the authority.*]—If an officer has a warrant from a proper magistrate to apprehend B. for felony; or if B. has been indicted for felony; or if the hue and cry has been levied against B.; in these cases, if B. or any of his accomplices kill the officer or any person joining in the hue and cry, or lawfully effecting or attempting to effect B.'s arrest, it is murder, whether B. is guilty or innocent of the felony charged against him. Fost. 318:

(*a*) R. and two others, under trial for burglary, were being reconveyed to gaol, when revolvers were thrown into the conveyance, and a fight ensued between the prisoners and the constables in charge. One of the latter having been killed by a shot fired by one of the prisoners acting in concert, R. was held guilty of murder. *R.* v. *Rice* [1902] 5 Canada Cr. Cases, 509; 4 Ont. L. R. 233.

R. v. *Porter*, 12 Cox, 444. But it is murder only if violence is used to prevent arrest, or to effect rescue or escape. Accidental killing in course of a struggle with the officers of justice seems to be manslaughter only, *Id.*, *and see R.* v. *Tooley*, 2 Ld. Raym. 1296, 1300, and for the killing to be murder the accused must know or be told that the person seeking his arrest is acting as an officer of justice. *R.* v. *Gordon*, 1 East, P. C. 315; 1 Leach, 515; *and see post*, p. 903). The killing is not murder, but only manslaughter, where the warrant under which the officer of justice is acting is not sufficient to justify him in arresting or detaining a prisoner, or he has no warrant at all, and the case is one in which he has not at law authority to arrest without warrant. *See R.* v. *Allen*, 17 L. T. (N. S.) 222; Steph. Dig. Cr. L. (6th ed.) 420, Blackburn, J. This rule has been held to apply where the warrant is illegal, and void upon the face of it, *see* 1 Hale, 457; 1 East, P. C. 310, or issued with a blank in it, and the blank afterwards filled up; *R.* v. *Stockley*, 1 East, P. C. 310; *and see Housin* v. *Barrow*, 6 T. R. 122; 3 R. R. 135: *R.* v. *Winwick*, 8 T. R. 454: *R.* v. *Hood*, 1 Mood. 281; or is issued with an insufficient description of the defendant, *e.g.*, if it were to take the son of J. S., *Id.*, or if it is attempted to be executed against C. instead of B. But a mere informality in the warrant is no excuse for killing the officer who attempted to execute it. *R.* v. *Allen*, 17 L. T. (N. S.) 222; Steph. Dig. Cr. L. (6th ed.) 184, 414, where the decisions are considered; *and see R.* v. *Fursey*, 3 St. Tr. (N. S.) 543, *and cf.* 6 *Id.* 219 n. If a writ of execution in civil cases is correct upon the face of it, although the judgment be erroneous, or the proceedings irregular, if the officer, in endeavouring to execute it, is resisted and killed, it is murder; 1 Hale, 457; Fost. 311, 312. So in the case of process out of an inferior court, as the county court, the production of a warrant good on the face of it, and appearing to be issued in a case in which the court had jurisdiction, is sufficient to justify an arrest under it, and render the party, if he resists the arrest, liable to an indictment for an assault upon the officer. *R.* v. *Davis*, L. & C. 64; 30 L. J. (M. C.) 159. But if the writ were a nullity on the face of it, or if the warrant upon it were attempted to be executed by any other than the officer to whom it was directed (that officer himself not being present, or at least not acting in the arrest, *see* 1 Cowp. 65), the killing would be manslaughter only. If an innocent person is charged with a felony, and an attempt is made to arrest him for it without warrant, and he resists and kills the party attempting to arrest him; if the party attempting to arrest were a constable, the killing is murder; 1 Hawk. c. 28, s. 12; 2 Hale, 84, 87, 91; if a private person, manslaughter; *sec* 2 Hale, 83, 92; because the constable has authority by law to arrest in such a case, but a private person has not. And the same in all cases where the arrest is made or attempted to be made upon a reasonable suspicion of felony. *See Samuel* v. *Payne*, 1 Doug. 359. Upon an indictment for shooting at and cutting a constable with intent, etc., it appeared that the defendant had been given in charge to the constable for having a forged note in his possession, and upon the constable attempting to handcuff him, had fired a pistol at the constable and wounded him, and afterwards cut him with the cock of the pistol; it was argued that the charge imported no legal offence, for if he did not know the note to be forged, the defendant was no felon, and the arrest was illegal;

but it was held that the defect in the charge was immaterial, and that it was not necessary for the charge to contain the same accurate description of the offence as an indictment, and that the charge must have been considered as importing a guilty knowledge. *R.* v. *Ford*, R. & R. 329. But where the defendant took his tools and left his work, saying that "he would do for any constable that offered to stop him," and his master applied to a constable to take the defendant, but made no charge against him, and the master and the constable followed the defendant, and found him in a public privy as if he had occasion there, and the master said, "This is the man, I give you charge of him;" upon which the constable said, "Your master gives me charge of you, you must go with me;" and the defendant immediately stabbed the constable: it was held by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as reduced the offence to manslaughter only. *R.* v. *Thompson*, 1 Mood. 80. If a constable arrests a man without warrant, upon a charge which gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable at the time, and charged by him to assist, and the man kills J. S., it is manslaughter only, because the arrest was illegal, and J. S. ought to have known it: and therefore the attempt to take the prisoner was illegal also. *R.* v. *Curvan*, 1 Mood. 132. A constable, without warrant, arrested N. on suspicion of having recently stolen potatoes out of the ground, and called O. to assist him; a rescue was attempted, in the course of which one of the party killed O.; and this was held to be manslaughter only; for, without warrant, the constable could only arrest a person found committing such offence, under 7 & 8 G. 4, c. 29, s. 68 (*rep.*); *R.* v. *Phelps*, C. & Mar. 180. But if a constable, having a charge of felony against a defendant, takes him without a warrant, and the defendant, knowing the constable, kills him, it will be murder, even though the constable did not tell him of the charge, and the defendant, in fact, has done nothing for which he is liable to be arrested. *R.* v. *Woolmer*, 1 Mood. 334. So, if a man actually commits a felony, and another, in whose presence he committed it, attempts to arrest him for it, and is resisted and killed; 2 Hawk. c. 12, s. 1; or if a person present at any affray, interferes for the purpose of restraining the offenders and keeping the peace and is killed; 3 Co. Inst. 52; 1 Hawk. c. 31, ss. 48, 54; Fost. 311, 318; or if a person present when another attempts to commit a treason or felony, lays hold of him in order to prevent him, and is killed; 2 Hawk. c. 12, s. 19; the killing in these cases would be murder, whether the person arresting or interfering, etc., is a constable or not; for either has power to arrest or interfere, etc., in such a case. *R.* v. *Hunt*, 1 Mood. 93: *R.* v. *Curran*, 3 C. & P. 397: *R.* v. *Price*, 8 C. & P. 282: *R.* v. *Weir*, 1 B. & C. 288. So, where a man seen attempting to commit a felony on fresh pursuit kills his pursuer, it is as much murder as if the party were killed while attempting to take the defendant in the act. *R.* v. *Howarth*, 1 Mood. 207: *see Beckwith* v. *Philby*, 6 B. & C. 635. But where an affray, which has taken place out of the constable's view, is over, and there is no continued pursuit, the constable has no right to arrest the

affrayer, unless there is an immediate danger of the affray being renewed. *R.* v. *Walker*, Dears. 358; 23 L. J. (M. C.) 123: *see Timothy* v. *Simpson*, 1 Cr. M. & R. 757; 4 L. J. (Ex.) 81; *Baynes* v. *Brewster*, 2 Q. B. 375; 11 L. J. (M. C.) 5. The prisoner was engaged in a disturbance in the street, when R., a constable, interfered to prevent it. A struggle ensued between R. and the prisoner. R. retired, and the prisoner went into and fastened up his house. After an interval of an hour, R. returned with W. and two other constables to the house, which was then fastened and all quiet. The prisoner from inside the house refused to admit the constables, who spent about a quarter of an hour in trying to get in, and finally burst open the door. They found the prisoner on the top of the stairs with a bill-hook in his hand, which he used against the constables to resist his apprehension, and with which in so doing he wounded W., one of the constables. Under these circumstances it was held that the apprehension was not lawful, as the first disturbance was at an end, and there was no fear of its renewal; nor was there a fresh pursuit by the constables, and the conviction of the prisoner upon an indictment for wounding W., with intent to resist his lawful apprehension, was therefore quashed. *R.* v. *Marsden*, L. R. 1 C. C. R. 131; 37 L. J. (M. C.) 80. Where the constable, standing outside the defendant's house, saw him hold a spade in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open;" in about twenty minutes afterwards the defendant left his house, after saying he would leave his wife altogether, and after he had proceeded a short distance in the direction of his father's residence, was taken into custody by the constable without warrant; the apprehension was held lawful. *R.* v. *Light*, Dears. & B. 332; 27 L. J. (M. C.) 1. If a person is taken before a magistrate for an assault, and whilst the warrant is being made up for his commitment, escapes, a constable may, by verbal directions from the magistrate, pursue and apprehend him; and if in so doing the constable is killed, it is murder. *R.* v. *Williams*, 1 Mood. 387. If a seaman is impressed, and the press-gang are resisted, and any of them are killed; if the press-gang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder, otherwise only manslaughter; *R.* v. *Broadfoot*, Fost. 154; for the presence of a commissioned officer is necessary to the due execution of an impress warrant. Where two soldiers not belonging to a recruiting party, who were in a public-house, wished to enlist M., and gave him a shilling for that purpose, and M. afterwards wishing to go away, an altercation ensued, and one of the soldiers stood at the door with his drawn sword, and swore he would stab any person who attempted to come in, and the landlord of the house was stabbed in the scuffle; it was argued that the soldiers had authority to enlist M., and that what was done was merely to prevent his rescue; but the judges held that they had no authority, and that the offence amounted to murder. *R.* v. *Longden*, R. & R. 228. A constable, who had verbal orders from the magistrate to apprehend all thimbleriggers, attempted to apprehend the defendant and his companions, who were playing at thimblerig in a public fair: he succeeded in apprehending one of the companions, whom the defendant rescued, and afterwards, in the evening, seeing

the defendant in a public-house, endeavoured to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable, calling others to his assistance, broke open the privy and attempted to apprehend the defendant, who stabbed one of the party; it was held that the constable had authority to apprehend the defendant. *R.* v. *Gardener*, 1 Mood. 390. In *R.* v. *Prebble*, 1 F. & F. 325, a constable (out of the limits of the Metropolitan Police Acts) was held not to be acting in the execution of his duty in clearing a public-house, unless there be a breach, or danger of a breach, of the public peace therein; but see *R.* v. *Hems*, 7 C. & P. 312: *and see now* s. 80 of the *Licensing* (*Consolidation*) *Act*, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24). A constable has no right to arrest a person for mere disorderly conduct, unless he be at least on the point of committing a breach of the peace, and the person so attempted to be arrested, and his companions, may use necessary force to prevent such an arrest. If, however, they use unnecessary violence, and kill the constable, they are guilty of manslaughter; and if the constable has given up his intention of making the arrest, and they know it, and still continue their violence, and the constable is killed, they are guilty of murder. *R.* v. *Lockley*, 4 F. & F. 155.

A special constable duly appointed under 1 & 2 W. 4, c. 41, is appointed for an indefinite time, and retains all the authority of a constable at common law, until his services are suspended or determined under the 9th section of that statute. *R.* v. *Porter*, 9 C. & P. 778.

By the *Night Poaching Act*, 1828 (9 G. 4, c. 69), s. 2 (*post*, p. 966), gamekeepers are empowered to apprehend persons "found upon any land committing any such offence as is hereinbefore mentioned," *i.e.*, in s. 1; and though this 2nd section appears only to authorize arrest for the offences mentioned in s. 1, yet they may arrest the offenders, where three or more are out by night armed, etc., for although that offence is punishable by s. 9, it is still an offence under s. 1. *R.* v. *Ball*, 1 Mood. 330. To authorize an arrest under this statute, it is not necessary that the gamekeeper should give notice of his purpose; *R.* v. *Payne*, 1 Mood. 378; nor that he should have a written authority from his master for so doing, if the poacher is on his master's land or manor; *R.* v. *Price*, 7 C. & P. 178: *see R.* v. *Fielding*, 2 C. & K. 621; but he could not, under this statute, without authority, arrest him upon the land or manor of another person; *R.* v. *Davis*, 7 C. & P. 785; or even on land on which he has the right to preserve game. *R.* v. *Addis*, 6 C. & P. 388. If a keeper, attempting lawfully to arrest a poacher, is met with violence, and in opposition to such violence and in self-defence strikes or lays hands on a poacher, and is then killed by him or one of the gang, it will be murder. *R.* v. *Ball*, 1 Mood. 330: *R.* v. *Whithorne*, 3 C. & P. 394. Even an interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. *R.* v. *Warner*, 1 Mood. 380. A gamekeeper appointed by a person who has only a permission to shoot over land has no authority to apprehend a poacher in pursuit of game on such land, or to take a gun from him; and where such a gamekeeper endeavoured to do so, and in the struggle which ensued the gun went off and

killed the poacher, this was held to be manslaughter. *R.* v. *Wesley*, 1 F. & F. 528; *see R.* v. *Wood*, *Id.* 470. 14 & 15 Vict. c. 19, s. 11 (*ante*, p. 655), under which any person whatsoever may apprehend and convey or deliver over to a constable any person found committing *any* indictable offence *in the night*, has been held to apply to persons committing an offence against s. 9 of the *Night Poaching Act*, 1828 (9 G. 4, c. 69). *R.* v. *Sanderson*, 1 F. & F. 598.

2. *As to the legality of the manner in which the authority is exercised.*]—If the constable of the vill of A. attempts without warrant to suppress a tumult in the vill of B. and is resisted and killed, it is manslaughter only; for he had authority in such a case within the vill of A. alone. 1 Hale, 459. So, if a sheriff's officer attempts to execute a writ out of the proper county, and is resisted and killed, it is manslaughter only; 1 Hale, 458 *et seq.* A justice's warrant of commitment, directed "To the constable of G.," a parish in the county of L., was read as directed to the parish constable of G., there being such an officer, who must execute it, and its execution by a county policeman was held illegal, and a conviction for wounding a county policeman in the execution of such a warrant, with intent to resist the prisoner's lawful apprehension thereunder, was quashed. *R.* v. *Sanders*, L. R. 1 C. C. R. 75; 36 L. J. (M. C.) 87. And where the defendant was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcester for his commitment to prison for default in payment of a fine but not backed by any justice of and for the city of Worcester, which city is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force, and the defendant was not pursued from the county, but found in the city, it was held that the constables were not acting in the execution of their duty in so executing such warrant, and therefore that the conviction was wrong. *R.* v. *Cumpton*, 5 Q. B. D. 341; 49 L. J. (M. C.) 41. But by s. 10 of the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), constables and other peace officers may execute warrants out of their respective precincts, if the place where the warrant is executed is within the jurisdiction of the magistrate granting or backing the warrant. If an officer were to attempt the arrest of a man on Sunday (unless for treason, felony, or breach of the peace, *see* 29 Car. 2, c. 7, s. 6), and were resisted and killed, it would be manslaughter only. A constable who had a warrant to apprehend A., gave it to his son, who, in attempting to apprehend A. was stabbed with a knife which he happened to have in his hand, the constable being in sight, but a quarter of a mile off; it was held that the son had no authority to apprehend A. *R.* v. *Patience*, 7 C. & P. 775. A justice issued a warrant directed to the constable of N., and all peace officers in and for the county of C., commanding him or them to apprehend G. for disobedience to an order in bastardy. A police officer arrested G., but at the time of doing so the warrant was not actually in his possession. It was held, that the arrest was illegal, as the officer ought to have had the warrant ready to be produced at the time of arrest. *Galliard* v. *Laxton*, 2 B. & S. 363; 31 L. J. (M. C.) 123. To justify an arrest by a police

officer under a warrant, for a misdemeanor, it is necessary that he should have the warrant with him at the time of the arrest. *R.* v. *Chapman*, 12 Cox, 4: *Codd* v. *Cabe*, 1 Ex. D. 352; 45 L. J. (M. C.) 101; 13 Cox, 202. So, where the prisoner against whom a warrant had been issued for his apprehension on a charge of threatening to shoot, was apprehended by a constable who at the time had not the warrant in his possession, and the prisoner drew a revolver, and shot the constable, it was held that the apprehension was unlawful, and the killing merely manslaughter. *R.* v. *Carey*, 14 Cox, 214, Lindley, J. It seems to have been suggested by the prosecution in that case that the prisoner, who was apprehended early in the morning while passing along a street with something evidently buttoned up in his coat, had been apprehended by the constable not under the warrant, but under the powers of a local Act which authorized constables to stop, search, and detain persons reasonably suspected of knowingly having or conveying anything stolen, and therefore that the apprehension was lawful. It was held, however, that there was no evidence from which the jury could infer that the constable reasonably suspected the prisoner of the possession of stolen goods, and that it lay on the prosecution to give such evidence. *Id.*

3. *As to the defendant's knowledge of the deceased's authority or intention.*]—When any officer in the legal execution of his duty, or a private person, is endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed; the killing is murder if it appears that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from circumstances, *R.* v. *Howarth*, 1 Mood, 207; but it is manslaughter only if it appears that he was ignorant in this respect. 1 Hawk. c. 31, ss. 49, 50; Fost. 310, 311; 1 Hale, 458 *et seq.*: *R.* v. *Gordon*, 1 East, P. C. 315; 1 Leach, 515. Where a bailiff rushed into a gentleman's bedroom early in the morning, without giving the slightest intimation of his business, and the gentleman not knowing him, in the impulse of the moment, wounded him with his sword and killed him; this was held to be manslaughter. 1 Hale, 470. But where the bailiff or constable shows the warrant, 1 Hale, 461; or where it appears that he is known to the defendant to be an officer; as, for instance, when the defendant said, "Stand off, I know you well enough, come at your peril;" *R.* v. *Pew*, Cro. Car. 183; if after this the officer is killed, it will be murder. If the constable interferes to prevent any affray within his own vill, if he is killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several knows him to be a constable, it will be murder in him, manslaughter in the rest. 1 Hale, 438. If a constable commands the peace, 1 Hale, 461, or shows his staff of office, Fost. 311, this, it seems, is a sufficient intimation of his authority. And in such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient. 1 East, P. C. 315. But private persons when they interfere must expressly intimate their intention, otherwise killing them will be manslaughter only. Fost. 310, 311. Where the outer door of a dwelling-house may be broken open, in order to execute

process : *e.g.*, in the case of a *capias* upon an indictment, 2 Hawk. c. 14, s. 3, a warrant to search for stolen goods, 2 Hale, 151, a *capias utlagatum*, 2 Hawk. c. 14, s. 4, a warrant of a magistrate for levying a penalty, *Id.* s. 5, a magistrate's warrant to arrest for any specific crime; Fost. 320 : 2 Hawk. c. 14, s. 3 : 1 Hale, 584; or where a person lawfully arrested escapes into a house; 2 Hawk. c. 14, s. 9; where one known to have committed treason or felony, or to have dangerously wounded another escapes into a house; *Id.* s. 7; where an affray is made in a house, and the constable wants to suppress it, or take the offender; *Id.* s. 8 : 1 Hale, 589; where there is disorderly drinking or noise in a house at any unseasonable time of night, particularly in inns, taverns, or ale-houses, and the constable or his watch wish to suppress the disorder; 2 Hale, 95; and in the case of forcible entry or detainer; 2 Hawk. c. 14, s. 6 (but not in the execution of writs in civil cases, Fost. 589, excepting writs of *habere facias possessionem*, *Semayne's case*, 5 Co. Rep. 91); in all such cases, before the outer door is broken open, there must be a demand of admittance, or something equivalent thereto, and a refusal; Fost. 136, 320; *see Launock* v. *Brown*, 2 B. & Ald. 592; otherwise, if the officer is killed, it will be manslaughter only.

In all cases, however, above stated to be manslaughter only, if there is evidence of express malice in the party killing, the homicide will be murder. *See R.* v. *Stockley*, 1 East, P. C. 310 : *R.* v. *Curtis*, Fost. 135.

Killing by officers and others.]—Where an officer of justice (including prison officers; *Prison Act*, 1898, 61 & 62 Vict. c. 41, s. 10), in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances.

1. Where an officer of justice is resisted in the legal execution of his duty (*see ante*, p. 874), he may repel force by force; and if, in doing so, he kill the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases. 1 Hale, 494; 2 Hale, 118. And the same as to persons acting in aid of such officer. Thus, if a peace officer has a legal warrant against B. for felony, or if B. stands indicted for felony, or if hue and cry is levied against B.; in these cases, if B. resists, and in the struggle is killed by the officer, or any person acting in aid of him, or joining in the hue and cry, the killing is justifiable. Fost. 318. So, if a private person attempts to arrest one who commits a felony in his presence, or interferes to suppress an affray, and is resisted, and kills the person resisting, this is also justifiable homicide. 1 Hale, 481, 484; Fost. 274. And this, not merely on the principle of self-defence (for the officer or private person is not bound to retreat, as in the case of homicide *se defendendo*, 1 Hale, 479 *et seq.*; *ante*, pp. 879), but upon that principle, and the necessity of executing the duty the law has imposed upon him, jointly : *see R.* v. *Forster*, 1 Lew. 187 : *R.* v. *Daunt*, 1 Crawf. & Dix (Ir. Circ. Rep.), 166. Still, there must be an apparent necessity for the killing; for if the officer were to kill after the resistance had ceased, 1 East, P. C. 297, or if there were no reasonable necessity for the violence used upon the part of the officer, etc., *see R.* v. *Goffe*, 1 Vent. 216, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of legally executing

a duty imposed upon them by law, and under such circumstances, that if the officer or private person were killed, it would have been murder (*see ante*, pp. 897 *et seq.*); for if the circumstances of the case were such, that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least in the officer or private person to kill the party resisting. *See* Fost. 318; 1 Hale, 490.

2. If prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in self-defence, kills any of them, it is justifiable, for the sake of preventing an escape. 1 Hale, 496; *cf.* 61 & 62 Vict. c. 41, *s.* 10.

3. Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit; if the offence with which the man was charged were a treason or felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; 1 Hale, 481; 2 Hale, 118, 119; 1 Hawk. c. 28, ss. 11, 12; Fost. 271: *R.* v. *Finnerty* [1830] 1 Crawf. & Dix (Ir. Circ. Rep.), 167 n.; but the killing, if intentional, would be murder if the deceased were charged merely with a breach of the peace, or other misdemeanor, Fost. 271; 1 Hale, 481; 2 Hale, 117: *R.* v. *Forster*, 1 Lew. 187, Holroyd, J.: *and see R.* v. *Dadson*, 2 Den. 35; 3 C. & K. 148; 20 L. J. (M. C.) 57; or if the arrest were intended in a civil suit, 1 Hale, 481; Fost. 271; or if a press-gang kill a seaman or other person flying from them, *R.* v. *Browning*, 1 East, P. C. 312; *and see R.* v. *Phillips* [1778] *Id.* 308; 2 Cowp. 830: *R.* v. *Borthwick* [1779] 1 Doug. 207. But if homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like, it would at most be only manslaughter. *See Fost.* 271.

4. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justified in killing them, both at common law, 1 Hale, 495; 1 East, P. C. 304, and under the *Riot Act*, 1 G. 1, st. 2, c. 5, if the riot cannot otherwise be suppressed. 4 Bl. Com. 179, 180: *R.* v. *Pinney*, 3 St. Tr. (N. S.) 11. As to the position of soldiers who fire on a riotous mob and kill rioters, *see* Report on Featherstone Riots, Parl. Pap. 1893-94, C. 7234.

5. Where a criminal is executed by the proper officer, in pursuance of his sentence, this is justifiable homicide. 4 Bl. Com. 178. But if it is done by any other person, 1 Hale, 501, or not done in strict conformity with the sentence, as, for instance, if an officer beheads one who is adjudged to be hanged, or the contrary, 3 Co. Inst. 52; 1 Hale, 501, it is murder.

6. Where in an attempt to impress a person not subject to impressment he resists and is killed, it is murder by the members of the press-gang. *R.* v. *Dixon*, 1 East, P. C. 313; *R.* v. *Rokeby*, 1 East, P. C. 312.

CONSPIRACY TO MURDER AND INCITING TO MURDER.

Statute.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 4.]—All persons who shall conspire, confederate and agree to murder any person, whether he be a subject of his Majesty or not, and whether he be within the King's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of his Majesty or not, and whether he be within the King's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not more than ten . . . years. [*This section was new as statute law in England in* 1861. *Conspiracy to murder was a common law misdemeanor;* see Greaves' Crim. Law Cons. Acts (2nd ed.), p. 34: R. *v.* Bernard, 8 St. Tr. (N. S.) 887; 1 F. & F. 240.]

Indictment for Conspiracy to Murder. (24 *& 25 Vict. c.* 100, *s.* 4.)

STATEMENT OF OFFENCE.

Conspiracy to murder, contrary to section 4 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., on divers days between the —— day of —— and the —— day of ——, in the county of ——, conspired together to murder J. N.

Misdemeanor: penal servitude for not more than ten nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 4; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace, and being of good behaviour*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Indictments for conspiracy to murder are within the Vexatious Indictments Acts. (See ante, p. 67.)

Conspiracy to murder is not triable at quarter sessions. 5 & 6 Vict. c. 38, s 1 (ante, p. 106).

Evidence.

Prove a conspiracy between the defendants, or between them and other persons, as the case may be (*see post, tit.* "*Conspiracy*"), and that the object of the conspiracy was to murder J. N. It is immaterial whether J. N. is a subject of the King or not, and whether he is within the King's dominions or not. It

seems not to be essential that the conspiracy should have been formed in England or Ireland, Greaves' Crim. Law Cons. Acts (2nd ed.) 34; 1 Russ. Cr. (7th ed.) 836; provided that some overt act is done within the realm or within the jurisdiction of the Admiralty; *but see R.* v. *Bernard*, 8 St. Tr. (N. S.) 887. The publication and circulation of an article in a newspaper may be an encouragement, or endeavour to persuade to murder, within this section, although not addressed to any person in particular. *R.* v. *Most*, 7 Q. B. D. 244; 50 L. J. (M. C.) 113; 14 Cox, 583. M. was indicted under 24 & 25 Vict. c. 100, s. 4. The encouragement and endeavour to persuade to murder proved at the trial, was the publication and circulation by him of an article, written in German in a newspaper published in that language in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty. It was held that such direction was correct. *Id.; cf. R.* v. *Bourtzeff*, 129 Cent. Crim. Court. Sess. Pap. 284: *R.* v. *Antonelli*, 70 J. P. 4. As to the evidence necessary to prove solicitation or incitement to murder, *see R.* v. *Fox*, 19 W. R. 109 (Ir.): *R.* v. *Ransford*, 13 Cox, 9 (C. C. R.).

To constitute an offence against s. 4, it must be shown that there was some actual communication between the accused and the person solicited; but it is not necessary to show that the latter's mind was affected by the communication. *R.* v. *Krause*, 66 J. P. 121, Alverstone, L.C.J.; *and see R. v. McCarthy* [1903] 2 Ir. Rep. 146, 154.

Where A solicited B, who was at the time pregnant, to murder her child at birth and subsequently the child was born alive, it was held that there was a soliciting to murder "a person" within the meaning of this section. *R.* v. *Shepherd* [1919] 2 K. B. 125; 88 L. J. (K. B.) 932; 83 J. P. 131; 121 L. T. 393; 14 Cr. App. R. 26.

ATTEMPTS TO MURDER.

ADMINISTERING POISON, WOUNDING, ETC., WITH INTENT TO MURDER.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 11.]—Whosoever shall administer to or cause *to be administered to or* to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person, with intent, in any

of the cases aforesaid, to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 7 W. 4 & 1 Vict. c. 85, s. 2, *modifications to get rid of the decisions in* R. *v.* Jenning, 2 Lew. 130. R. *v.* Murrow, 1 Mood. 456 : R. *v.* Stevens, 1 Mood. 409; R. *v.* Harris, 7 C. & P. 446. *For power to convict and punish under this section upon an indictment for murder*, see R. *v.* White [1910] 2 K. B. 124; 79 L. J. (K. B.) 854; 102 L. T. 784; 22 Cox, 325; 74 J. P. 318; 26 T. L. R. 466; 4 Cr. App. R. 258.]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *ss.* 102, 104.—*Punishment of children and young persons for attempt to murder.*]—Ante, p. 248, 249.

14 *& 15 Vict. c.* 19 (*Prevention of Offences Act*, 1851), *s.* 5.—*Conviction for misdemeanor on trial for felony.*]—If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding. [See ante, p. 213. *This enactment is limited to cases "where the indictment shall allege that the defendant did cut, stab, or wound," and therefore upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grievous bodily harm, with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawful wounding.* R. *v.* Miller, 14 Cox, 356, Bowen, J. *The words* "cutting or stabbing" *are not used in* 24 & 25 Vict. c. 100.]

Indictment for administering Poison with intent to Murder. (24 *& 25 Vict. c.* 100, *s.* 11, supra.)

STATEMENT OF OFFENCE.

Administering Poison, contrary to section 11 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, administered to or caused to be administered to or to be taken by C. D. a poison or other destructive thing, with intent to murder the said C. D.

Felony; penal servitude for life, or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict.

c. 100, s. 11; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865). *As to offenders under sixteen*, see 8 Edw. 7, c. 67, s. 104 (ante, p. 249).

The offences mentioned in this section are not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the administering of the poison by the defendant to the prosecutor, as stated in the indictment. *R.* v. *Cadman*, 1 Mood. 114, has been cited as an authority that it is necessary to prove that something more than delivery, such as swallowing, was essential. The case is differently reported in Car. Supp. 137 (*see R. v. Dale*, 6 Cox, 16 n.), and was dissented from in *R.* v. *Walford*, Essex Assizes [1899] 34 L. J. Newsp. 116, Wills, J. Where a servant, in preparing breakfast for her mistress, put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and she (the mistress) drank the coffee, Park, J., held that it was an administering within the meaning of the statute. *R.* v. *Harley*, 4 C. & P. 369. So also, where the defendant knowingly gave poison to A. to administer as a medicine to B., but A. neglecting to do so, it was accidentally given to B. by a child, this was held to be an administering by the defendant, as much as if she had given it to B. with her own hands. *R.* v. *Michael*, 2 Mood. C. C. 110; 9 C. & P. 356. Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to "Mrs. Daws, Townhope," and left it on the counter of a tradesman, who sent it to Mrs. Davis, who used some of the sugar, Gurney, B., held it to be an administering: for that, although it was intended for Mrs. Daws, yet as it found its way to Mrs. Davis, it was as much within the Act as if it had been intended for Mrs. Davis. *R.* v. *Lewis*, 6 C. & P. 161. In *R.* v. *Ryan*, 2 M. & Rob. 213, however, Parke, B., after consulting Alderson, B., expressed an opinion that an indictment for causing poison to be taken by A., with intent to murder A., was not sustained by evidence showing that the poison, though taken by A., was intended for another person; and doubted the propriety of the decision in *R.* v. *Lewis;* and accordingly, after the defendant had been convicted, he directed a fresh indictment to be preferred, charging the intent to be generally "to commit murder;" upon which the defendant was again tried, convicted, and sentenced. *See* however, *R.* v. *Smith*, Dears 559; 25 L. J. (M. C.) 29; 7 Cox, 51 (*post*, p. 914). Prove also the intent to murder, by circumstances from which that intent may be implied. *See ante*, pp. 352, 357, 400: *R.* v. *Voke*, R. & R. 531. Evidence of administering at different times may be given to show the intent. *R.* v. *Mogg*, 4 C. & P. 364. The defendant administered to a child two cocculus indicus berries entire in the pod, with intent to murder the child. The kernel is a poison; the pod is not, and will not dissolve in the stomach, and they were therefore harmless. This was held to be an administering of poison, with intent to murder, within this section. *R.* v. *Cluderay*, 1 Den. 514; 2 C. & K. 907; 19 L. J. (M. C.) 119; 4 Cox, 84.

Indictment for Wounding with intent to Murder. (24 & 25 *Vict. c.* 100, *s.* 11, ante, p. 908).

STATEMENT OF OFFENCE.

Wounding with intent to murder, contrary to section 11 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, wounded or caused grievous bodily harm to C. D., with intent to murder him.

Felony: 24 & 25 Vict. c. 100, s. 11. See *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant wounded C. D. (*See post*, p. 938). The instrument or means by which the wound was inflicted need not be stated, and if stated, would not confine the prosecutor to prove a wound, etc., by such means. *R.* v. *Briggs*, 1 Mood. 318. A wounding by any means whatever, whether by stabbing, cutting, or otherwise, will support the indictment under this statute. 24 & 25 Vict. c. 100, s. 11. Prove the intent as directed (*ante*, pp. 352, 357). *See R.* v. *Jones* (*post*, p. 913). It is not necessary that the prosecutor should be in fact wounded in a vital part; for the question is not what the wound is, but what wound was intended. *R.* v. *Hunt*, 1 Mood. 93: *R.* v. *Griffith*, 1 C. & P. 298.

Power to convict of unlawful wounding.]—If the intent is not proved, the defendant may, by virtue of 14 & 15 Vict. c. 19, s. 5 (*ante*, p. 908), be convicted of unlawfully wounding, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawfully wounding: that is, by penal servitude for any period not less than three years, and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years, 24 & 25 Vict. c. 100, s. 20 (*post* p. 936); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (*ante*, pp. 238, 239). 14 & 15 Vict. c. 19, s. 5, is to be read as if the word "maliciously," as well as "unlawfully," had been inserted therein, with reference to the wounding of which the jury may convict the prisoner, and it is therefore essential to a conviction under that section that the act done which caused the wound should be done maliciously. The unlawful wounding of which the jury are at liberty to find the prisoner guilty under that section, is the unlawful and malicious wounding referred to in 24 & 25 Vict. c. 100, s. 20 (*post*, p. 936): *R.* v. *Ward*, L. R. 1 C. C. R. 356; 41 L. J. (M. C.) 69. As to what constitutes a malicious wounding under the last-mentioned enactment, *see R.* v. *Ward* (*supra*): *R.* v. *Martin*, 8 Q. B. D. 54; 51 L. J. (M. C.) 36 (*post*, p. 942). Prior to the passing of 4 & 5 Geo. 5, c. 58 (*Criminal Justice Administration Act*, 1914) the defendant could not, on an indictment for the felony, *plead guilty* to the misdemeanor, for the acquittal

of the felony had to be the act of the jury; *R.* v. *Calvert*, 3 C. & K. 201; but now by s. 39 (1) of that Act (*ante*, p. 168) he may do so. On an indictment against several for the felony, it seems that some may be convicted of the felony, and another or others of the misdemeanor, under this section (*R.* v. *Cunningham*, Bell, 72; 28 L. J. (M. C.) 66; *see R.* v. *Archer*, 2 Mood. 283: *R.* v. *Elliott*, 1 Cox, 36), on the principle that there may be a joint assault with a felonious intent in some only, *R.* v. *Archer*, *supra*. Where the facts in the opinion of the judge do not justify the jury in reducing the offence to unlawful wounding, he is not bound to inform them of their power to do so. *R.* v. *Naylor*, 74 J. P. 460 (C. C. A.).

ATTEMPTING TO POISON, SHOOT, DROWN, ETC., WITH INTENT TO MURDER.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 14.]—Whosoever shall attempt to administer to *or shall attempt to cause to be administered to or to be taken by* any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, *whether* any bodily injury be effected *or not*, be guilty of felony; and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This is taken from* 7 W. 4 & 1 Vict. c. 85, s. 3, *with modifications.*]

Sect. 19.—*Loaded arms, defined.*]—Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause. [*This clause was new law in* 1861, *and was framed to get rid of* R. *v.* Williams, 1 Den. 39; 1 C. & K. 589: R. *v.* Carr, R. & R. 377: R. *v.* Harris, 5 C. & P. 159. *As to the effect of this definition*, see post, p. 914.].

Indictment for attempting to Poison, with Intent, etc. (24 & 25 *Vict. c.* 100, *s.* 14, supra.)

STATEMENT OF OFFENCE.

Attempted murder, contrary to section 14 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, attempted to administer to or attempted to cause to be administered to or to be taken by C. D. a poison or other destructive thing, with intent to murder the said C. D.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 100, s. 14; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865). *As to punishment of offenders under sixteen*, see 8 Edw. 7, c. 67, s. 104 (ante, p. 249).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the attempt to administer the poison or other destructive thing, as stated in the indictment. As to what is "administering," *see ante*, p. 909. Putting poison where it is likely to be found and taken seems to be an attempt to murder within this enactment. *R.* v. *Dale*, 6 Cox, 14. Prove the intent, as in the last case. It is immaterial whether bodily injury be or be not effected.

The delivery of poison to an agent, with directions to him to cause it to be administered to another, under such circumstances that if administered the agent would be the sole principal felon, would doubtless come within the words "shall attempt to cause to be administered to or to be taken by," which are for the first time to be found in the present statute. It was held not an attempt to administer within 7 W. 4 & 1 Vict. c. 85, s. 3 (*rep.*): *R.* v. *Williams*, 1 C. & K. 589; 1 Den. 39.

Indictment for attempting to Drown, etc., with intent to Murder.
(*24 & 25 Vict. c.* 100, ante, p. 911.)

STATEMENT OF OFFENCE.

As in last precedent.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, attempted to drown [*suffocate or strangle, as the case may be*] C. D., with intent to murder the said C. D.

Felony: 24 & 25 Vict. c. 100, s. 14. See *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the attempt to drown as stated in the indictment, and the intent as directed, *ante*, pp. 352, 357. It is immaterial whether bodily injury be or be not proved.

Indictment for Shooting with intent to Murder. (24 & 25 *Vict. c.* 100, *s.* 14, ante, p. 911.)

STATEMENT OF OFFENCE.

as on p. 865.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, shot at C. D. with intent to murder him.

If a wound was caused, add a count for wounding with intent to murder, as on p. 910, *and also a count for wounding with intent to do grievous bodily harm contrary to the* Offences against the Person Act, 1861, *s.* 18. See post, pp. 936, 937.

Felony: 24 & 25 Vict. c. 100, s. 14. See *the last precedent but one.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the shooting, as stated in the indictment, and that the gun was loaded in the barrel with gunpowder or some other explosive substance, and with ball, shot, slug, or other destructive material. 24 & 25 Vict. c. 100, s. 19 (*ante*, p. 911). *See R.* v. *Kitchen*, R. & R. 95 : *R.* v. *Hughes*, 5 C. & P. 126 : *R.* v. *Coates*, 6 C. & P. 394 : *R.* v. *Oxford*, 9 C. & P. 525; 4 St. Tr. (N. S.) 497. Prove also the intent as directed, *ante*, pp. 352, 357. In *R.* v. *Jones*, 9 C. & P. 258, Patteson, J., appeared to think it doubtful whether, under 7 W. 4 & 1 Vict. c. 85, s. 3 (*rep.*) (which was in the same terms as the present statute), it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued; he said, however, that the circumstance that it would have been murder if death had ensued would be a good ground whence the jury might infer the existing intent, as every man must be taken to intend the necessary consequences of his acts. Upon an indictment for shooting at H. with intent to murder H., it appeared that the defendant intended to shoot at and kill L., but shot at H. by mistake, and Littledale, J., left it to the jury to say whether the defendant intended to murder H. : and upon their finding that he shot at H. intending to murder L., directed an acquittal. *R.* v. *Holt*, 7 C. & P. 518. That case arose under 9 G 4, c. 31, ss. 11, 12 (*rep.*) the words of which were " with intent to murder *such person.*" But it would seem, however, from *R.* v. *Ryan*, 2 M. & Rob. 213

(ante, p. 909), that the intent must still be proved as laid; and therefore that an allegation of an intent to murder A. would not be satisfied if it appeared that, although A. was struck, the shot was intended for another person. But where the defendant was charged with wounding T. with intent to murder him, and it appeared in evidence that the defendant intended to murder M., and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing him to be M., the Court held the conviction right. *R.* v. *Smith*, Dears. 559; 25 L. J. (M. C.) 29; 7 Cox, 51 : followed in *R.* v. *Stopford*, 11 Cox, 643; *see also post*, p. 939. To avoid such questions, the indictment should always contain a count charging an intent " to commit murder " generally.

As to what is sufficient evidence of common purpose, and a proper direction to the jury, when two persons are jointly indicted for shooting with intent to murder, when the shot is fired by one, *see R.* v. *Pridmore*, 77 J. P. 339; 29 T. L. R. 330; 8 Cr. App. R. 198.

On an indictment for shooting at a police constable with intent to murder, the defence set up was that the accused purposely shot wide in order to frighten. The Judge directed the jury, if they accepted this, to find the accused guilty on a count in the indictment which charged him with resisting or obstructing the policeman in the execution of his duty. *R.* v. *Hufflett*, 84 J. P. 24 (Salter, J.).

Indictment for attempting to Shoot, with Intent, etc. (24 & 25 Vict. c. 100, *s.* 14, ante, p. 911.)

Statement of Offence.

Attempting to shoot with intent to murder, contrary to section 14 of the Offences against the Person Act, 1861.

Particulars of Offence.

A. B., on the —— day of ——, in the county of ——, attempted to discharge a loaded gun or pistol at C. D., with intent to murder the said C. D.

Felony: 24 & 25 Vict. c. 100, s. 14. See *the punishment under precedent*, ante, p. 911.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant presented a pistol (or gun) at C. D., and attempted, by pulling the trigger, to discharge it at him. If the weapon is " loaded in the barrel with gunpowder or other explosive material and ball, etc.," the fact that the prisoner fails to discharge it " from want of proper priming or any other cause " is no defence to an indictment under 24 & 25 Vict. c. 100, s. 14, by reason of s. 19 of that statute (*ante*, p. 911). *R.* v. *Carr*, R. & R. 377

and the other decisions on statutes prior to 1861, cited *ante*, p. 911 (the effect of which was that the weapon must be so loaded as to be capable of being discharged), are no longer law. *See* Greaves, Cr. Law Cons. Acts (2nd ed.), 53. In *R.* v. *Gamble*, 10 Cox, 545, an attempt to fire off an unprimed pistol was held not to be within s. 14; but in that case the attention of the Court was not called to s. 19. An attempt to fire a revolver loaded in some chambers, which fails because the hammer falls on a barrel containing an empty cartridge case, is within s. 14. *R.* v. *Jackson*, 17 Cox, 104, Charles, J. So also where the prisoner pulls the trigger of a central-fire revolver loaded with rim-fire cartridges, unless he knows that such cartridges could not be discharged in such a weapon. *R.* v. *Jones*, Staff. Autumn Assizes [1901] 36 L. J. Newsp. 650, Kennedy, J. If B. draws a loaded pistol from his pocket for the purpose of murdering S., but before he has time to do anything further in pursuance of his purpose the pistol is snatched out of his hand—*semble*, that B. commits an offence within s. 14 of 24 & 25 Vict. c. 100; *R.* v. *Brown*, 10 Q. B. D. 381; 52 L. J. (M. C.) 49; 15 Cox, 199; and at all events, if he puts his finger on the trigger and attempts to pull it, and is only prevented from doing so by the forcible interference of bystanders, he commits that offence. *R.* v. *Duckworth* [1892] 2 Q. B. 83; 17 Cox, 495; overruling on that point *R.* v. *St. George*, 9 C. & P. 483 (*post*, p. 930) and *R.* v. *Lewis*, *Id.* 523. In those cases, however, the weapon was not in a condition to be discharged. Prove the intent as directed, *ante*, pp. 352, 357, *and see R.* v. *Lallement*, 6 Cox, 204. To do the first of a series of acts intended to result in the murder of another is an attempt to murder. Placing the hand on a loaded revolver and drawing it from the pocket may be an attempt to murder. Not all such acts are attempts; an act may be mere preparation. *R.* v. *Linneker* [1906] 2 K. B. 99; 75 L. J. (K. B.) 385; 70 J. P. 293; 94 L. T. 856; 22 T. L. R. 495; 21 Cox, 196. Walton, J. On this case, *see R.* v. *White* [1910] 2 K. B. 124; 79 L. J. (K. B.) 854; 102 L. T. 784; 22 Cox, 325; 74 J. P. 318; 26 T. L. R. 466; 4 Cr. App. R. 258; *and post, tit.* "*Attempts*."

DESTROYING BUILDINGS BY EXPLOSIVES WITH INTENT TO MURDER.

Statutes.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 12.].—Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent *to commit murder*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 9 & 10 Vict. c. 25, s. 2, *omitting the words* "*unlawfully and maliciously*," *and substituting the words* "*intent to commit murder*" *for the words* "*with intent to murder any person.*"]

Sect. 64.—*Possessing or making gunpowder, etc., to commit felonies.*]—Whosoever shall knowingly have in his possession or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious thing, or any

machine, engine, instrument, or thing, with intent by means thereof to commit any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, . . . and if a male under the age of sixteen years, with or without whipping. (*Cf.* 24 & 25 Vict. c. 97, s. 54, *ante*, p. 755).

Sect. 65.]—*Search for explosives.*

38 & 39 *Vict. c.* 75, *s.* 86.]—*Search for explosives.*

46 & 47 *Vict. c.* 3.—*Explosive Substances Act*, 1883.]—See ante, p. 756.

Indictment. (24 & 25 *Vict. c.* 100, *s.* 12.)

Statement of Offence.

Destroying building by gunpowder with intent to murder, contrary to section 12 of the Offences against the Person Act, 1861.

Particulars of Offence.

A. B., on the —— day of ——, in the county of ——, by the explosion of gunpowder or other explosive substance, destroyed or damaged the dwelling-house, known as 76, Cromwell Road, with intent to murder C. D.

[*The words "with intent to commit murder" generally have been held sufficient.* R. *v.* Ryan, 2 M. & Rob. 213.]

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 12; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s 71 (ante, p. 865). *As to punishment of offenders under sixteen*, see 8 Edw. 7, c. 67, s. 104 (ante, p. 249).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

As to the proof of the act charged, and of its having been done maliciously, *see ante*, pp. 741, 800).

As to the proof of the intent, *see ante*, pp. 352, 357, 396.

DESTROYING SHIPS WITH INTENT TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 13.]—Whosoever shall set fire to any ship or vessel *or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein*, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

[*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, s. 4, *with the addition of the words in italics and omission of the words "unlawfully and maliciously," and substituting "intent to commit murder" for "intent to murder any person."*]

The punishment is the same as under the last precedent.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

The evidence also will be the same as under the precedents above mentioned, together with proof of the intent, as directed *ante*, pp. 352, 357, 396.

OTHER ATTEMPTS TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 15.]—Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable to . . . be kept in penal servitude for life. . . . [*This enactment was new in* 1861.]

Indictment.

STATEMENT OF OFFENCE.

Attempt to murder, contrary to section 15 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, attempted to murder C. D. by [*describe the act done in ordinary language.*]

Felony: punishable by penal servitude for life or not less than three years, or by imprisonment with or without hard labour for not more than two years. 24 & 25 Vict. c. 100, s. 15; 54 & 55 Vict. c. 69, s. 1 (*ante*, pp. 238, 239). *As*

to recognizances and sureties, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865). *As to punishment of offenders under sixteen*, see 8 Edw. 7, c. 67, s. 104 (ante, p 249).

No offence against this section is triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant committed or procured the commission of the overt act stated in the indictment; and that it was done with intent to murder, which of course may be implied from the nature of the act itself, or may be proved by other evidence, or by threats or declarations of the defendant to that effect (*see ante*, pp. 357, 396 *et seq.*).

24 & 25 Vict. c. 100, s. 15, includes every attempt to murder not specified in any preceding section of the Act. Where a woman jumped out of a window to avoid the violence of her husband, it was held that he could not be convicted of an attempt to murder unless it were proved that he intended by his conduct to make her jump out. *R.* v. *Donovan*, 4 Cox, 399: *but see R.* v. *Halliday*, 61 L. T. 701; 38 W. R. 256, and other cases (*ante*, p. 872). It therefore embraces cases where machinery used in lowering miners into mines has been injured with intent that it may break and precipitate the miners to the bottom of the pit. And cases where steam-engines are injured in order to kill any person, fall within it; and cases of sending or placing infernal machines with intent to murder. *R.* v. *Mountford*, 1 Mood. 441; 7 C. & P. 242; 1 Russ. Cr. (7th ed.) 841, 842 n. This section, however, does not embrace attempts to murder which are *ejusdem generis* with those mentioned in ss. 11-14 of 24 & 25 Vict. c. 100. *R.* v. *Brown*, 10 Q. B. D. 381; 52 L. J. (M. C.) 49; 15 Cox, 199. Therefore, where the prisoner drew a loaded pistol from his pocket, for the purpose of murdering the prosecutor, but before he had time to do anything further in pursuance of his purpose, the pistol was snatched out of his hand, it was held that the offence was not within s. 15, being *ejusdem generis* with the offences mentioned in s. 14, even if it did not actually come within s. 14, but *semble* that it did come within s. 14. *Id.: and see now R.* v. *Duckworth* [1892] 2 Q. B. 83 (*ante*, p. 915).

An attempt to commit suicide is not an attempt to commit murder within the meaning of 24 & 25 Vict. c. 100, s. 15, and is therefore triable at quarter sessions. *R.* v. *Burgess*, L. & C. 258; 32 L. J. (M. C.) 55. But it is an attempt to commit a felony within 3 G. 4, c. 114 (*ante*, p. 242), and punishable accordingly with hard labour. *R.* v. *Mann* [1914] 2 K. B. 107; 83 L. J. (K. B.) 648; 78 J. P. 200; 30 T. L. R. 310; 10 Cr. App. R. 31.

SECT. 2.

ENDEAVOURING TO CONCEAL THE BIRTH OF CHILDREN.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 60.]—If any woman shall be delivered of a child, *every person* who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided, that if *any person* tried for the murder of *any* child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that *the child had recently been born*, and *that such person* did, *by some secret disposition* of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the Court may pass such sentence as if *such person* had been convicted upon an indictment for the concealment of the birth. [*This section was taken from* 9 G. 4, c. 31, s. 14; *and* 10 G. 4, c. 34, s. 17 (1), with *the alterations printed in italics. Under the former enactments the mother only could be tried for the offence, and the words*, "*by any secret disposition*" *have been substituted for* "*by secret burying or otherwise disposing of the dead body.*" *For the history of the legislation on this subject*, see 1 Russ. Cr. (7th ed.) 773 et seq. *As to indictments for murder*, see ante, p. 865.]

Indictment against a Mother.

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Endeavouring to conceal birth, contrary to section 60 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of——, in the county of ——, endeavoured to conceal the birth of a child, of which she had been delivered, by secretly disposing of the dead body of the child.

Under the present statute a person assisting the mother in concealing a birth (who was formerly only indictable as an aider and abettor) is indictable as a principal, as the statute extends to every person who endeavours to conceal the birth of a child by a secret disposition of its dead body.

The proviso extends to a trial on a coroner's inquisition as well as on an indictment. R. *v.* Cole, 2 Leach, 1095; 3 Camp. 371: R. *v.* Maynard, R. & R. 240: and see 5 & 6 Geo. 5, c. 90, s. 8 (3) (ante, p. 61).

Misdemeanor: imprisonment not exceeding two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 60. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour,* Id. s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p 106).

Evidence.

Prove that the defendant was delivered of a child as stated in the indictment; that the child was dead at the time of the secret disposition of its body. *R.* v. *May*, 10 Cox, 448 : *R.* v. *Bell*, Ir. Rep. 8 C. L. 542 : *R.* v. *Williams*, 11 Cox, 684 : *and cf. R.* v. *Bate*, *Id.* 686. It is immaterial whether it die before, at, or after its birth, 24 & 25 Vict. c. 100, s. 60 (*ante*, p. 919). And prove the concealment. A fœtus not bigger than a man's finger, but having the shape of a child, has been held to be a child within the statute. *R.* v. *Colmer*, 9 Cox, 506, Martin, B.; *but see R.* v. *Hewitt*, 4 F. & F. 1101 : *R.* v. *Berriman*, 6 Cox, 388, Erle, J.

Concealment—Secret disposition.]—Where a woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to show who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavouring to conceal the birth. *R.* v. *Higley*, 4 C. & P. 366. But the fact that the mother had previously allowed the birth to be known to some persons is not *conclusive* evidence negativing concealment. *R.* v. *Douglas*, 1 Mood. 480 : *cf. R.* v. *Cornwall*, R. & R. 336. On the other hand, the denial of the birth only is not sufficient to convict her; she must be proved to have done some act of disposal of the body after the child was dead. *R.* v. *Turner*, 8 C. & P. 755. The putting of the dead body between a bed and the mattress, or under a bolster on which the defendant laid her head, was held to be a sufficient "disposing of" it to constitute an offence within 9 G. 4, c. 31, s. 14 (*rep.*), though the disposition may have been only temporary. *R.* v. *Perry*, Dears. 471; 24 L. J. (M. C.) 137; 6 Cox, 531 : following *R.* v. *Goldthorpe*, 2 Mood. 244; C. & Mar. 335, which overruled the earlier cases in which it was held that a *final* disposing of the body must be shown. *See R.* v. *Farnham*, 1 Cox, 349, Patteson, J. Where, however, the prisoner put the dead body of her child upon her bed, and covered it over with a petticoat, where it was subsequently found by a policeman who entered the room, the jury were directed to acquit. *R.* v. *Rosenberg*, 70 J. P. 264, Jelf, J. And where a woman had placed the body of her child in an open box in her bedroom, Byles, J., although he left the case to the jury, intimated to them his opinion, that there was no secret disposition of the dead body, and the prisoner was acquitted. *R.* v. *Sleep*, 9 Cox, 559. So also where the prisoner put the dead body of her child into a box, and put this box into a larger box (neither of the boxes being locked or fastened, although they were closed), and then placed the boxes in a room much resorted to by the people in the house, and in such a position as to attract attention, Bovill, C.J., directed the jury that there was no secret disposition of the dead body. *R.* v.

George, 11 Cox, 41. There may, however, be circumstances attending the deposit by the prisoner of the body of a child in an unlocked box, which may warrant the conclusion that such deposit was a secret disposition of the body. *R.* v. *Cook*, 11 Cox, 542, Lush, J. Where the prisoner took the body out of the house and placed it in a pin-fold or pound, which was open to the sky, although locked, and surrounded by a wall five feet high, along which there was a public footway, Martin, B., held that there was no secret disposition of the body. *R.* v. *Nixon*, 4 F. & F. 1040, *note* (*a*). *See also R.* v. *Clarke*, *Id.* 1040. And to take the dead body of a child and leave it exposed in a public street does not constitute a concealment within the statute, but it is indictable as a nuisance. *R.* v. *Clark*, 15 Cox, 171, Denman, J. The most open exposure may, however, be a secret disposition, as, for instance, in the middle of Dartmoor, or on the top of a mountain in Scotland in winter. *R.* v. *Brown*, L. R. 1 C. C. R. 244; 39 L. J. (M. C.) 94; 11 Cox, 517, Bovill, C.J. In that case the following facts were held to be evidence to go to the jury of a secret disposition of the dead body of the child. The prisoner put the dead body of her child over a wall which was four and a half feet high and divided a yard from a field. The yard was at the back of a public-house, and entered from the street by a narrow passage. The prisoner did not live at the public-house, and must have carried the body from the street up the passage to the yard. The field was grazed by the cattle of a butcher, and the only entrance to it was through a gate leading from the butcher's own yard. There was no path through the field, and a person in the field could only see the body in case he went up to the wall, close against which the body lay. There was nothing on or over the body to conceal it. In *R.* v. *Waterage*, 1 Cox, 338, taking the body of a child to the house of a sister of the mother for burial in a churchyard was held not concealment. In *R.* v. *Hughes*, 4 Cox, 447, a woman placed a living child in a place of concealment. On her return she found the child dead and left it where it lay, replacing the materials by which the concealment was effected. This was held a concealment within 9 G. 4, c. 31, s. 14 (*rep.*). In *R.* v. *Opie*, 8 Cox, 332, the discovery of the dead body of a child three days after birth in a tub covered over, behind the door of the privy of the house in which the mother lived, was held not conclusive evidence of concealment. But in that case Martin, B., expressed his dissent from the decision of the C. C. R. in *R.* v. *Perry* (*ante*, p. 920). *Cf. R.* v. *Goode*, 6 Cox, 318.

Identification.]—In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found and identified as that of the child of which she is alleged to have been delivered. *R.* v. *Williams*, 11 Cox, 684; *and see R.* v. *Bell*, Ir. Rep. 8 C. L. 542. A woman apparently pregnant, while staying at S., received by post, on the 28th August, 1870, an R. newspaper, with the R. postmark upon it. On the same day her appearance and the state of her room indicated that she had been delivered of a child. She left for D. next morning, carrying a parcel. That afternoon a parcel was found in a waiting-room at S. station. It was the dead body of a newly-born child, wrapped in an R. newspaper of 27th August, 1870, bearing the R. postmark. There is a railway from S. to D., but no proof was given of the woman having

been at S. station. It was held that this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, and would not therefore justify her conviction for endeavouring to conceal the birth of her child. *Id.*, Montague Smith, J. Where the only evidence against a prisoner for endeavouring to conceal the birth of her child was that she had been delivered of a child, the body of which was taken away by two other persons, but the prisoner did not know where it was put; this was held not sufficient to warrant a conviction. *R.* v. *Bate*, 11 Cox, 686, Montague Smith, J.

As to cases when a mother indicted for the murder of her newly-born child can be convicted of *manslaughter*, *see R.* v. *Knights*, 2 F. & F. 46 : *R.* v. *Handley*, 13 Cox, 79, and *R.* v. *Izod*, 20 Cox, 690 (*ante*, p. 873).

SECT. 3.

ATTEMPTS TO PROCURE ABORTION.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 58.—*Use of poison or instruments to cause miscarriage.*]—*Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent*, and whosoever, with intent to procure the miscarriage of any woman, *whether she be or be not with child* [*R.* v. *Sockett*, 72 J. P. 428; 1 Cr. App. R. 101] shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section is framed on* 7 W. 4 & 1 Vict. c. 85, s. 6, *with the additions and alterations italicized.*]

Sect. 59.—*Supplying or procuring poison or instruments with like intent.*]—Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section was new law in* 1861. *An offence within this section may also fall within s.* 58. R. *v.* Turner, 4 Cr. App. R. 203.]

Indictment for administering Poison to procure Miscarriage.
(24 & 25 *Vict. c.* 100, *s.* 58, supra.)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

First Count.

Administering poison, with intent to procure miscarriage, contrary to section 58 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to procure the miscarriage of a woman named C. D., unlawfully administered to, or caused to be taken by her, a poison or other noxious thing [*called* ——, *or the nature of which is unknown, as the case may be*].

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 58; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

To support this indictment it must be proved :—

1. That the defendant *administered to or caused to be taken by* C. D., the poison, etc., mentioned in the indictment: or any other substance or thing *ejusdem generis*. *R.* v. *Phillips*, 3 Camp. 73: *R.* v. *Coe*, 6 C. & P. 403. In *R.* v. *Cadman*, as reported in 1 Mood. 114, where the defendant gave the prosecutrix a cake containing poison, which she merely put into her mouth and spat out again, and did not swallow any part of it, it was held that the mere delivery to the woman did not constitute an administering within the meaning of the statute; although the judges seemed to think that swallowing it was not essential. But in *R.* v. *Walford* (Essex Assizes, Feb., 1899), 34 L. J. Newsp. 116, Wills, J., said that *R.* v. *Cadman* must be inaccurately reported, and held it unnecessary for proving administration to show that the poison was taken into the stomach (*see ante*, p. 909): and it is not necessary that there should be an actual delivery by the hand of the defendant. *R.* v. *Harley*, 4 C. & P. 309. Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within 7 W. 4 & 1 Vict. c. 85, s. 6 (*rep.*), of which 24 & 25 Vict. c. 100, s. 58, is a re-enactment. *R.* v. *Wilson*, Dears. & B. 127; 26 L. J. (M. C.) 18; 7 Cox, 190: *R.* v. *Farrow*, Dears. & B. 164. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended; but it must also appear

that the substance administered was either a "poison" or a "noxious thing." *See R.* v. *Isaacs*, L. & C. 220; 32 L. J. (M. C.) 52; 9 Cox, 228: *R.* v. *Hollis*, 12 Cox, 463 (C. C. R.). Where the substance administered is a recognized "poison," then it may be that, although the quantity administered by the defendant is so small as to be incapable of doing harm, that is sufficient to bring him within the statute. *R.* v. *Cramp*, 5 Q. B. D. 307; 49 L. J. (M. C.) 44; 14 Cox, 401. Where the substance is not a "poison," then although if when administered in small quantites it may be innocuous and useful, yet if the quantity administered by the defendant is noxious, the quantity of the substance so administered by him is a "noxious thing" within the statute. *Id.* On the other hand, if the substance, when administered in large quantities, is noxious, yet if in the quantity administered by the defendant it is innocuous, he is not guilty of the administration of a "noxious thing" within the statute. *R.* v. *Hennah*, 13 Cox, 547, Cockburn, C.J., and Hawkins, J. As to evidence of similar acts by accused, *see R.* v. *Bond* [1906] 2 K. B. 389; 75 L. J. (K. B.) 693; 21 Cox, 252; 70 J. P. 424: *R.* v. *Palm*, 4 Cr. App. R. 253.

As to proof of statement in the absence of the accused by the woman to whom the substance was administered, *see R.* v. *Smith*, 16 Cox, 170 (*ante*, p. 375). As to corroboration of her evidence, *see R.* v. *Cramp*, 14 Cox, 390, Denman, J. (*ante*, p. 456). Where a woman in respect of whom offences under ss. 58, 59, are alleged to have been committed is a witness for the Crown, corroboration of her evidence is required, *R.* v. *M*——, 72 J. P. 214, unless she has been acting as a police spy to detect the accused. *R.* v. *Bickley*, 73 J. P. 239; 2 Cr. App. R. 53.

2. It must be proved that the substance in question was administered *with intent to procure the miscarriage of* C. D. Whether it were, in fact, a substance likely or calculated to produce that effect, seems to be immaterial, provided the intent be proved, and the substance were a "poison" or "other noxious thing." As to mode of proving intent, *see ante*, pp. 352, 357, 396.

Although under s. 58, if a woman with intent to procure her own miscarriage does any of the acts mentioned in that section, she only commits a crime under that section if she is with child, yet she may be convicted of conspiring with other persons to procure her own miscarriage, although she may not in fact be with child. *R.* v. *Whitchurch*, 24 Q. B. D. 420; 59 L. J. (M. C.) 77; 16 Cox, 743.

If the woman dies in consequence of the felonious act, the person who committed it is indictable for murder: *see ante*, pp. 888 *et seq.*

Indictment for using Instruments to Procure Miscarriage.
(24 & 25 *Vict. c.* 100, *s.* 58, *ante*, p. 922.)

STATEMENT OF OFFENCE.

Using an instrument to procure miscarriage, contrary to section 58 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to procure the miscarriage of a woman named C. D., unlawfully used an instrument or some other unknown means.

Felony: 24 & 25 Vict. c. 100, s. 58. See *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

The evidence will be the same as in the last case, with this exception, that instead of proving the administration of the poison, etc., it must be proved that the defendant used the instrument mentioned in the indictment, or some other means. Where the instrument alleged to have been used was a quill, which might possibly have been used for an innocent purpose, evidence was allowed to be given, in order to prove the intent, that the prisoner had at other times caused miscarriages by similar means. *R.* v. *Dale*, 16 Cox, 703, Charles, J. As to the principle upon which this kind of evidence is admissible, *see ante*, pp. 357, 359.

As to inciting a person to attempt to commit an offence against this section, *see R.* v. *Brown*, 63 J. P. 790, *post*, "Attempt to commit crime."

Indictment for procuring Poison for the purpose of its being used to cause Miscarriage. (24 & 25 *Vict. c.* 100, *s.* 59, *ante*, p. 922.)

STATEMENT OF OFFENCE.

Procuring poison to be used with intent to procure abortion, contrary to section 59 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, supplied or procured a poison or other noxious thing [*called* ——, *or the nature of which is unknown, as the case may be*], knowing that it was intended to be unlawfully used or employed with intent to procure the miscarriage of a woman named C. D.

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years.—24 & 25 Vict. c. 100, s. 59; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace, and being of good behaviour*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

In order to constitute the offence of supplying a noxious thing knowing that the same was intended to be used with intent to procure a miscarriage, the

substance supplied must be of a noxious character (in the quantity in which it was supplied). *R.* v. *Cramp*, and *R.* v. *Hennah* (*ante*, p. 924); and it is not sufficient that, being harmless in itself, it might, if taken under a belief that it would procure miscarriage, produce that result by its mere action on the imagination. *R.* v. *Isaacs*, (*ante*, p. 923). If, however, the drug administered produces miscarriage, although there be no other evidence of its nature, this is sufficient evidence of its being a noxious thing. *R.* v. *Hollis*, 12 Cox, 463 (C. C. R.). If the drug supplied by the defendant is noxious, and is supplied with intent to procure miscarriage, the offence is complete, although the woman herself may not have intended to use the drug, and although no other person than the defendant may have intended that it should be used for the purpose of causing a miscarriage : *R.* v. *Hillman*, L. & C. 343; 33 L. J. (M. C.) 60; 9 Cox, 386 : and although the woman was not, and never had been, pregnant. *R.* v. *Titley*, 14 Cox, 502, Stephen, J. (*a*)

SECT. 4.

ASSAULT, BATTERY, WOUNDING, ETC.

Statutes.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 43.—*Aggravated assaults.*]—When any person shall be charged before two justices of the peace with an assault and battery upon a male child whose age shall not, in the opinion of such justices, exceed fourteen years, or on any female, either upon the complaint of the party aggrieved or otherwise, if the assault or battery is of such an aggravated nature that it cannot, in their opinion, be sufficiently punished under the provisions hereinbefore contained (s. 42) as to common

(*a*) The *ratio decidendi* of both these cases has been severely criticized in a colonial case upon the enactment in exactly the same terms as 24 & 25 Vict. c. 100, s. 59. *R.* v. *Hyland* [1898] 24 Victoria L. R. 101. There the police set a trap to catch a supposed abortionist, and wrote him a letter stating that a woman was pregnant and asking for something to cure her. In the mistaken belief that the woman existed, the prisoner sent pills containing a small quantity of a certain drug, and at the trial the question arose and was reserved, whether the prisoner could be convicted as the drug had not been supplied for an existing woman. The Court of six judges was equally divided in opinion, three accepting *R.* v. *Hillman* as decisive and as correctly defining the word "knowing" so as to include "believing," the other three holding that the word "knowing" could not be so extended, and that the words "intended to be used" applied to the person supplied, and not to the supplier.

In *R.* v. *Sculley* [1903] 23 N. Z. L. R. 380, the Court followed *R.* v. *Hillman*, but were of opinion that on a charge of "procuring" there must be evidence that the instrument, etc., was obtained for the forbidden purpose, and not merely that it was possessed and used for such purpose. *R.* v. *Neil* [1909] Queensland State Rep. 225, also followed *R.* v. *Hillman* in preference to *R.* v. *Hyland*. The High Court of Australia declined to entertain the appeal brought to decide between the two cases, holding that on the facts of the case there was no substantial miscarriage of justice. *R.* v. *Neil* [1909] 8 Australia C. L. R. 671.

assaults and batteries, they may proceed to hear and determine the same in a summary way; and if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of 20*l.*, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and if the justices shall so think fit in any of the said cases, shall be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of such sentence. [See Godsen *v.* Dartford Justices, 62 J. P. 104. *A person charged under this section cannot elect to be tried on indictment* (42 & 43 Vict. c. 49, s. 17, ante, p. 7), *but may be sent for trial under s.* 46, infra. *As to the procedure and evidence under this section, where the person assaulted is under sixteen, see* 8 Edw. 7, c. 67, ss. 27-32, post, pp. 987-990. *As to who may institute proceedings under s.* 42, see Pickering *v.* Willoughby [1907] 2 K. B. 296; 76 L. J. (K. B.) 709; 71 J. P. 311.]

Sect. 44.—*Certificate of dismissal of charge of assault made to a court of summary jurisdiction.*]—Ante, p. 161.

Sect. 45.—*Certificate of conviction, effect, etc.*]—Ante, p. 161.

Sect. 46.]—Provided that in case the justices shall find the assault or battery complained of (under ss. 42, 43) to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstances, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereon, and shall deal with the case in all respects as if they had no authority finally to hear and determine the same:

Provided also that nothing herein contained shall authorize any justices to hear and determine any case of assault and battery in which any questions shall arise as to the title to any lands, tenements, or hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency or any execution under the process of any court of justice. [See Anon., 1 B. & Ad. 382; R. *v.* French, 20 Cox, 200. *The justices can commit for trial even where the person assaulted does not prosecute.* R. *v.* Gaunt, 18 Cox, 210; 60 J. P. 90 (C. C. R.) And see Crocker *v.* Raymond [1886] 3 C. L. R. 181; Nicholson *v.* Booth [1888] 57 L. J. (M. C.) 43; 16 Cox, 373; 52 J. P. 662; and Pickering *v.* Willoughby, *supra.*]

Sect. 47.—*Punishment of assaults.*]—Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to be kept in penal servitude. . . .

And whosoever shall be convicted upon an indictment for a common assault shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour. [*The first part of this section re-enacts* 14 & 15 Vict. c. 100, s. 29. *The italicized part was new in* 1861. *For indictment*, see post, p. 929. Cf. s. 20, post, p. 936.]

58 & 59 *Vict. c.* 39 (*Summary Jurisdiction* (*Married Women*) *Act*, 1895), *s.* 4.—*Power to make a separation order in favour of a married woman on*

conviction of her husband of assaulting her.]—Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of s. 43 of the *Offences against the Person Act*, 1861 (*ante*, p. 926), or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act :

Provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment she may apply to the Court before whom her husband has been convicted, and that court shall, for the purpose of this section, become a court of summary jurisdiction, and shall have the power without a jury to hear an application, and make the order or orders applied for. [*Where a husband was convicted at assizes upon an indictment for throwing corrosive fluid on his wife with intent to burn, and was sentenced to imprisonment with hard labour for eighteen months, an order was made by* Darling, J., *on the application of the wife (under this and the following sections), that she be no longer bound to cohabit with her husband.* R. *v.* Knowles, 65 J. P. 27.]

Sect. 5.—*Provisions which may be included in a separation order.*]—The Court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz. :—

(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):

(*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband while under the age of sixteen years be committed to the applicant :

(*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court, or third person on her behalf, such weekly sum not exceeding two pounds as the Court shall, having regard to the means of both the husband and wife, consider reasonable :

(*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the Court and such reasonable costs of either of the parties as the Court may think fit. (See *note to s.* 4, *supra*).

24 & 25 *Vict. c.* 100, *ss.* 74, 75, 77.—*Costs.*]—Repealed as to England, 8 Edw. 7, c. 15, s. 10. For the present law as to costs, *see ante*, pp. 267 *et seq.*

Indictment for an Assault occasioning actual Bodily Harm. (24 & 25 *Vict. c.* 100, *s.* 47, *ante*, p. 927.)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Assault, contrary to section 47 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted C. D. thereby occasioning to C. D. actual bodily harm.

On this indictment the defendant may be convicted of a common assault. R. *v.* Oliver, Bell, 287; 30 L. J. (M. C.) 12; 8 Cox, 384: R. *v.* Yeadon, L. & C. 81; 31 L. J. (M. C.) 70; 9 Cox, 91.

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years with or without hard labour.— 24 & 25 Vict. c. 100, s. 47; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 71 (ante, p. 865).

As to adjudging payment by the defendant of the costs of the prosecution on conviction, see 8 Edw. 7, c. 15, s. 6 (1) (ante, p. 284).

The Court will not pass judgment for an assault during the pendency of an action for the same assault. R. *v.* Mahon, 4 A. & E. 575.

The Court may, with the assent of the prosecutor, if the circumstances appear to be such as to warrant that course, allow the defendant to plead guilty to a charge of assault, and inflict upon him a mere nominal fine, on the understanding that he shall make a compensation to the prosecutor. R. *v.* Roxburgh, 12 Cox, 8, Cockburn, C.J. But see post, tit. "Compounding Offences."

Indictment for Common Assault (Common Law).

STATEMENT OF OFFENCE.

Common assault.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted C. D.

Misdemeanor: imprisonment, with or without hard labour, not exceeding one year; 24 & 25 Vict. c. 100, s. 47; *or fine, etc., or order to pay costs*, ut supra.

The indictment may be preferred by any person: and the right to prosecute is not restricted to the person aggrieved, even where the indictment is preferred after summary proceedings, in consequence of the decision of the justices, under 24 & 25 Vict. c. 100, s. 46, supra. See R. *v.* Gaunt, 18 Cox, 210; 60 J. P. 90 (C. C. R.).

Evidence for the Prosecution.

Assault.]—An assault is an attempt to commit a forcible crime against the person of another: such as an attempt to commit a battery, murder, robbery, rape, etc. It includes an attempt to commit a battery, and also a battery actually committed; and in an indictment for a common assault, if the prosecutor proves either, the defendant must be convicted. Striking at another with a cane, stick or fist, although the party striking misses his aim; 2 Roll. Abr. p. 554, pl. 45; drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a loaded gun at a man who is within the distance to which the gun will carry (*see R.* v. *St. George*, 9 C. & P. 483: *R.* v. *Baker*, 1 C. & K. 254: *Osborn* v. *Veitch*, 1 F. & F. 317: *Read* v. *Coker*, 13 C. B. 850); pointing a pitchfork at him, when within reach of it; or any other like act indicating an intention to use violence against the person of another, is an assault. 1 Hawk. c. 62, s. 1. And if a person presents a firearm which he knows to be unloaded at another who does not know that it is unloaded, and so near that it might produce injury if it was loaded and went, off, this is an assault. *R.* v. *St. George*, 9 C. & P. 483, *per* Parke, B.; *but see R.* v. *James*, 1 C. & K. 530, *contra*. In *Hunter* v. *Johnson*, 13 Q. B. D. 225; 53 L. J. (M. C.) 182, detention of a child after school hours by the master without lawful authority was held to be an assault. *And see R.* v. *Linsberg* (*post*, p. 1000).

An unlawful imprisonment is also an assault. Where the defendants took a new-born child from the mother, under pretence of taking it to an institution to be nursed, and put it into a bag, and hung the bag with the child in it on some palings by the wayside, this was held to be an assault. *R.* v. *March*, 1 C. & K. 496. But in *R.* v. *Renshaw*, 2 Cox, 285; 11 Jur. 615, abandoning a child in a dry ditch, where it suffered no harm from exposure, and was soon found, was held by Parke, B., not to be an assault.

Mere words, however, can never amount to an assault. 1 Hawk. c. 62, s. 1. So, if a man strikes at another, but at such a distance that he cannot by possibility touch him, it is no assault. Com. Dig. Battery (C.). But if A. advances in a threatening attitude towards B. to strike him, and is stopped just before he is near enough for his blow to take effect, it is an assault. *Stephens* v. *Myers*, 4 C. & P. 349. The causing a deleterious drug to be taken by another was held to be an assault in *R.* v. *Button*, 8 C. & P. 660; but that decision is now overruled: *see R.* v. *Dilworth*, 2 M. & Rob. 351: *R.* v. *Hanson*, 2 C. & K. 912: *R.* v. *Walkden*, 1 Cox, 282.

As to ill-treatment of apprentices, servants, lunatics, and children, *see post*, pp. 972 *et seq.*

Battery.]—A battery, in the legal acceptation of the word, includes beating and wounding. To beat, also in the legal acceptation of the term, means not merely to strike forcibly with the hand, or a stick, or the like, but includes every touching or laying hold (however trifling) of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner; 1 Hawk. c. 62, s. 2; *see Rawlings* v. *Till*, 3 M. & W. 28: *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J. (Ex.) 260; as, for instance, thrusting or pushing him in anger: *Cole*

v. *Turner*, 6 Mod. 149, Holt, C.J.; holding him by the arm; spitting in his face; *R.* v. *Cotesworth*, 6 Mod. 172; jostling him out of the way; *Cole* v. *Turner*, *supra*; pushing another man against him; Bull (N. P.) 16; throwing a squib at him; *Scott* v. *Shepherd*, 2 W. Bl. 892; striking a horse upon which he is riding, whereby he is thrown; *Dodwell* v. *Burford*, 1 Mod. 24; *Anon.*, W. Jones, 444; or the like. If a man strikes at another with a cane or fist, or throws a bottle at him, or the like, if he misses him it is an assault; if he hits him it is a battery. A wounding is where the violence is so great as to draw blood, by striking or stabbing with a sword, knife, or other instrument, or by shooting, or by striking with a cudgel or fist, or the like. (*See post*, p. 938.)

Actual bodily harm.]—"Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor: it need not be an injury of a *permanent* character; nor need it amount to what would be considered to be grievous bodily harm." (*See post*, p. 940.)

Consent.]—As a general rule, if consent is freely given by a rational and sober person, knowing the nature of the act, it is an answer to the indictment, unless the consent is to bodily injury amounting to mayhem, or to an injury constituting a breach of the public peace. *See* Steph. Dig. Cr. L. (6th ed.) 164-166: *R.* v. *Coney*, 8 Q. B. D. 534; 51 L. J. (M. C.) 66; 15 Cox, 46. A magistrate has no right to order an examination of the person of a prisoner, and therefore an examination by medical men, in pursuance of such an order, of the person of a female, in custody upon the charge of concealing the birth of her illegitimate child, and against her consent, is an assault. *Agnew* v. *Jobson*, 13 Cox, 625, Lopes, J. For the American authorities on the physical examination of prisoners, *see State of Iowa* v. *Height* [1902] 94 Amer. State Reports, 323, *and notes*. If a master takes indecent liberties with a female scholar, without her consent, though she does not resist, he may be convicted of a common assault. *R.* v. *Nichol*, R. & R. 130: *see R.* v. *Day*, 9 C. & P. 722, in which case Coleridge J., drew a distinction between consent and submission. If a medical man unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault if he himself takes off her clothes. *R.* v. *Rosinski*, 1 Mood. 19.

Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case, this was held to be certainly an assault and probably a rape. *R.* v. *Case*, 1 Den. 580; 19 L. J. (M. C.) 174; 4 Cox, 220. Prior to 48 & 49 Vict. c. 69, s. 3, sub-s. 2 (*post*, p. 1035), there seems to have been no doubt that the prisoner under such circumstances as those in *R.* v. *Case*, *supra*, might be indicted for rape. *R.* v. *Flattery*, 2 Q. B. D. 410; 46 L. J. (M. C.) 130. In *R.* v. *O'Shay*, 19 Cox, 76, Ridley, J., held that the effect of the *Criminal Law Amendment Act*, 1885 (s. 3, sub-s. 2), is to make *R.* v. *Flattery* no longer law, and that consent, however obtained, is an answer to an indictment for rape except in the cases within the last paragraph of s. 4

of that Act. But the learned judge appears to have directed the jury that if satisfied that the accused had obtained his purpose by fraud, they might convict of indecent assault. *Cf.* Steph. Dig. Cr. Law (6th ed.), p. 207. It was laid down by Willes, J., in *R.* v. *Bennett*, 4 F. & F. 1105, that assault is within the rule that fraud vitiates consent. Where, therefore, the prisoner, who had venereal disease, induced a girl of thirteen years of age, who was ignorant of his condition, to have connection with him, and he infected her, it was held that he was guilty of an indecent assault. *R.* v. *Bennett*, *supra*. The prisoner might also, under a similar state of facts, be indicted for an assault occasioning actual bodily harm. *R.* v. *Sinclair*, 13 Cox, 28, Shee, J.: *and see Hegarty* v. *Shine*, 4 L. R. Ir. 288; 14 Cox, 145. The cases of *R.* v. *Bennett* and *R.* v. *Sinclair*, and the maxim that fraud vitiates consent, at all events in any wide application of that maxim, were the subjects of unfavourable comment by some among the majority of judges who decided *R.* v. *Clarence*, 22 Q. B. D. 23; 58 L. J. (M. C.) 10; 16 Cox, 511. The circumstances of that case were, however, very special (*see post*, p. 942), and *R.* v. *Bennett* and *R.* v. *Sinclair* were not expressly overruled. Pollock, B., who was one of the majority, stated that although he saw great difficulty in adopting those cases in their integrity, he was not prepared to say that they should be overruled, as in cases of a similar kind, which might well arise, they were undoubtedly important and useful in the administration of the criminal law. But where there is full consent to the intercourse, it is difficult, since *R.* v. *Clarence*, to contend that concealment of the physical condition of the accused is such a fraud as to create criminal liability. *See per* Wills, J., 22 Q. B. D. 32-36.

If parish officers cut off the hair of a pauper in the poorhouse by force and against her will, it is an assault. *Forde* v. *Skinner*, 4 C. & P. 239.

In the case of an indecent assault on children of either sex, under the age of thirteen, consent is no defence. 43 & 44 Vict. c. 45, s. 2 (*post*, p. 1032).

Although, as a general proposition, it is true that there can be no assault unless the act charged as such be done without the consent of the person alleged to have been assaulted, this rule does not extend to cases where the alleged assault is of such a nature or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured, and involves an actual breach of the peace. *R.* v. *Coney*, 8 Q. B. D. 534; 51 L. J. (M. C.) 66; 15 Cox, 46. Therefore, in the case of a prize-fight, each of the fighters, and all persons aiding and abetting therein, are guilty of an assault. *Id.*

Evidence for the Defendant.

The defendant must prove either that he is not guilty at all, or that the facts of the case do not amount to an assault or battery, or that he was justified or excused in law in what he did; *see R.* v. *Meredith*, 8 C. & P. 589; or that the complaint has been already disposed of upon summary application before two justices. 24 & 25 Vict. c. 100, ss. 44, 45 (*see ante*, p. 161). The first two defences are always given in evidence under the general issue both in civil and criminal cases; matter of justification or excuse is specially pleaded in civil actions, but is always given in evidence under the general issue in

criminal cases, except in defamatory libel. The defence of previous acquittal or conviction by justices should be specially pleaded. (*See ante*, pp. 155, 160).

1. Misadventure.]—It is a good defence to prove that the alleged battery happened by misadventure. If a horse runs away with his rider, and runs against a man, it is no battery. *Gibbon* v. *Pepper*, 2 Salk. 637; 1 Ld. Raym. 38: *Stanley* v. *Powell* [1891] 1 Q. B. 86, 90; 60 L. J. (Q. B.) 52, Denman, J. If a soldier, in his ranks, discharges his gun, and a man unexpectedly passes before him at the time, and is hurt by it, it is no battery. *Weaver* v. *Ward*, Hob. 134; *and see R.* v. *Gill*, 1 Str. 190. There are many cases of accidents which cannot be set up as a defence in an action for trespass to the person, that would certainly be a good defence upon an indictment. In civil cases, the accident must have been unintentional, and not due to negligence or any want of caution, if the defendant is to be excused. *See Stanley* v. *Powell*, *supra*, and cases there collected, and 2 Rolle Abr. 548 (G.): *Wakeman* v. *Robinson*, 1 Bing. 213. But in criminal cases, it may be deemed a general rule, that the same facts which would make a killing homicide by misadventure (*see ante*, pp. 870 *et seq.*) will be good defence upon an indictment for a battery.

2. Consent.]—It is as a general rule a good defence that the person complaining of assault or battery consented to the acts complained of. (*See ante*, p. 931).

3. Lawful sport.]—It is a good defence to prove that the alleged battery was merely an amicable contest; as, that the defendant wrestled with the prosecutor for a wager. Com. Dig. Pleader, 3 M. 18. So, that it happened by accident whilst the defendant was engaged in some sport or game which was neither unlawful nor dangerous (*see ante*, p. 879) is a good defence.

4. Lawful correction.]—It is a good defence to prove that the alleged battery was merely the correcting of a child by its parent, the correcting of an apprentice or scholar by his master, or the punishment of the criminal by a proper officer; Com. Dig. Pleader, 3 M. 19; 1 Hawk. c. 60, s. 23; c. 62, s. 2; *and see Watson* v. *Christie*, 2 B. & P. 224; provided the correction be moderate in the manner, the instrument, and the quantity of it (*see ante*, p. 885), or that the criminal is punished in the manner appointed by the law. It has been held that the defendant may justify even a mayhem, if done by him as a military officer, for disobedience of orders. *Lane v. Hegberg*, Bull. (N. P.) 19, *cit.* (As to the lawful modes of inflicting corporal punishment on criminals, *see ante*, pp. 244-6.)

5. Self-defence.]—It is a good defence, in justification even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first; and that the defendant committed the alleged battery merely in his own defence. *Cockcroft* v. *Smith*, 2 Salk. 642; 1 Ld. Raym. 177; *and see* 1 Sid. 246; 1 Rolle Rep. 19; 3 Salk. 46: *R.* v. *Knock*, 14 Cox, 1 (*ante*, p. 880). If he proves an assault merely, as, for instance, that the prosecutor lifted up his

staff and offered to strike him, it is sufficient to justify the defendant's striking him: for he need not in such a case stay till the other has actually struck him. Bull. (N. P.) 18; 2 Rolle Abr. 547, *l.* 37, approved and adopted in *R.* v. *Deana* [1909] 73 J. P. 255 (C. C. A.). So a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 2 Rolle Abr. 546 (D.); 1 Hawk. c. 60, ss. 23, 24. But in all these cases the battery must be such only as was necessary to the defence of the party or his relation; for if it were excessive, if it were greater than was necessary for mere defence, or if it were after all danger from the assailant was past, and by way of revenge, the prior assault will be no justification. Bull. (N. P.) 18; *R.* v. *Driscoll*, C. & Mar. 214: *Anon.*, 2 Law. 48, Farke, B. *R.* v. *Morse*, 4 Cr. App. R. 50. It is a sufficient answer to this defence, to prove that the first assault was justifiable. Com. Dig. Pleader, 3 M. 15; 1 Salk. 407; Carth. 280 (*see ante*, pp. 879, 886 *et seq.*).

6. Defence of property.]—The defendant may justify a battery by proving that he committed it in defence of his possession; as, for instance, to remove the prosecutor out of the defendant's close or house; or to prevent him from entering it; 2 Rolle Abr. 548, *l.* 25; to restrain him from taking or destroying his goods, etc.; 2 Rolle Abr. 549, *l.* 7; from taking or rescuing cattle, etc., in his custody upon a distress; *Id. l.* 16; 2 Bro. Ent. 253; or the like. In the case of a trespass in law merely, without actual force, the owner of the close, etc., must first request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him; and, even if he refuses, he can only justify so much force as is necessary to remove him. *Weaver* v. *Bush*, 8 T. R. 78. But if the trespasser uses force, then the owner may oppose force to force; *Green* v. *Goddard*, 2 Salk. 641; *Weaver* v. *Bush*, *supra*: *Tullay* v. *Reed*, 1 C. & P. 6; and in such case, if he is assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive; *King* v. *Tebbart*, Skin. 387; or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like (*see ante*, p. 886).

7. Execution of process.]—It is a good defence to prove that the defendant, as an officer of justice, arrested the prosecutor by virtue of a certain writ of process, which is the alleged battery complained of. 2 Rolle Abr. 547 (A.). A sheriff's officer, however, can only justify laying his hand upon a man, in order to arrest him upon a writ of process; *Harrison* v. *Hodgson*, 8 L. J. (K. B.) 223; 10 B. & C. 445; 5 Man. & Ry. 392; unless he resist, or an attempt be made to rescue him, or to prevent or hinder the arrest; *Williams* v. *Jones*, Cas. (K. B.) temp. Hardw. 298; 2 Str. 1049: *Truscott* v. *Carpenter*, 1 Ld. Raym. 229, 232: *Levy* v. *Edwards*, 1 C. & P. 40; and even then he can justify no greater degree of force than was necessary in order to secure the prisoner. And the same as to officers of justice, and persons acting in their aid, arresting on suspicion of felony, without warrant; and as to private persons

arresting men committing felonies in their presence, *see ante*, pp. 897 *et seq.* So a man may justify laying his hand upon another to prevent him from fighting, or committing a breach of the peace; Com. Dig. Pleader, 3 M. 16; or to prevent him from rescuing goods taken in execution; *Bridgwater* v. *Bythway*, 3 Lev. 113; or the like. *See Glover* v. *Hynde*, 1 Mod. 168; 2 Rolle Abr. 546, *l.* 40. Yet, even in these cases, he must not use more force than is requisite to restrain the other party, otherwise he cannot avail himself of the threatened breach of the peace, etc., as a justification. A coroner has a discretion to decide on the degree of publicity to be allowed in an inquest before him, and may justify the forcible exclusion of any person from his court. *Garnett* v. *Ferrand*, 5 L. J. (K. B.) 221; 6 B. & C. 611. In *Cox* v. *Coleridge*, 1 B. & C. 37, it was held that a magistrate, on a preliminary inquiry into a case of felony, might justify a forcible exclusion of a party from the justice-room, even though he was the attorney of the party accused. 11 & 12 Vict. c. 42, s. 19, provides that such an inquiry is not to be deemed to be held in open court, and that the justices may exclude any person except the counsel or solicitor of the accused. *See s.* 17. (*a*) But if the inquiry is final and of a judicial nature, it must be public. *Daubney* v. *Cooper*, 8 L. J. (K. B.) 21; 10 B. & C. 237; *see also Willis* v. *Maclachlan*, 1 Ex. D. 376; 45 L. J. (Ex.) 689; 11 & 12 Vict. c. 43, s. 12; 42 & 43 Vict. c. 49, s. 20 (1), unless a statute authorizes hearing *in camera*, *e.g.*, under 8 Edw. 7, c. 45, s. 5, and 8 Edw. 7, c. 67, s. 114 (*see ante*, p. 199). Serving process by thrusting a document into the fold of a man's coat is not necessarily an assault. *Rose* v. *Kempthorne*, 22, Cox, 356; 75 J. P. 71.

8. Previous summary trial.]—It is a good defence to show that the complaint has been disposed of by two justices, either by conviction or dismissal of the case, provided, in the former case, the defendant has paid the penalty, and suffered the imprisonment awarded: and in the latter, the magistrates have dismissed the case, because it was justified, or so trifling as not to merit punishment, or not proved, and this be forthwith certified under their hands. 24 & 25 Vict. c. 100, ss. 44, 45 (*ante*, p. 161). As to the mode of pleading this defence and its effect, *see ante*, pp. 155, 160. It is to be observed that these provisions do not prevent the prosecutor from preferring his indictment in the first instance, if he thinks fit.

(*a*) In 1884 the Home Office adopted the view, on the advice of the law officers, that s. 19 was superseded by 42 & 43 Vict. c. 49, s. 20 (1). *See* Douglas, Summary Jurisdiction Procedure (9th ed., 350). But in 1894 the Secretary of State came to the conclusion that s. 19 remained in full force. *See* 58 J. P. 772. *Boulter* v. *Kent*, *JJ.* [1897] A. C. 556.

SHOOTING, WOUNDING, ETC., WITH INTENT TO MAIM, ETC.

Statutes.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 18.]—Whosoever shall unlawfully and maliciously *by any means whatsoever* wound *or cause any grievous bodily harm to any person*, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 7 W. 4 & 1 Vict. c. 85, s. 4, *with the modifications in italics, and the omission of the words "cut" and "stab." The section extends to three species of the assaults: namely*, 1. *To "wound or cause any grievous bodily harm to any person;"* 2. *To "shoot at" any person;* 3. *To attempt, "by drawing a trigger, or in any other manner," to discharge any kind of loaded arms at any person. And each of these may be done with any one of the following intents: namely*, 1. *To maim;* 2. *To disfigure;* 3. *To disable;* 4. *To do some other grievous bodily harm;* 5. *To resist or prevent the lawful apprehension or detainer of any person.* (*a*) *The offence was held not to be one involving bodily injury to a child under sixteen, within* 57 *&* 58 Vict. c. 41, s. 12, *and Sched.* R. *v.* Roberts, 18 Cox, 530. *That enactment was repealed and re-enacted by* 4 Edw. 7, c. 15, *and is now represented by* 8 Edw. 7, c. 67, s. 12, *post*, p. 980. *It is submitted that* R. *v.* Roberts *was wrongly decided*: see post, p. 994.]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *ss.* 102, 104.—*Punishment of persons under sixteen.*]—Ante, pp. 248, 249.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 19.]—*Definition of loaded arms.*]—Ante, p. 911.

Sect. 20.]—Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section re-enacts* 14 & 15 Vict. c. 19, s. 4. *The maximum punishment is now five years' penal servitude, by virtue of* 54 & 55 Vict. c. 69 (Penal Servitude Act, 1891), s. 1 (1), ante, p. 238. See R. *v.* Peters, 1 Cr. App. R. 141. *For indictment*, see post, p. 937.

(*a*) Under this section the intent to maim, etc., is an essential element in the offence, and must be charged and found, and the malicious intent must be found. *See Slaughenwhite* v. *R.* [1905] 9 Canada Cr. Cas. 173.

Indictment for Wounding, with intent to Maim, etc.
(24 & 25 *Vict. c.* 100, *s.* 18.)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

First Count:

Wounding with intent, contrary to section 18 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, wounded C. D., with intent to do him grievous bodily harm, or to maim, disfigure, or disable him, or to resist the lawful apprehension of the said A. B.

[First Count.—*Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.*—24 & 25 Vict. c. 100, s. 18; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

For punishment of offenders under sixteen, see 8 Edw. 7, c. 67, s. 104 (ante, p. 249).

The offence of wounding with intent is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).]

STATEMENT OF OFFENCE.

Second Court.

Unlawful wounding, contrary to section 20 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously wounded C. D.

As to second count, *see post*, p. 941. *Unlawful wounding is triable at quarter sessions.*

Evidence.

Malice.]—By 9 G. 4, c. 31, s. 12 (*rep.*), it was necessary that the offence should have been committed under such circumstances that, if death had ensued therefrom, it would have amounted to murder. This proviso was omitted from 7 W. 4 & 1 Vict. c. 85, s. 4 (*rep.*), and is not contained in 24 & 25 Vict. c. 100, s. 18, which would seem therefore to include every wounding, etc., done without lawful excuse with any of the intents mentioned in the statute, for from

the act itself malice will be inferred. The word " maliciously " in the statute does not mean with malice aforethought; for if it did, the offence would be included under s. 14 (*ante*, p. 911). The offence is therefore equally within this section, although if death had ensued it would have been manslaughter only. *R.* v. *Griffiths*, 8 C. & P. 248 : *R.* v. *Nicholls*, 9 C. & P. 267 : *Anon.*, 2 Mood. 40.

Wound.]—Under 43 G. 3, c. 58 (*rep.*), which used the words " stab, cut, or wound," if the indictment was for cutting, evidence of a stabbing would not support it, the words being in the alternative. *R.* v. *M'Dermot*, R. & R. 356. Under the words " stab " or " cut," an incised wound must have been proved; a mere contused or lacerated wound was not within those words. The word " wound " in s. 18 includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds. *See Shea* v. *R.*, 3 Cox, 141 (Ir.). But to constitute a wound within the statute, the continuity of the skin must be broken : *R.* v. *Wood*, 1 Mood. 278; or, in other words, the outer covering of the body (that is, the *whole skin*, not the mere *cuticle* or upper skin) (*R.* v. *M'Loughlin*, 8 C. & P. 635) must be divided. *R.* v. *Beckett*, 1 M. & Rob. 526. But a division of the *internal* skin—*e.g.*, within the cheek or lip—is sufficient to constitute a wound within the statute. *R.* v. *Smith*, 8 C. & P. 173 : *R.* v. *Warman*, 1 Den. 183; 2. C. & K. 195. If the skin is broken, the nature of the instrument with which the injury is inflicted is immaterial. Thus, a wound from a kick with a shoe is within the statute. *R.* v. *Briggs*, 1 Mood. 318. And where a hammer was thrown at a person, which struck him on the nose, and broke the skin, it was held to be a wound within the meaning of 7 W. 4 & 1 Vict. c. 85, s. 4 (*rep.*). *R.* v. *Withers*, 1 Mood 294. *See R.* v. *Payne*, 4 C. & P. 558. Where the defendant struck the prosecutor on the outside of his hat violently with an air-gun, and the hat wounded the prosecutor, but the air-gun never came in contact with the prosecutor, it was held to be a wounding. *R.* v. *Sheard*, 2 Mood. 13; 7 C. & P. 846.

It was held under 9 G. 4, c. 36, ss. 11, 12 (*rep.*). that the " wound " must be made by an instrument, and not by the hands or teeth, because the word " wound " is there used concurrently with " stab " and " cut." But the present statute extends to wounding, etc., " *by any means whatsoever.*" The wound must be given by the act of the defendant; for if in self-defence the prosecutor forces a part of his body against an instrument in the defendant's hands, and so cut or wound himself, it is not within the statute. *R.* v. *Beckett*, 1 M. & Rob. 526. *Sed quære. Cf. R* v. *Day*, 1 Cox 207.

With intent, etc.]—In order to convict of the felony, the intent must be proved as laid, and as a general rule can be proved by circumstantial evidence only (*ante*, pp. 352, 357, 396).

If an indictment alleges that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension; *R.* v. *Duffin*, R. & R. 365 : *R.* v. *Boyce*, 1 Mood. 29; unless, for the purpose of effecting his escape, the defendant also harboured one of the intents stated in

the indictment; *R.* v. *Gillow*, 1 Mood. 85; for where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was held that he was guilty of cutting with intent to do grievous bodily harm, notwithstanding his principal object was to commit the rape. *R.* v. *Cox*, R. & R. 362. So, also, if a person wounds another in order to rob him, and thereby inflicts grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm. *R.* v. *Bowen*, C. & Mar. 149. In the case of *R.* v. *Woodburn and Coke*, 16 St. Tr. 53, 69, the defendants had the effrontery to set up as a defence that the assault was committed by them with intent, not to maim or disfigure, but to murder; the Court, however, held, that if a man attacks another with intent to murder him, with an instrument which cannot but cause a risk of disfigurement, and in such attack happens not to kill, but only to disfigure him, it was within *Sir John Coventry's Act*, 22 & 23 Car. 2, c. 1, s. 7 (*rep.*), which made it felony to commit any of the offences there mentioned, with intent to maim or disfigure. The defendants were accordingly convicted and executed. 4 Bl. Com. 207 n. (*k*).

Where the defendant struck at A., but B., interposing, received the blow, and was wounded, it was held that the defendant could not be convicted of wounding B. with intent to do him grievous bodily harm, under 7 W. 4 & 1 Vict. c. 85, s. 4 (*rep.*). *R.* v. *Hawlett*, 1 F. & F. 91; *and cf. R.* v. *Holt*, 7 C. & P. 513: *R.* v. *Ryan*, 2 M. & Rob. 213 (*ante*, p. 909). But *R.* v. *Hewlett* was doubted by Brett, J., in *R.* v. *Stopford*, 11 Cox, 643, on the ground that it was inconsistent with *R.* v. *Hunt*, 1 Mood. 93 (*ante*, p. 889), which was accepted as good law in *R.* v. *Latimer*, 17 Q. B. D. 359 (*post*, p. 942); and under the present statute it is sufficient if it is proved that the defendant wounded, etc., shot at, etc., any person, with intent to maim, etc., *any person*; therefore, in the case just cited, the defendant might now be convicted of wounding B. with intent to do grievous bodily harm to A. And an indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm, is supported by evidence that the prisoner intended to do grievous bodily harm to the man he wounded, and who in fact was A., although the prisoner did not think that he was A., but somebody else. *R.* v. *Stopford*, *supra*, Brett, J. *See also R.* v. *Smith*, Dears. 559; 25 L. J. (M. C.) 29 (*ante*, p. 909). Where a person at night heard a person in the house, and reasonably believing that he was there for a felonious purpose, shot at him with intent to frighten him, and hit him, it was held that no offence under this section was committed. *R.* v. *Dennis* [1905] 69 J. P. 256, Fulton, Recorder. A person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. *R.* v. *Fretwell*, L. & C. 443; 33 L. J. (M. C.) 118; 9 Cox, 471.

If it is doubtful whether the act was done by accident or design, other circumstances may be given in evidence to prove the intent (*ante*, pp. 352, 357, 396).

With respect to the intents mentioned in the statute; to *maim*, is to injure any part of a man's body which may render him, in fighting, less able to defend himself, or annoy his enemy. 1 Hawk. c. 55, s. 1; *see R.* v. *Sullivan*, C. & Mar. 209. To *disfigure*, is to do some external injury which may detract from his personal appearance; and to *disable*, is to do something which creates a permanent disability, and not merely a temporary injury. *See R.* v. *Boyce*, 1 Mood. 29. It is not necessary that *grievous bodily harm* should be either permanent or dangerous; *R.* v. *Ashman*, 1 F. & F. 88; if it is such as seriously to interfere with health or comfort, that is sufficient; and therefore when the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was held that the conviction was right. *R.* v. *Cox*, R. & R. 362. Where the intent laid is to prevent a lawful apprehension, it must be shown that the arrest would have been lawful (*see ante*, pp. 897 *et seq.*); and where the circumstances are not such that the party must know why he is about to be apprehended (*R.* v. *Howarth*, 1 Mood. 207; Car. Supp. 231, *ante*, p. 903), it must be proved that he was apprised of the intention to apprehend him. *R.* v. *Ricketts*, 3 Camp. 68; *but see R.* v. *Bentley*, 4 Cox, 406.

Power to convict of unlawful wounding.]—Even where a count for unlawful wounding is not added to the indictment, if the prosecutor fails in proving the intent, the defendant, under 14 & 15 Vict. c. 19, s. 5 (*ante*, p. 908), may, on an indictment for felonious wounding, be convicted of the misdemeanor of unlawful wounding contained in s. 20 of the Offences against the Person Act, 1861. *See post*, p. 941. *See also R.* v. *Miller*, 14 Cox, 356 : *R.* v. *Waudby* [1895] 2 Q. B. 482; 64 L. J. (M. C.) 257; 18 Cox 194.

Indictment for Shooting with intent to Maim, etc.
(24 & 25 *Vict. c.* 100, *s.* 18, *ante*, p. 936).

STATEMENT OF OFFENCE.

Shooting with intent, contrary to section 18 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, shot at C. D., with intent [*as in last example*].

Felony [as in last precedent].

Indictment for attempting to Shoot with intent to Maim, etc. (24 & 25 *Vict. c.* 100, *s.* 18, *ante*, p. 936).

As in last precedent, except " attempted to discharge a loaded pistol or other arms at C. D., with intent [*as in last precedent*].

Felony [as in last precedent but one].

As to what is evidence of an attempt to shoot, see R. *v.* Linneker [1906] 2 K. B. 99; 75 L. J. (K. B.) 385 (ante, p. 915).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the attempt to shoot as directed, *ante*, p. 914; and the intent as under the last two examples. If a person intending to shoot another, puts his finger on the trigger of a loaded firearm, but is prevented from pulling the trigger, this is an attempt to discharge loaded arms within the statute. *R.* v. *Duckworth* [1892] 2 Q. B. 83; 17 Cox, 495, which on this point overrules *R.* v. *St. George*, 9 C. & P. 483, which had previously been doubted in *R.* v. *Brown*, 10 Q. B. D. 381; 52 L. J. (M. C.) 49 (*ante*, p. 915). In *R.* v. *Jackson*, 17 Cox, 104, a revolver loaded with cartridges in some chambers only, was held by Charles, J., to be " loaded" within 24 & 25 Vict. c. 100, s. 14 (*ante*, p. 911). The ruling seems to apply equally to s. 18. The presenting of a loaded pistol at another is an assault. *R.* v. *St. George*, *supra*: *R.* v. *Baker*, 1 C. & K. 254. And *semble*, though the pistol is not in fact loaded, if it is presented so near the person of another as that it would have endangered him had it been loaded and gone off, and he is ignorant that it is not loaded, that is an assault. *Id.*: *but see R.* v. *James*, 1 C. & K. 330, *contra*.

Any gun, pistol or other arms, loaded in the barrel with gunpowder or other explosive substance, and ball, shot, slug, or other *destructive material*, are loaded arms within the meaning of the statute, although the attempt to discharge them may fail from want of proper priming or from any other causes. 24 & 25 Vict. c. 100, s. 19 (*ante*, p. 911).

Indictment for unlawful Wounding. (24 & 25 *Vict. c.* 100, *s.* 20, *ante*, p. 936).

See second count of Indictment under section 18, *ante*, p. 937. A separate indictment charging wounding or inflicting grievous bodily harm can easily be framed from that example.

The defendant may be convicted of a common assault upon this indictment. R. *v.* Taylor, L. R. 1 C. C. R. 194; 38 L. J. (M. C.) 106 (ante, p. 212).

Misdemeanor : penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour.— 24 & 25 Vict. c. 100, s. 20 (ante, p. 936); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2

(ante, pp. 238, 239). R. *v.* Peters, 1 Cr. App. R. 141. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

The evidence will be the same as on an indictment framed on 24 & 25 Vict. c. 100, s. 18 (*ante*, p. 937), except as to the proof of the intent. It is, however, necessary to show that the wounding was malicious, but it may be malicious although the prisoner had no spite or ill-feeling against the prosecutor, and did not even intend to wound him. The prosecutor was using a punt in a creek of a river for the purpose of shooting wild fowl. When slewing the punt round to return home he suddenly heard the report of a gun, and found himself shot and seriously wounded. The prisoner had fired the shot in the direction of the punt with the intention of frightening the prosecutor from again coming into the creek for the purpose of fowling, but not with the intention of doing him bodily harm. It was held that there was evidence on the above facts of a malicious wounding by the prisoner. *R.* v. *Ward*, L. R. 1 C. C. R. 356; 48 L. J. (M. C.) 69; 12 Cox, 123. Shortly before the conclusion of a performance at a theatre, the prisoner with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslights on a staircase which a large number of such persons had to descend in order to leave the theatre, and he also, with the intention and with the result of obstructing the exit, placed an iron bar across a doorway through which they had to pass in leaving. Upon the lights being thus extinguished a panic seized a large portion of the audience, and they rushed in fright down the staircase, forcing those in front against the iron bar. By reason of the pressure and struggling of the crowd thus created on the staircase, several of the audience were severely injured, and amongst them A. and B. It was held that upon these facts the prisoner was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon A. and B. *R.* v. *Martin*, 8 Q. B. D. 54; 51 L. J. (M. C.) 36; 14 Cox, 633; 46 J. P. 228. This decision was approved in *R.* v. *Halliday*, 61 L. T. Rep. 701; 38 W. R. 256, and it was there held that where a wife to escape from the violence of her husband, who had threatened to take her life, got out of a window, and in so doing fell and broke her leg, the husband was properly convicted under s. 20. This decision seems inconsistent with *R.* v. *Donovan*, 4 Cox, 399 (*ante*, p. 918). For the proper direction to the jury in such a case, see *R.* v. *Beech*, 23 Cox, 181; 76 J. P. 287; *R.* v. *Coleman*, 84 J. P. 112. *R.* v. *Martin*, was also followed in *R.* v. *Chapin*, 74 J. P. 71, Grantham, J. In that case a woman, in attempting to damage ballot papers with chemicals, caused injuries to the presiding officer at the polling station. She was held liable to conviction under this section, though she had no personal malice against the officer. The prisoner aimed a blow at one person, but, missing his aim, struck and wounded another. He was indicted and convicted under s. 20 of 24 & 25 Vict. c. 100, for unlawfully and maliciously wounding such other person, and it was held that such conviction was right. *R.* v. *Latimer*, 17 Q. B. D. 359; 55 L. J. (M. C.) 135; 16 Cox, 70. The prisoner, a married man, at a time when he knew, but his wife did not know, that he was suffering from

gonorrhœa, had connection with her, and the result was that the disease was communicated to her. Had she been aware of his condition, she would not have submitted to the intercourse. Upon these facts it was held that the prisoner could not be convicted of unlawfully and maliciously inflicting grievous bodily harm upon his wife under 24 & 25 Vict. c. 100, s. 20, nor of an assault occasioning actual bodily harm under s. 47. *R.* v. *Clarence*, 22 Q. B. D. 23; 58 L. J. (M. C.) 10; 16 Cox, 511. (Compare R. v. Rakmá, 11 Bombay, 59, *decided on ss.* 269, 270, *of the Indian Penal Code*: and see ante, p. 931).

ATTEMPTING TO CHOKE, SUFFOCATE, OR STRANGLE, ETC., WITH INTENT, ETC.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 21.]—Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This was new law in* 1861.]

26 & 27 *Vict. c.* 44.—*Power to award punishment of whipping.*]—Ante, p. 245.

Indictment.

STATEMENT OF OFFENCE.

Attempting to choke, contrary to section 21 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, attempted to choke, suffocate, or strangle C. D., with intent to enable himself [*or E. F.*] to rob [*or assist E. F. to rob*] the said C. D.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 21; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *The Court before which the prisoner is convicted may also, in addition to the punishment of penal servitude or imprisonment, direct that, if a male, he be once privately whipped, subject to the following provisions: 1. In the case of an offender whose age does not exceed sixteen years, the number of strokes*

at such whipping shall not exceed twenty-five and the instrument used shall be a birch rod. 2. In the case of any other male offender the number of strokes shall not exceed fifty at such whipping. 3. In each case the Court in its sentence shall specify the number of strokes and the instrument to be used. The whipping is not to take place after the expiration of six months from the passing of the sentence, and in the case of a person sentenced to penal servitude, is to be inflicted before his removal to a convict prison. 26 & 27 Vict. c. 44: 4 & 5 Geo. 5, c. 58, s. 36 (ante, pp. 244, 245). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

ADMINISTERING, ETC., CHLOROFORM, ETC., TO COMMIT INDICTABLE OFFENCES.

Statutes.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 22.]—Whosoever shall unlawfully apply or administer to *or cause to be taken by*, or attempt to apply or administer to, *or attempt to cause to be administered to or taken by*, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing *any indictable offence*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 14 & 15 Vict. c. 19, s. 3, *with the additions italicized.*]

48 *& 49 Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 3 (3).—*Administering, etc., drugs to females with a view to unlawful carnal intercourse.*]—Post, p. 1035.

Indictment.

STATEMENT OF OFFENCE.

Administering chloroform, contrary to section 22 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully applied or administered to or caused to be taken by or attempted to apply or administer to or attempted to cause to be administered to or taken by C. D. chloroform [*laudanum or other stupefying or overpowering drug, matter, or thing*] with intent to enable himself [*or E. F.*] to steal the watch from the person of C. D., [or with intent to assist E. F. to steal the watch from the person of the said C. D.]

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 100, s. 22; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant administered or assisted in administering chloroform (or laudanum, or other stupefying or overpowering drug, etc.), as stated in the indictment. If the drug, etc., is not named in the indictment, evidence must be given to show that it was of a stupefying or overpowering nature, calculated to aid the offender in the commission of a felony. Then prove the intent, as directed, *ante*, p. 938. In practice the ordinary evidence of the intent will be that the prosecutor was robbed or otherwise injured while under the influence of the drug, etc.

ADMINISTERING, ETC., POISON, ETC., SO AS TO ENDANGER LIFE, ETC., OR WITH INTENT TO INJURE, ETC.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 23.]—Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years . . . .[*This section re-enacts* 23 & 24 Vict. c. 8, s. 1. *This and the succeeding section appear to override* R. *v.* Hanson, 2 C. & K. 912: R. *v.* Walkden, 1 Cox, 282: R. *v.* Dilworth, 2 M. & Rob. 531.]

Sect. 24.]—Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section re-enacts* 23 & 24 Vict. c. 8, s. 2.]

Sect. 25.]—If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor. [*This section re-enacts* 23 & 24 Vict. c. 8, s. 3.]

Indictment for administering Poison so as to endanger Life, etc. (24 & 25 *Vict. c.* 100, *s.* 23.)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

First Count:

Administering poison, so as to endanger life, contrary to section 23 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously administered to or caused to be administered to or taken by C. D. a poison or other destructive or noxious thing so as thereby to endanger the life of C. D., or to inflict grievous bodily harm upon him.

STATEMENT OF OFFENCE.

Second Count:

Administering poison, contrary to section 24 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

As in count one down to "noxious thing," then "with intent to injure, aggrieve, or annoy C. D."

First Count: Felony: penal servitude for not more than ten and not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 23; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865). *Even where the second count is not inserted, the defendant may be convicted of the misdemeanor mentioned in s.* 24, *if the prosecutor fails in proving the felony.* Id. s. 25. *If the defendant is convicted of the misdemeanor only, the punishment is penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour.* 24 & 25 Vict. c. 100, s. 24; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (*ante*, pp. 238, 239). *As to fine, recognizances, and sureties for keeping the peace, and being of good behaviour*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

Prove the administering, etc., of the poison, etc., as directed, *ante*, p. 909. Prove also that by means thereof the prosecutor's life was endangered, or grievous bodily harm was done to him (*see ante*, p. 938). If the poison, etc., is administered merely with intent "to injure, aggrieve, or annoy," which in itself would only amount to a misdemeanor under s. 24, yet if it does in fact

" inflict grievous bodily harm," this amounts to a felony under s. 23. *Tulley* v. *Corrie*, 10 Cox, 640. In order to obtain a conviction of the misdemeanor mentioned in s. 24, it must be proved that the defendant intended the administration of the poison, etc., to " injure, aggrieve, or annoy " the prosecutor. *See R.* v. *Wilkins* (*infra*). Whether the thing administered is a " noxious thing " or not, may depend upon the quantity administered, some drugs being innocuous in small, and noxious in large, quantities. Thus, where the prisoner was indicted under s. 24, and the evidence was that he had administered cantharides to the prosecutrix, that a large dose of cantharides is poisonous, but that the quantity administered by the prisoner was insufficient to produce any effect upon the human system, it was held that the prisoner could not be convicted under s. 24 of administering a " destructive or noxious thing," notwithstanding the prisoner administered it with intent to injure or annoy. *R.* v. *Hennah*, 13 Cox, 547, Cockburn, C.J., and Hawkins, J. On the other hand, where the prisoner was indicted under s. 58 (*ante*, p. 922), for having caused to be taken a certain noxious thing, to wit, half an ounce of oil of juniper, with intent to procure miscarriage, and the evidence was that oil of juniper in considerably less quantities than half an ounce might be taken without ill effects, but that half an ounce produces ill effects, and is to a pregnant woman dangerous, it was held that the half ounce of oil of juniper was a " noxious thing " within the statute. *R.* v. *Cramp*, 5 Q. B. D. 307; 49 L. J. (M. C.) 44; 14 Cox, 390. And where the drug administered is a recognized " poison," then it may be that, although the quantity administered by the defendant is so small as to be incapable of doing harm, that is sufficient to bring him within the statute. *Id.*

Where the defendant administered cantharides to a woman, and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might obtain connection with her, this was held to be an administering with intent to " injure, aggrieve, and annoy " her. *R.* v. *Wilkins*, L. & C. 89; 31 L. J. (M. C.) 72; 9 Cox, 20.

INJURING OR ATTEMPTING TO INJURE PERSONS BY EXPLOSIVE OR CORROSIVE SUBSTANCES, ETC.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 28.—*Causing bodily injury by explosives.*]—Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 9 & 10 Vict. c. 25, s. 37.]

Sect. 29.—*Using explosives or corrosives with intent to do grievous bodily harm.*]—Whosoever shall unlawfully and maliciously cause any gunpowder or

other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, *or put or lay at any place*, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, *whether* any bodily injury be effected *or not*, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 9 & 10 Vict. c. 25, s. 4, *and* 7 W. 4 & 1 Vict. c. 85, s. 5, *with the alterations in italics.*]

Sect. 30.—*Placing explosives near buildings or ships with intent to do grievous bodily harm.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 9 & 10 Vict. c. 25, s. 6.]

Sect. 64.—*Making gunpowder, etc., to commit felonies against the Act.*]—Ante, p. 915.

Indictment for causing bodily injury by explosives. (24 & 25 *Vict. c.* 100, *s.* 28, *supra.*)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Causing bodily injury by explosives, contrary to section 28 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by the explosion of gunpowder or other explosive substance, maliciously burned, maimed, disfigured, disabled or did grievous bodily harm to C. D.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 100, s. 28; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (*ante*, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (*ante*, p. 865).

As to the punishment of whipping, see ante, p. 244, *and* 24 & 25 Vict. c. 100, s. 70 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant, by means of the explosion of gunpowder, burnt the person of C. D., or maimed, disfigured, or disabled him, or did him some grievous bodily harm. (*See ante*, p. 938.) Prove that the act was done maliciously. (*See ante*, pp. 741, 800. *And see R.* v. *Saunders*, 14 Cox, 180.)

Indictment for sending an Explosive Substance, with Intent, etc.
(24 & 25 *Vict. c.* 100, *s.* 29, *ante*, p. 947).

Statement of Offence.

Sending explosive substance with intent, contrary to section 29 of the Offences against the Person Act, 1861.

Particulars of Offence.

A. B., on the —— day of ——, in the county of ——, maliciously sent [*or delivered to*] or caused to be taken or received by C. D. an explosive substance, or other dangerous or noxious thing called ——, with intent to burn, etc., C. D. [*as in last precedent*].

Felony: 24 & 25 Vict. c. 100, s. 29. See *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the sending of the explosive substance, and the intent as directed, *ante*, pp. 352, 357. Under 7 W. 4 & 1 Vict. c. 85, s. 54 (*rep.*), it was necessary to prove that the prosecutor was actually burnt, etc. But by the present statute the offence is complete by the malicious sending, etc., with intent to burn, etc., any person, whether or not any bodily injury be effected.

Indictment for throwing Corrosive Fluid with Intent. (24 & 25 *Vict. c.* 100, *s.* 29, *ante*, p. 947).

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Throwing corrosive fluid with intent, contrary to section 29 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, threw at or upon or applied to C. D. a certain corrosive fluid [*or other destructive or explosive substance*] called vitriol, with intent to burn, etc., C. D. [*as in last precedent but one*].

Felony : 24 & 25 Vict, c. 100, *s.* 29. See *the last precedent but one.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant wilfully threw vitriol on (or at) the prosecutor; and prove the intent as directed (*ante*, pp. 352, 357). 6 G. 1, c. 2, s. 11 (*rep.*), made it felony to assault any person in the public streets, etc., with intent to cut, etc., and cutting the clothes of such person : upon which it was held in a case where the defendant, intending to cut the person of the prosecutrix, struck her with a sharp instrument, and, in doing so, cut her clothes, that the primary intent must be to cut the clothes, and that as the primary intention there was the wounding of the person, the statute did not apply. *R.* v. *Rhenwick Williams*, 1 Leach, 529, 533. So here, if it were clearly shown that the intention was only to burn the clothes, it would seem not to be within the statute; but unless the contrary be proved, the intention will be evidenced by the act.

Boiling water was held to be "destructive matter," within the 7 W. 4 & 1 Vict. c. 85, s. 5 (*rep.*). *R.* v. *Crawford*, 1 Den. 100; 2 C. & K. 129.

CAUSING EXPLOSIONS LIKELY TO ENDANGER LIFE.

Statute.

46 & 47 *Vict. c.* 3 (*Explosive Substances Act*, 1883).]—Ante, pp. 756 et seq.

SETTING SPRING-GUNS, ETC., WITH INTENT, ETC.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 31.]—Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . ; and whosoever shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid.

Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin:

Provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed in a dwelling-house for the protection thereof. [*This section re-enacts* 7 & 8 G. 4, c. 18.]

Indictment.

STATEMENT OF OFFENCE.

Setting spring gun, contrary to section 31 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, set or placed [*or caused to be set or placed*] a spring-gun [*man-trap or other engine calculated to destroy human life or inflict grievous bodily harm*], with the intent that it should inflict grievous bodily harm upon any person coming in contact therewith.

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100; s. 31; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace, and being of good behaviour*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

Prove that the defendant placed, or continued (*see* 24 & 25 Vict. c. 100, s. 31, *supra*) the spring-gun loaded in a place where persons might come in contact

with it; and if any injury was in reality occasioned, state it in the indictment and prove it as laid.

The intent can only be inferred from circumstances (*see ante*, pp. 352, 357, 396), as the position of the gun, the declarations of the defendant, and so forth, Any injury actually done will, of course, be some evidence of the intent.

This statute applies only to instruments set with an intention to do grievous bodily harm thereby to human beings, or whereby grievous bodily harm may be done to a human being; not, therefore, to *dog-spears* set by a man in his own land. *Jordin* v. *Crump*, 8 M. & W. 782; 11 L. J. (Ex.) 74: *cf. Wootton* v. *Dawkins*, 2 C. B. (N. S.). 412. If death was caused by setting a spring-gun, the setter is guilty of manslaughter. *R.* v. *Heaton*, 60 J. P. 508, Kennedy, J.: *and see ante*, p. 896.

The prisoners were indicted under s. 31 for causing to be set or placed in a field a spring-gun or engine calculated, etc. The gun in question was an alarm-gun stuck in the ground and was loaded with a cartridge containing shot, but there was no evidence to show that the prisoners knew that the gun contained shot. It was contended that the evidence disclosed no offence because the engine must be calculated, etc., and the gun was merely intended to give an alarm, and the fact of its being loaded did not alter its character or the object with which it was set. These contentions were overruled: *R.* v. *Smith and York* [1902] Northamptonshire Assizes, 37 L. J. Newsp. 89, Bruce, J.

ENDANGERING THE SAFETY OF RAILWAY PASSENGERS.

Statutes.

3 *& 4 Vict. c.* 97, *ss.* 13, 14.—*Neglect or misconduct by railway servants.*]—See ante, p. 783.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 32.]—Whosoever shall *unlawfully* and maliciously put or throw upon or across any railway, any wood, stone, or other matter or thing, or shall *unlawfully* and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall *unlawfully* and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall *unlawfully* and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 14 & 15 Vict. c. 19, s. 6, *with the substitution of* "*unlawfully*" *for* "*wilfully.*"]

Sect. 33.]—Whosoever shall *unlawfully* and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, *or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 14 & 15 Vict. c. 19, s. 7, *with the substitution of* "*unlawfully*" *for* "*wilfully*," *and the addition of the other words italicized, to get rid of* R. *v.* Court, 6 Cox, 202: and see R. *v.* Rooke, 1 F. & F. 407: R. *v.* Sanderson, Id. 37.]

Sect. 34.]—Whosoever, by *any unlawful act, or by any wilful omission or neglect*, shall endanger *or cause to be endangered* the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 3 & 4 Vict. c. 97, s. 15, *with the alterations italicized. As to the meaning of* "*wilful*," see R. *v.* Holroyd, 2 M. & Rob. 539; *and* R. *v.* Senior [1899] 1 Q. B. 283; 68 L. J. (Q. B.) 175, ante, p. 894.]

45 & 46 *Vict. c.* 56, *s.* 22.—*Cutting off electricity.*]—See ante, p. 784.

54 & 55 *Vict. c.* 69, *s.* 1.—*Minimum term of penal servitude, and term of imprisonment.*]—Ante, pp. 238, 239.

Indictment for endangering the Safety of Railway Passengers. (24 & 25 *Vict. c.* 100, *s.* 32.)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Endangering safety of railway passengers, contrary to section 32 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously put or threw upon or across the Great Western Railway a stone [*wood or other matter or thing*] with intent to endanger the safety of persons travelling or being upon the said railway.

Felony: penal servitude for life, or for not less than three years, or imprisonment for not more than two years. If male under sixteen, whipping. As to fine, recognizances, and sureties, see s. 71, ante, p. 865.

Evidence.

Prove that the defendant put a stone upon the railway; that he did it maliciously (*see ante*, pp. 741, 800); and with intent to endanger the safety of railway passengers (*see ante*, pp. 352, 357, 396).

Throwing a stone at engines or carriages appears to be an offence within section 34 (*supra.*) *R.* v. *Bowray*, 10 Jur. 211, Alderson, B. So is playing with a cart on railway premises with the result of letting it run within a dangerous distance of the track. *R.* v. *Monaghan*, 11 Cox, 608. Neglect by an engine driver to keep a good look-out for signals was held not to be within 3 & 4 Vict. c. 97, s. 15 (*rep.*): *R.* v. *Pardenton*, 6 Cox, 247; but it appears to be within the italicized words of 24 & 25 Vict. c. 100, s. 34.

An acquittal on an indictment framed under s. 32 is no bar to a subsequent indictment upon the same facts for a misdemeanor under s. 34. *R.* v. *Gilmore*, 15 Cox, 85, Huddleston, B. As to cases where death is caused by act or defaults within ss. 33, 34, *see ante*, p. 893.

INJURIES ARISING FROM THE FURIOUS DRIVING OF CARRIAGES.

Statutes.

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 35.]—Whosoever, having the charge of *any* carriage *or vehicle*, shall, by wanton or furious driving or racing, or other wilful misconduct, *or by wilful neglect*, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 1 G. 4, c. 4, *with the additions italicized. It applies to all carriages and vehicles, public or private; also to bicycles.* R. *v.* Parker, 59 J. P. 793, Hawkins, J. *A bicycle is a "carriage"* within 5 & 6 W. 4, c. 50 (Highway Act, 1835), s. 78: Taylor *v.* Goodwin, 4 Q. B. D. 228; 48 L. J. (M. C.) 104; cf. Cannan *v.* Earl of Abingdon [1900] 2 Q. B. 66; 69 L. J. (Q. B.) 517. *A motor bicycle is a "carriage" within* 51 & 52 Vict. c. 8 (Customs and Inland Revenue Act, 1888), s. 4, O'Donoghue *v.* Moon, 68 J. P. 349, and see ante, p. 892.]

Indictment.

STATEMENT OF OFFENCE.

Causing bodily harm, contrary to section 35 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, having the charge of a public omnibus, by wanton or furious driving or by wilful neglect caused bodily harm to C. D.

Misdemeanor: imprisonment with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 35. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 71 (ante, p. 865).

OBSTRUCTING, ETC., MINISTERS OF RELIGION IN DISCHARGE OF THEIR DUTIES.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 36.]—Whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites, or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section is based on* 9 G. 4, c. 31, s. 23, *but is framed so as to include ministers, and places of worship and burial, not belonging to the Established Church of England.*]

Indictment for obstructing a Clergyman in the Discharge of his Duty.

STATEMENT OF OFFENCE.

Obstructing a clergyman, contrary to section 36 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by threats or force obstructed or prevented, or endeavoured to obstruct or prevent, the Reverend ——, the Vicar of the Parish of ——, from celebrating divine service in the Parish Church.

Misdemeanor: imprisonment with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 36. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 71 (ante, p. 865).

Evidence.

Prove that the person obstructed is a clergyman and vicar of the parish, as stated in the indictment; that the defendant by force obstructed or prevented him from celebrating divine service in the parish church, etc., or assisted in doing so.

ASSAULTS ON OFFICERS, ETC., SAVING WRECK.

Statute.

24 & 25 *Vict. c.* 100, *s.* 37.]—Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, *in or* on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 9 G. 4, c. 31, s. 24, *with the addition of the words in italics.*]

Indictment for assaulting an officer, etc., on account of the Exercise of his Duty in preserving Wreck.

STATEMENT OF OFFENCE.

Assaulting an officer, contrary to section 37 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted and struck C. D., an officer, in or on account of the exercise of his duty, concerning the preservation of the vessel called the *Rattler*, cast on the shore.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 37; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

Prove that C. D. was an officer, etc., as stated in the indictment (*see ante*, p. 401); that a vessel was wrecked, etc.; that C. D. was engaged in endeavouring to preserve the vessel; that A. B. struck [or wounded] him as stated; and that he did so in or on account of C. D. doing his duty in the preservation of the vessel. This may be proved by the declarations or acts of the defendant, or by circumstances from which his motive may be inferred.

IMPEDING PERSONS ENDEAVOURING TO ESCAPE FROM WRECKS.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 17.]—*Whosoever* shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his *life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 7 W. 4 & 1 Vict. c. 89, s. 7, *with the additions italicized.*]

Indictment. (24 & 25 *Vict. c.* 100, *s.* 17.)

STATEMENT OF OFFENCE.

Impeding saving of life, contrary to section 17 of Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously prevented or impeded C. D. in his endeavour to save the life of E. F., who had thrown himself into the sea from the ship called the *Rattler*, then stranded.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 100, s. 17; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 100, s. 71 (*ante*, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

FORCING SEAMEN ON SHORE, ETC.

Statute.

6 *Edw.* 7, *c.* 48 (*Merchant Shipping Act*, 1906), *s.* 43.—*Forcing seamen on shore.*]—A person belonging to a British ship shall not wrongfully force a seaman on shore and leave him behind, or otherwise cause a seaman to be wrongfully left behind, at any place, either on shore or at sea, in or out of his

Majesty's dominions, and if he does so he shall in respect of each offence be guilty of a misdemeanor. [*This section takes the place of* 57 & 58 Vict. c. 60, s. 187.]

Sect. 30.—*Discharging seamen abroad.*]—(1) The master of a British ship shall not discharge a seaman at any place out of the United Kingdom (except at a port in the country in which he was shipped), unless he previously obtains endorsed on the agreement with the crew the sanction of the proper authority as defined for the purpose in this part of this Act (s. 49, *post*), but that sanction shall not be refused where the seaman is discharged on the termination of his service. (2) The authority to whom an application is made for sanction under this section may, and, if not a merchant, shall, examine into the grounds on which a seaman is to be discharged at a place out of the United Kingdom, and for that purpose may, if he thinks fit, administer oaths, and may grant or refuse the sanction as he thinks just, but such sanction shall not be unreasonably withheld. (3) If the master of a ship fails to comply with this section, he shall, in respect of each offence, be guilty of a misdemeanor, and in any legal proceeding for the offence it shall lie on the master to prove that the sanction was obtained, or was unreasonably withheld. [*This section takes the place of part of* 57 & 58 Vict. c. 60, s. 188.]

Sect. 36.—(1) The master of a British ship shall not leave a seaman behind, at any place out of the United Kingdom, ashore or at sea (except where the seaman is discharged in accordance with the Merchant Shipping Acts), unless he previously obtains endorsed on the agreement with the crew the certificate of the proper authority as defined for the purpose in this part of this Act (s. 49), stating the cause of the seaman being left behind, whether the cause be unfitness or inability to proceed to sea, or desertion, or disappearance, or otherwise.

(2) The authority to whom an application is made for a certificate under this section may, and, if not a merchant, shall, examine into the grounds on which a seaman is to be left behind, and for that purpose may, if he thinks fit, administer oaths, and may grant or refuse a certificate as he thinks fit, but the certificate shall not be unreasonably withheld.

(3) If the master of a ship fails to comply with this section, he shall, without prejudice to his liability under any other provision of the Merchant Shipping Acts, be guilty in respect of each offence of a misdemeanor, and on any legal proceeding for the offence it shall lie on the master to prove that the certificate was obtained, or could not be obtained without unreasonable delay to the ship, or was unreasonably withheld. [*This takes the place of part of* 57 & 58 Vict. c. 60, s. 188.]

57 & 58 *Vict. c.* 60, *s.* 680.—*Hard labour.*]—(1) Subject to the special provisions of this Act and to the provisions hereafter contained with respect to Scotland: (*a*) An offence under this Act declared to be a misdemeanor shall be punishable by fine or by imprisonment not exceeding two years, with or without hard labour (*see ante*, pp. 239, 241); but may, instead of being prosecuted as a misdemeanor, be prosecuted summarily in manner provided by the *Summary Jurisdiction Acts*, and if so prosecuted, shall be punishable by imprisonment for a term not exceeding six months, with or without hard

labour, or by a penalty not exceeding one hundred pounds. (*b*) An offence under this Act made punishable by imprisonment for a term not exceeding six months, with or without hard labour, or by any penalty not exceeding one hundred pounds, shall be prosecuted summarily in manner provided by the *Summary Jurisdiction Acts. . . . [As to the right of a person proceeded against under sub-s. 2 to elect to be tried on indictment*, see 42 & 43 Vict. c. 49, s. 17 (ante, p. 7). R. *v.* Goldberg, 20 Cox, 699.]

Sect. 684.—*Jurisdiction.—Venue.*]—For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be. [*This section has been explained in a colonial case* (R. *v.* Hinde [1902] 22 N. Z. L. R. 436) *as meaning that when an offence against the Act is committed in any part of the King's dominions, it may be tried in any other part of those dominions in which the offender is. In the particular case the colonial Court asserted its jurisdiction to try an offence committed in London against s.* 130 *of the Act.*]

Sect. 685.—*Jurisdiction over ships lying off the coasts.*

Sects. 686, 687.—*Venue.*]—Ante, pp. 31 *et seq.*

Sect. 742.]—"Seaman" includes every person (except master, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity, on board any ship.

* * * * * * *

"Superintendent" shall, so far as respects a British possession, include any shipping master or other officer discharging in that possession the duties of a superintendent.

* * * * * * *

6 *Edw.* 7, *c.* 48, *s.* 49.—For the purposes of this part of this Act, unless the context otherwise requires,

(1) The expression "proper authority" means—

(*a*) as respects a place out of his Majesty's dominions the British consular officer, or if there is no such officer in the place, any two British merchants resident at or near the place, or if there is only one British merchant so resident, that British merchant; and

(*b*) as respects a place in a British possession,

(i.) in relation to the discharge or leaving behind of seamen, or the payment of fines, the superintendent, or, in the absence of any such superintendent, the chief officer of customs at or near the place.

* * * * * * *

(2) The expression "seamen" includes not only seamen as defined by the principal Act (s. 742, *supra*), but also apprentices to the sea service.

Indictment for wrongfully forcing on Shore and leaving behind a Seaman. (6 *Edw.* 7, *c.* 48, *s.* 43, ante, p. 957.)

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Forcing seaman on shore, contrary to section 43 of the Merchant Shipping Act, 1906.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, then being the captain of a British ship called the *Rattler*, wrongfully forced C. D., one of the crew of the said ship, on shore at San Francisco, in the United States of America, and left him behind.

The allegation that it is a British ship is material. See R. *v.* Dunnett, 1 C. & K. 425.

Misdemeanor: imprisonment for not more than two years, with or without hard labour, or fine, or both. 57 & 58 Vict. c. 60, s. 680; 6 Edw. 7, c. 48, ss. 43, 84, 86. *For examination of witnesses abroad*, see 57 & 58 Vict. c. 60, ss. 689, 691 (ante, pp. 440, 481). *As to costs of prosecution and defence*, see ante, pp. 267 *et seq.*

Evidence.

Prove that the defendant belonged to and acted as master of the vessel, and that it was, at the time of the commission of the offence, a British ship; *see R.* v. *Dunnett*, 1 C. & K. 425: *R.* v. *Bjornsen*, 34 L. J. (N. S.) M. C. 180; L. & C. 545 (*ante*, p. 33): *R.* v. *Seberg*, L. R. 1 C. C. R. 264; 39 L. J. (N. S.) M. C. 133 (*ante*, p. 33); prove that C. D. was then "seaman" as defined; it is immaterial whether he was one of the *original* crew of the ship or not; prove that the voyage for which he was engaged was not then completed; and that the defendant forced him on shore, and left him behind at the place mentioned in the indictment.

ASSAULTS WITH INTENT TO COMMIT FELONY, OR ON PEACE OFFICERS, POOR LAW OFFICERS, ETC.

Statutes.

7 *& 8 Vict. c.* 19, *s.* 7.]—*Assaults on bailiffs of inferior civil courts in execution of duty, punishable on summary conviction.*

13 *& 14 Vict. c.* 101 (*Poor Law Amendment Act*, 1850), *s.* 9.—*Assaults on poor law officers.*]—Where any person shall be charged with and convicted of any assault upon any officer of a workhouse or relieving officer in the due execu-

tion of his duty, or upon any person acting in aid of such officer, the Court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer or revenue officer in the due execution of his duty. . . . [*Rest of section as to costs repealed by* 8 Edw. 7, c. 15, s. 10, *and replaced by the provisions of that Act*, ante, pp. 267 *et seq.*]

14 *&* 15 *Vict. c.* 105 (*Poor Law Amendment Act*, 1851), *s.* 18.—*Assaults on poor law officers.*]—The provision in the *Poor Law Amendment Act*, 1850, s. 9 (*supra*), relative to assaults upon certain poor law officers in the execution of their duties, or upon persons acting in their aid, shall extend to an assault upon any person included under the word " officer " in the *Poor Law Amendment Act*, 1834 (4 & 5 W. 4, c. 76, *see* s. 109), or upon any other person acting in his aid.

24 *&* 25 *Vict. c.* 100, *s.* 38.—*Assaults with intent to commit felony or on a peace officer.*]—Whosoever shall assault any person with intent to commit felony, or shall assault, *resist or wilfully obstruct* any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 9 G. 4, c. 31, s. 75, *with the addition of the words italicized, and the omission of revenue officers, as to whom*, see *s.* 11 *of the* Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21). *For indictment*, see infra.]

34 *&* 35 *Vict. c.* 112 (*Prevention of Crimes Act*, 1871), *s.* 12.—*Assaults on peace officers.*]—Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the Court, be liable either to pay a penalty not exceeding 20*l.*, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months; or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour. [*The prisoner cannot elect to be tried on indictment.* See 42 & 43 Vict. c. 49, s. 17 (1) (ante, p. 7). *The section is not affected by* 45 & 46 Vict. c. 50, s. 188. See 46 & 47 Vict. c. 44.]

48 *&* 49 *Vict. c.* 75 (*Prevention of Crimes Amendment Act*, 1885), *s.* 1.]—This Act shall be construed as one with the "*Prevention of Crimes Act*, 1871." . . .

Sect. 2.—*Assaulting or obstructing peace officer.*]—The provisions of the 12th section of the said recited Act shall apply to all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty. Provided that in cases to which the said Act is extended by this Act the person convicted shall not be liable to a greater penalty than 5*l.*, or in default of payment to be imprisoned, with or without hard labour, for a greater term than two months.

50 & 51 *Vict. c.* 55 (*Sheriffs Act*, 1889), *s.* 8 (2).]—*Resistance to execution of writ by sheriff a misdemeanor.*

51 & 52 *Vict. c.* 43 (*County Courts Act*, 1888), *s.* 48.]—*Assaults on county court officer in execution of his duty, summarily punishable.* See Lewis *v.* Owen [1894] 1 Q. B. 102; 63 L. J. (Q. B.) 233: Broughton *v.* Wilkerson, 44 J. P. 781.

Indictment for assault with intent to commit felony, under 24 & 25 *Vict. c.* 100, *s.* 38 (ante, p. 961).

STATEMENT OF OFFENCE.

Assault with intent to commit felony, contrary to section 38 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted C. D., with intent to ravish her.

Misdemeanor punishable under the above section by imprisonment, with or without hard labour, for not more than two years.

Evidence.

To constitute the offence there must be, in addition to evidence of an assault, the evidence of the intention to have carnal knowledge of the woman notwithstanding her resistance. *R.* v. *Lloyd*, 7 C. & P. 318. Evidence of liberties taken on former occasions with the prosecutrix by the accused has been held not to be admissible to show the intent. *Id.*

The accused on this indictment may be convicted of a common assault. Russell on Crimes (7th ed.), p. 942. If the indictment contain a second count for common assault and consent is established on the first count, the accused cannot be convicted on the second. *R.* v. *Meredith*, 8 C. & P. 589.

An acquittal upon an indictment for an assault with intent to ravish is no bar to a subsequent indictment on the same facts for a common assault. *R.* v. *Dungey*, 4 F. & F. 99.

A boy under fourteen cannot be convicted of this offence. *R.* v. *Eldershaw*, 3 C. & P. 396: *R.* v. *Waite* [1892] 2 Q. B. 600; 61 L. J. (M. C.) 187: *R.* v. *Williams* [1893] 1 Q. B. 320; 62 L. J. (M. C.) 29.

As to rape generally, *see post*, p. 1016.

Indictment, under 24 & 25 Vict. c. 100, s. 38 (supra).

STATEMENT OF OFFENCE.

Assaulting with intent, contrary to section 38 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted C. D., with intent to steal from the person of C. D.

As to adding a count for a common assault, see *note to next precedent.*

Misdemeanor: imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 38. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 71 (ante, p. 865).

Evidence.

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances that, had the attempt succeeded, the defendant might have been convicted of the felony. If you fail in proving the intent, but prove the assault, the defendant may be convicted of the common assault.

Indictment for assaulting a Peace Officer in the Execution of his Duty. (24 & 25 *Vict. c.* 100, *s.* 38, ante, p. 961).

STATEMENT OF OFFENCE.

Assault on police officer, contrary to section 38 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted, resisted, or wilfully obstructed C. D., a police constable, in the due execution of his duty.

Misdemeanor: 24 & 25 Vict. c. 100, s. 38. See *the last precedent. It is submitted that on this indictment a conviction for a common assault can be sustained, and that it is unnecessary to add a count for a common assault.* See ante, pp. 929 *et seq.*

Summary punishment is provided for assaults on special constables, 1 & 2 W. 4, c. 41, s. 11: R. *v.* Porter, 9 C. & P. 778: *on metropolitan constables.* 2 & 3 Vict. c. 47, s. 18; 24 & 25 Vict. c. 51, s. 3: *on county police.* 2 & 3 Vict. c. 93, s. 8: *on borough police*, 45 & 46 Vict. c. 50, s. 188; 46 & 47 Vict. c. 44, s. 2: *and on urban police.* 10 & 11 Vict. c. 89, s. 20; 46 & 47 Vict. c. 44, s. 2.

Evidence.

Prove that C. D. was a peace officer, etc., as stated in the indictment, by showing that he had acted as such (*see ante*, p. 407); or if the indictment is for assaulting C. D., acting in aid of an officer, prove that the officer acted as such, and that C. D. was acting in his aid. The officer's appointment need not be proved; *Berryman* v. *Wyse*, 4 T. R. 366. Prove that C. D. was in the due execution of his duty (*see ante*, p. 902), and prove the assault as directed (*ante*, pp. 930 *et seq*). The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, furnishes no defence. *R.* v. *Forbes*, 10 Cox, 362, approved in *R.* v. *Maxwell*, 73 J. P. 176 (C. C. A.).

Parish constables are not now appointed except under resolution of quarter sessions. As to the mode of appointment and their present duties, *see* 5 & 6 Vict. c. 109; 35 & 36 Vict. c. 92. They have for most purposes been superseded in the metropolitan police district by the metropolitan police; 10 G. 4, c. 44; 2 & 3 Vict. cc. 47, 71; and in counties and boroughs, by the county and borough police: 2 & 3 Vict. c. 93; 3 & 4 Vict. c. 88; 19 & 20 Vict. c. 69. The metropolitan police have all the powers, authorities, privileges, advantages, duties, and responsibilities which a constable has at common law or by statute, within the counties of London, Middlesex, Surrey, Hertford, Essex, Kent, Berks, Bucks, and on the Thames adjoining all but the last two counties, and adjoining the city of London, and on creeks, docks, etc. 10 G. 4, c. 44, s. 4; 2 & 3 Vict. c. 47, s. 5. County police have the like duties, etc., in their county, and also the duties, etc., of special constables. 2 & 3 Vict. c. 93, s. 8. So have borough police within, or within seven miles of, their borough. 45 & 46 Vict. c. 50, s. 191. The result of these Acts is to bring all these officers within the protection of 24 & 25 Vict. c. 100, s. 38. Prison officers while acting as such have by virtue of their appointment all the powers, authorities, and protection and privileges of a constable. 61 & 62 Vict. c. 41, s. 10. *In R.* v. *Sanders*, L. R. 1 C. C. R. 75; 36 L. J. (M. C.) 87; 10 Cox, 445, it was held that a justice's warrant of commitment upon a conviction for a penalty directed "To the constable of G.," a parish in the county of L., must be read as directed to the parish constable of G., there being such an officer, who must execute it, and its execution by a county policeman was illegal, and a conviction for wounding a county policeman in the execution of such a warrant, with intent to resist the prisoner's lawful apprehension thereunder, was quashed. But, as already stated, few parish constables are now appointed, and a warrant to the constable of a parish would be taken to be to the ordinary police. C. was convicted of an assault on two police constables in the county police of Worcester in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcester for his commitment to prison in default in payment of a fine, but which warrant was not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction and a separate police force. C. was not pursued from the county, but found in the city. It was held that the constables were not acting in the execution of their duty in so executing the warrant,

and therefore that the conviction was wrong. *R.* v. *Cumpton*, 5 Q. B. D. 341; 49 L. J. (M. C.) 41. When a warrant has been issued to apprehend a person for an offence less than felony for which there is no statutory authority to arrest without warrant, the police officer who executes it must have the warrant in his possession at the time of attempting the arrest; and if he has it not, and is assaulted by the person whom he is endeavouring to arrest, such person cannot be convicted of an assault upon the police officer in the execution of his duty, nor of a common assault, unless he used more force than was necessary to prevent his apprehension. *Codd* v. *Cabe*, 1 Ex. D. 352; 45 L. J. (M. C.) 101; 13 Cox, 202. *See also Galliard* v. *Laxton*, 2 B. & S. 363; 31 L. J. (M. C.) 123 (*ante*, p. 902): *R.* v. *Phelps*, C. & Mar. 180 (*ante*, p. 899): *R.* v. *Chapman*, 12 Cox, 4 (*ante*, p. 902): *R.* v. *Carey*, 14 Cox, 214 (*ante*. p. 903). Although a police constable may not be bound, in the execution of his duty, to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he is assaulted by the intruder while so doing, the latter, though he may not be indictable for assaulting a peace officer in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him. *R.* v. *Roxburgh*, 12 Cox, 8. If the police are exceeding their authority, resistance is not an assault within this section. *R.* v. *Marsden*, L. R. 1 C. C. R. 131; 37 L. J. (M. C.) 80; 11 Cox, 90: *R.* v. *Mabel*, 9 C. & P. 474, though it may be a common assault; *and see Broughton* v. *Wilkerson*, 44 J. P. 781, as to justifiable resistance to a county court bailiff.

Duty to aid constables.]—Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment, it must be proved that the constable saw a breach of the peace committed; that there was a reasonable necessity for calling upon the defendant for his assistance; and that when duly called on to do so, the defendant, without any physical impossibility or lawful excuse, refused to do so. And it is no defence that the single aid of the defendant could have been of no avail. *R.* v. *Brown*, C. & Mar. 314; 4 St. Tr. (N. S.) 1369. An indictment for refusing to assist a constable in the execution of his duty, and prevent an assault made upon him by persons in his custody on a charge of felony, with intent to resist their lawful apprehension, is sufficient without stating how the apprehension became lawful; and if it states a refusal to assist, without the further allegation that the defendant did not, in fact, assist. *R.* v. *Sherlock*, L. R. 1 C. C. R. 20; 35 L. J. (M. C.) 92; 10 Cox, 170.

Obstruction.]—It would seem that the words in the statutes as to wilful obstruction do not necessarily imply assault, and that they extend to acts done to interfere with constables who, in the execution of their duty under statute or lawful orders, are seeking to obtain evidence as to offences. *See Betts* v. *Stevens* [1910] 1 K. B. 1; 79 L. J. (K. B.) 17: *Bastable* v. *Little* [1907] 1 K. B. 59; 76 L. J. (K. B.) 77; 21 Cox, 384.

ASSAULTS BY POACHERS ON GAMEKEEPERS.

Statutes.

9 *G.* 4, *c.* 69 (*Night Poaching Act*, 1828), *s.* 2.]—Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond seas for seven years (*now penal servitude*, ante, p. 236), or to be imprisoned or kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner. (*For the rest of the Act*, see post, tit. Poaching.)

7 & 8 *Vict. c.* 29, *s.* 1.]—Post, tit. Poaching.

Indictment.

STATEMENT OF OFFENCE.

Assault on gamekeeper, contrary to section 2 of the Night Poaching Act, 1828.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, at 11 o'clock in the night-time, in the county of ——, then being found unlawfully on certain land in the occupation of C. D. armed with a gun for the purpose of taking game, assaulted or offered violence with the said gun towards E. F., a gamekeeper in the employment of the said C. D., being a person authorized to seize and apprehend him, the said A. B.

This count may be joined with one framed under the 9th section, post, tit. Poaching, *and with one for common assault.* R. *v.* Finacane, 5 C. & P. 551.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 9 G. 4, c. 69, s. 2, *supra;* 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239).

Evidence.

Prove that the defendant entered certain land belonging to or in the occupation of C. D. (*See ante*, pp. 51, 350). It is not necessary to state the name of the close; but it has been held that if stated, it must be proved. *R.* v. *Owen*, 1 Mood. 118. Prove that the defendant entered the land in the night-time, that is, sometime between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise. 9 G. 4, c. 69, s. 12, *post*, *tit. Poaching* : see *R.* v. *Tomlinson*, 7 C. & P. 183. It is not necessary to state the hour (*ante*, pp. 51, 350); nor, if stated, need it be proved, provided that it be within the period above mentioned. Prove that the defendant was armed with a gun, etc., and that he was on the land for the purpose of destroying game there. *See R.* v. *Barham*, 1 Mood. 151; *R.* v. *Davis*, 8 C. & P. 759. Prove also that the defendant was found on the land in the commission of the offence. The words of the statute are " *found* upon any land." Under 57 G. 3, c. 90, s. 3 (*rep.*), the words of which were " enter into or be found in any forest," etc., where the defendant was not found in the close, but was seen in an adjoining close, and, shortly before he was seen, shots were heard in the close, and the jury found that he had been firing in the close, it being reserved for the judges whether it was necessary to prove that the defendant was seen in the close where the indictment stated him to have been found, they held that, as the jury were satisfied that the defendant had been in the close armed, it was sufficient. *R.* v. *Worker*, 1 Mood. 165. (*See post*, *tit. Poaching*). Prove that E. F. was servant to C. D., the owner or occupier of the land (or, if the offence was committed on any public road, highway, or path, or the sides thereof, or at any gate, outlet, or opening from any land to such road, etc., the owner or occupier of land adjoining either side of that part of the road, etc., where the offender was (7 & 8 Vict. c. 29, s. 1), and prove the assault as directed (*ante*, pp. 930 *et seq.*). Proof of a common intent of several prisoners to poach is not evidence of a common intent to wound. *R.* v. *Doddridge*, 8 Cox, 335, Martin, B. *See also R.* v. *Pridmore*, 77 J. P. 339; 29 T. L. R. 330; 8 Cr. App. R. 198. If A. B. escaped and was pursued, it must be stated; and if stated, it must be proved. Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 G. 4, c. 69, s. 4, *post*, *tit. Poaching*.

A gamekeeper, or other person lawfully authorized, may apprehend poachers without giving notice of his purpose. *R.* v. *Payne*, 1 Mood. 378 : *R.* v. *Fielding*, 2 C. & K. 621; and without a written authority so to do; *R.* v. *Price*, 7 C. & P. 178; provided they are upon the land or manor of his master, or other place mentioned in 7 & 8 Vict. c. 29; but without authority he may not apprehend them upon the lands of others. *R.* v. *Davis*, 7 C. & P. 785. A person who has only the right of shooting over the land of another has no authority to authorize a gamekeeper to apprehend persons trespassing on such land in pursuit of game; consequently, resistance to such apprehension, if not excessive, is lawful. *R.* v. *Wood*, 1 F. & F. 470. Although s. 2 is confined to offences mentioned in s. 1, still an offender under s. 9 may be apprehended under the powers given by s. 2; for though a greater punishment is inflicted by s. 9 where several are out armed together, it is still an offence within s. 1. *R.* v. *Ball*,

1 Mood. 330: *see R.* v. *Lines* [1902] 1 K. B. 199, 203; 71 L. J. (K. B.) 125; 20 Cox, 142. And under 14 & 15 Vict. c. 19, s. 11 (*ante*, p. 655), *any person* may apprehend persons committing offences against s. 9 of this Act in the night-time. *R.* v. *Sanderson*, 1 F. & F. 598. As to homicide by poachers, *see ante*, p. 901.

SHOOTING AT OFFICERS OF THE CUSTOMS, OR KING'S SHIPS.

Statute.

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876), *s.* 193.—*Shooting at customs officers, or King's ships.*]—If any person shall maliciously shoot at any vessel or boat belonging to his Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony; and shall be liable, at the discretion of the Court, to penal servitude for any term not less than five years, or to be imprisoned for any term not exceeding three years. (*See post*, p. 970).

Sect. 229.—*Offences on the water.*]—Where any offence shall be committed in any place upon the water, not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of the Customs Acts, be deemed, and taken to be, an offence committed on the high seas, and for the purpose of giving jurisdiction under such Acts every such offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same was actually committed or arose, or in any place on land where the offender or person complained against may be or be brought (*see ante*, pp. 31-37, 41).

Sect. 255.—*In whose name indictments to be preferred.*]—All indictments or suits for any offences or the recovery of any penalties or forfeitures under the Customs Acts shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of his Majesty's Attorney-General for England or Ireland, or of the Lord Advocate of Scotland, or of some officer of customs or inland revenue.

Sect. 257.—*Limitation of proceedings.*]—All suits, indictments, or informations brought or exhibited for any offence against the Customs Acts in any court, or before any justice, shall be brought or exhibited within three years next after the date of the offence committed. (*See ante*, p. 64).

Sect. 258.—*Venue.*]—Any indictment, prosecution, or information which may be instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts shall and may be inquired of, examined,

tried, and determined in any county of England when the offence is committed in England, and in any county of Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried. (See ante, p. 41).

Sect. 260.—*Averments in smuggling cases.*]—The averment that the Commissioners of Customs or Inland Revenue have directed or elected that any information or proceedings under the Customs Acts shall be instituted, or that any ship or boat is foreign or belonging wholly or in part to his Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure is or is not a subject of his Majesty, or that any goods thrown overboard, staved, or destroyed were so thrown overboard, staved, or destroyed to prevent seizure, or that any goods thrown overboard, staved, or destroyed during chase by any ship or boat in his Majesty's service or in the service of the Revenue were so thrown overboard, staved, or destroyed to prevent seizure, or that any person is an officer of Customs or Excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in the information or proceedings shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary. (*See ante*, p. 401).

Sect. 261.—*Proof of commission, and competency of witnesses.*]—If upon any trial, a question shall arise whether any person is an officer of the army, navy, marines, or coastguard, duly employed for the prevention of smuggling, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient without production of his commission or deputation; and every such officer and any person acting in his aid or assistance shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information. (*As to this section*, see ante, pp. 401, 455).

Indictment for shooting at an Officer of the Customs. (39 & 40 Vict. *c.* 36, *s.* 193, ante, p. 968).

STATEMENT OF OFFENCE.

Shooting at customs officer, contrary to section 193 of the Customs Consolidation Act, 1876.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously shot at, maimed or wounded C. D., a coastguard on full pay, employed in the prevention of smuggling and then being in the execution of his duty.

As to the venue, see ante, pp. 41, 968.

Felony. It would seem that the effect of 39 & 40 Vict. c. 36, s. 293, *was to impose penal servitude for life or not less than five years. The latter is altered to three years by* 54 & 55 Vict. c. 69, s. 1 (1) (ante, p. 238). *But the point is not quite clear. The maximum term of imprisonment, three years, specified in* 39 & 40 Vict. c. 36, s. 193, *seems to be reduced to two years by* 54 & 55 Vict. c. 69, s. 1, sub-s. 2 (ante, p. 239).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that C. D. was a coastguard, etc., in the due exercise of his office. His own evidence thereof, or other evidence of his acting as such, will be sufficient, without producing his commission or appointment (39 & 40 Vict. c. 36, ss. 260, 261, *ante*, p. 969, *and see ante*, p. 401). The statute only applies to such officers of the army, navy, marines, or coastguard, as are on full pay, and employed for the prevention of smuggling. Prove that the defendant wilfully fired at C. D. If he fired wilfully, it will be sufficient evidence of his doing so maliciously, *see ante*, pp. 741, 800.

Indictment for shooting at Vessels belonging to the Navy, etc.
(*39 & 40 Vict. c. 36, s. 193*, ante, p. 968).

Statement of Offence.

Shooting at a vessel, contrary to section 193 of the Customs Consolidation Act, 1876.

Particulars of Offence.

A. B., on the —— day of ——, on the high seas, maliciously shot at a vessel belonging to his Majesty's navy, called the *Hawk*.

As to venue, see s. 229 (ante, p. 968).

Felony: 30 & 40 Vict. c. 36, s. 193. See *the last precedent*.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant wilfully shot at the vessel, etc., mentioned in the indictment; the malice will be presumed until the contrary be shown upon the part of the defendant (*see ante*, p. 800). Where a custom-house vessel chased a smuggler and fired into her without hoisting such a pendant as required (56 G. 3, c. 104, s. 8 (*rep.*)), the returning the fire was considered not to be malicious. *R.* v. *Reynolds*, R. & R. 465. Prove, also, that the vessel in

question belonged at the time to his Majesty's navy, or was in the service of the revenue, as stated in the indictment; which may be done, it should seem, by parol testimony without any documentary evidence.

The pendants and ensigns to be worn by ships in the preventive service and merchant vessels are regulated by proclamation of January 1, 1801, and February 1, 1817 (Statutory Rules and Orders Revised (ed. 1904), vol. i. tit. Arms, etc., p. 6), and by s. 73 of the *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60).

NEGLECTING TO PROVIDE FOOD, ETC., FOR, AND ASSAULTING, ETC., APPRENTICES OR SERVANTS.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 26.]—*Whosoever*, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . .

Sect. 73.—*Prosecutions by guardians of poor.—Costs.*]—Where any complaint shall be made of any offence against s. 26 of this Act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute. (*This section re-enacts* 14 & 15 Vict. c. 19, ss. 6, 7. See also ante, p. 287), and 8 Edw. 7, c. 67, s. 34 (post, p. 990)).

38 & 39 *Vict.* c. 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 6.—*Neglect to supply apprentice or servant with food or medical aid.*]—Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labour. [*The defendant can elect to be tried on indictment.* 38 & 39 Vict. c. 86, s. 9; 42 & 43 Vict. c. 49, s. 17 (ante, p. 7).]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 12.]—*Assaults, etc., by persons over sixteen on persons under sixteen.*]—See post, p. 980.

Indictment for not providing a Servant with necessary Food.
(24 & 25 *Vict. c.* 100, *s.* 26, ante, p. 971).

STATEMENT OF OFFENCE.

Failing to provide food for a servant, contrary to section 26 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, and on other days between the —— —— —— ——, then being the master of C. D., a domestic servant and legally liable to provide necessary food for the said C. D., wilfully and without lawful excuse neglected to provide the same, [and thereby endangered the life of the said C. D. or permanently injured her health or made it likely that her health should be permanently injured.]

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 100, s. 26; 54 & 55 Vict. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances, and sureties for keeping the peace and being of good behaviour*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

In the case of an apprentice, to prove the apprenticeship, if it was by deed, produce and prove the execution of the deed, or, in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant to produce it (*see ante*, pp. 368-370).

Legally liable.]—The legal liability of a master to provide his apprentice with necessary food, clothing or lodging will be inferred, even if it is not

expressly stipulated for, from the apprenticeship itself. But in the case of neglect of a servant, an indictment against a master at common law for neglecting to provide sufficient food for his servant (*see ante*, p. 2; 1 Russ. Cr. (7th ed.) 668, 907) must allege that the servant was of tender years and under the dominion and control of the defendant. *R.* v. *Ridley*, 2 Camp. 650. There is a distinction between the cases of children, apprentices of tender years, and lunatics under the care of persons bound to provide for their wants and the case of a mistress and a servant of full age able to take care of herself and to withdraw herself from the service of her mistress; *R.* v. *Jane Charlotte Smith*, L. & C. 607, 620; 34 L. J. (M. C.) 153, *per* Montague Smith, J.; and when a person, having free control of her actions and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue. *Id.*, L. & C. 625, *per* Erle, C.J.

Prove the wilful refusal or neglect of the defendant to provide the prosecutor with necessary food, etc., as stated in the indictment. Whether it be necessary to prove that by such refusal or neglect the prosecutor's life was endangered, or that his health was or was likely to be permanently injured, depends upon the construction which is to be put upon the statute. If the words " so that the life of such person shall be endangered," etc., apply to all the preceding matter, such proof will be necessary; if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject, it will be safer to introduce the allegation between square brackets (*ante*, p. 972), and to be prepared with evidence to sustain it. It would seem, indeed, to be the better opinion, that the words " so that the life of such person shall be endangered, etc.," override all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant, it is clear that such allegation and proof are necessary.

Medical aid.]—" By the general law a master was not bound to provide medical advice for his servant; yet the case was different with respect to an apprentice." *R.* v. *Smith*, 8 C. & P. 153, Patteson, J.; *and see Sellen* v. *Norman*, 4 C. & P. 80: *Wennall* v. *Adney*, 3 B. & P. 247: Eversley, Dom. Rel. (2nd ed.) 868. Cruelty to servants or apprentices under sixteen (including failure to provide adequate medical aid) can be dealt with under 8 Edw. 7, c. 67, s. 12 (*post*, p. 980).

ILL-TREATMENT OF LUNATICS IN ASYLUMS, ETC.

Statutes.

23 *& 24 Vict. c.* 75 (*Criminal Lunatic Asylums Act*, 1860), *s.* 13.]—Any superintendent, officer, nurse, attendant, servant, or other person employed in any asylum for criminal lunatics, who strikes, wounds, ill-treats or wilfully

neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and on conviction under the indictment to fine or imprisonment, with or without hard labour, or to both fine and imprisonment, at the discretion of the Court, or to forfeit for every such offence on summary conviction thereof before two justices any sum not exceeding twenty pounds, nor less than two pounds.

53 & 54 *Vict. c. 5* (*Lunacy Act*, 1890), *s.* 322.]—If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics [*which by s.* 341 *means an asylum, hospital, or licensed house*], or any person having charge of a lunatic, whether by reason of any contract, or of any tie of relationship, or marriage, or otherwise, ill-treats or wilfully neglects a patient, he shall be guilty of a misdemeanor, and, on conviction on indictment, shall be liable to fine or imprisonment, or to both fine and imprisonment, at the discretion of the Court, or be liable on summary conviction for every offence to a penalty not exceeding twenty pounds, nor less than two pounds. [*This section was framed on* 8 & 9 Vict. c. 100, s. 56; 16 & 17 Vict. c. 96, s. 5; *and* 16 & 17 Vict. c. 97, s. 123. *As to its effect*, see Wood Renton on Lunacy, 680. *It was applied with modifications to Ireland by* 1 Edw. 7, c. 17, s. 2.

Sects. 207-229.]—*Define what are licensed houses and prescribe rules for their conduct.*

Sect. 324.—*Abuse of female lunatic.*]—Post, p. 1017.

Sect. 325.]—*Prosecution only by consent of the attorney-general, or order of the commissioners of lunacy, or visitors of the asylum, etc.*

Sect. 341.—*Definitions.*]—In this Act, if not inconsistent with the context:

"Asylum" means an asylum for lunatics, provided by a county or borough, or by a union of counties or boroughs.

"Hospital" means any hospital or part of a hospital, or other house or institution (not being an asylum) wherein lunatics are received and supported wholly or partly by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients for or towards the maintenance, provision, or benefit of other patients.

"Institution for lunatics" means "asylum," "hospital," or "licensed house."

"Lunatic" means an idiot, or person of unsound mind (*ante*, p. 13).

Indictment. (53 & 54 *Vict. c.* 5, *s.* 322, supra.)

An indictment for this offence can be framed on the precedents (ante, p. 972, post, p. 976).

Evidence.

As to the evidence necessary to support an indictment for misusing a lunatic, *see R.* v. *Pelham*, 8 Q. B. 959; 15 L. J. (M. C.) 105. As to what may constitute wilful neglect, *see Dent's case* [1874], cited Wood Renton on Lunacy,

682: *R.* v. *Hill*, 50 J. P. 137. In *R.* v. *Rundle*, Dears. 482; 24 L. J. (M. C.) 129; 6 Cox, 549, it was held under 16 & 17 Vict. c. 96, s. 9 (*rep.*), that a husband having the care and charge of his wife, a lunatic, was not "a person having the care or charge" of a lunatic within the meaning of that enactment, which it was held did not apply to persons whose care or charge was purely of a domestic character. This case was distinguished in *R.* v. *Porter*, 33 L. J. (N. S.) M. C. 126; L. & C. 394; 9 Cox, 449; and was questioned in *Buchanan* v. *Hardy*, 18 Q. B. D. 486; 56 L. J. (M. C.) 42, and seems to be no longer an authority under the wider language of 53 & 54 Vict. c. 5, s. 322. On a charge under s. 322, the lunatic is admissible as a witness if the judge considers him competent. *R.* v. *Hill*, 2 Den. 254; 20 L. J. (M. C.) 222 (*see ante*, p. 452; Wood Renton on Lunacy, 683 n.). Imbecility and loss of mental power, whether arising from natural decay or paralysis, softening of the brain, or other natural cause, although unaccompanied by frenzy or delusion of any kind, was held to constitute unsoundness of mind amounting to lunacy, within 8 & 9 Vict. c. 100 (*rep.*). *R.* v. *Shaw*, L. R 1 C. C. R. 145; 37 L. J. (M. C.) 112; 11 Cox, 109.

OFFENCES WITH RESPECT TO DEFECTIVES.

Statute.

3 & 4 *Geo.* 5, *c.* 28 (*Mental Deficiency Act*, 1913), *s.* 1.—*Definition of defectives.*]—The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:—(*a*) Idiots; that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers; (*b*) imbeciles; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so; (*c*) feeble-minded persons; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools; (*d*) moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.

Sect. 51.—*Offences with respect to the reception and detention of defectives.*]—(1) It shall not be lawful for a person without the consent of the Board to undertake the care and control of more than one person who is a defective, or who is placed under his care as being a defective elsewhere than in an institution, a certified house, or an approved home, and, if any person contravenes this provision, he shall be guilty of a misdemeanor.

(3) If any manager of any institution for defectives, or the owner of a certified house, or the guardian of a defective, detains a patient or exercises any of the powers conferred upon him by this Act after he has knowledge that those powers have expired, he shall be guilty of a misdemeanor.

(4) Nothing in this section shall apply to or affect any person who under the Lunacy Acts, 1890 to 1911, or the Elementary Education (Defective and Epileptic Children) Act, 1899, as amended by any subsequent enactment, receives or detains any person in accordance with those Acts, notwithstanding that the person so received and detained is a defective within the meaning of this Act.

Sect. 54.—*Obstruction.*]—(1) Any person who obstructs any Commissioner or inspector or visitor or any officer or other person appointed or employed by a local authority in the exercise of the powers conferred by or under this Act, shall be guilty of a misdemeanor.

Sect. 55.—*Ill-treatment.*]—If any manager, officer, nurse, attendant, servant, or other person employed in an institution or certified house, or approved home, or any person having charge of a defective, whether by reason of any contract, or of any tie of relationship, or marriage, or otherwise, ill-treats or wilfully neglects the defective, he shall be guilty of a misdemeanor.

Sect. 60.—*Punishment for offences.*]—(1) An offence under this Act declared to be a misdemeanor shall be punishable by fine or by imprisonment for a term not exceeding two years, with or without hard labour, but may, except where otherwise expressly provided, instead of being prosecuted on indictment, be prosecuted summarily, and, if so prosecuted, shall be punishable only with imprisonment for a term not exceeding three months, with or without hard labour, or with a fine not exceeding fifty pounds, or both.

Sect. 71.—*Interpretation.*]—

The expressions " institution " and " institution for defectives " mean a State institution or certified institution :

The expression " State institution " means an institution for defectives of dangerous or violent propensities established by the Board under this Act :

The expression " certified institution " means an institution in respect of which a certificate has been granted under this Act to the managers to receive defectives therein, and includes, subject to the provisions of this Act, any premises provided by a board of guardians and approved under this Act :

The expression " certified house " means a house in which defectives are received by the owner thereof for his private profit, and in respect of which a certificate has been granted under this Act :

The expression " approved home " means any premises in which defectives are received and supported wholly or partly by voluntary contributions, or by applying the excess of payment of some patients for or towards the support of other patients, or a house in which defectives are received by the owner thereof for his private profit, and which has been approved by the Board under this Act :

For other offences under this Act, *see post*, p. 1038.

ABANDONING OR EXPOSING CHILDREN UNDER TWO YEARS OF AGE WHEREBY LIFE IS ENDANGERED.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 27.—*Abandoning, etc., child under two years.*]—Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section was new law in* 1861. *In practice it is superseded by the Children Act*, 1908 (8 Edw. 7, c. 67), s. 12, post, p. 980.]

8 *Edw.* 7, *c.* 67, *ss.* 27-32.—*Procedure and evidence.*]—See post, pp. 987-9.

Indictment.

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Abandoning a child, contrary to section 27 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully abandoned or exposed a child under the age of two years, whereby its life was endangered or its health permanently injured or was likely to be permanently injured.

Add counts under 8 Edw. 7, c. 67, s. 12 (post, p. 980).

If the offence is continuous it is not necessary to specify the date of the acts alleged to constitute the offence. (8 Edw. 7, c. 67, s. 32 (4) post, p. 990).

" *Abandoning* " *seems to be a continuous offence.* See R. *v.* White, (post, p. 978).

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 27; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

In order to sustain an indictment under this section it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment; that the child was then under two years of age (*as to presumption of age*, see 8 Edw. 7, c. 67, s. 123 (*post*, p. 992)); and that its life was thereby endangered, or its health had been or then was likely to be permanently injured. The following facts were held to warrant a conviction on an indictment framed on this section charging the prisoner with abandoning and expos-

ing a child under the age of two years, whereby its life was endangered. One of the prisoners was the mother of a weakly bastard child. When it was about five weeks old, both the prisoners put the child in a hamper at S., wrapped up in a shawl and packed with shavings and cotton wool, and the mother took the hamper from S. to the booking-office of the railway station at M. (a distance of about four miles) and there left it, having paid the carriage of the hamper to G. The hamper was addressed to the lodgings of the child's father at G., and he had told the mother, previous to the child's birth, that if she sent it to him he would keep it. The mother told the clerk at the station to be very careful of the hamper, and to send it by the next train, which was done in ten mintes from the time of its delivery at the station. Upon the address were the words "With care; to be delivered immediately." The hamper was, as above mentioned, duly sent by train, and was delivered at its address in G. in little less than an hour from the time of its being despatched from M. On its being opened the child was alive and lived for three weeks afterwards, when it died from causes not attributable to the conduct of the prisoners or either of them. *R.* v. *Falkingham*, L. R. 1 C. C. R. 222; 39 L. J. (M. C.) 47; 11 Cox, 475.

A woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child on the 19th October, and left it outside the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door from 7 p.m. till 1 a.m., when it was removed by a constable, being then cold and stiff. Upon this state of facts, it was held, that although the father had not the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of 24 & 25 Vict. c. 100, s. 27. *R.* v. *White*, L. R. 1 C. C. R. 311; 40 L. J. (M. C.) 134; 12 Cox, 83.

As to the cases in which an indictment for murder or manslaughter will lie, where death ensued from the abandonment or exposure, *see ante*, pp. 871, 894.

As to criminal liability at common law for neglect of children of tender years, *see ante*, p. 2, and 1 Russ. Cr. (7th ed.) 907.

ACTUAL BODILY HARM TO CHILD OR YOUNG PERSON ENGAGED IN DANGEROUS PERFORMANCE.

Statutes.

42 & 43 *Vict. c.* 34 (*Children's Dangerous Performances Act*, 1879), *s.* 3.—*Offence punishable on summary conviction.*]—Any person who shall cause any child under the age of fourteen years to take part in any public exhibition or performance whereby, in the opinion of a court of summary jurisdiction, the life or limbs of such child shall be endangered, and the parent or guardian, or

any person having the custody of such child, who shall aid or abet the same, shall severally be guilty of an offence against this Act, and shall on summary conviction be liable for each offence to a penalty not exceeding ten pounds.

Indictable misdemeanor.]—And where in the course of a public exhibition or performance which in its nature is dangerous to the life or limb of a child under such age as aforesaid taking part therein, any accident causing actual bodily harm occurs to any such child, the employer of such child shall be liable to be indicted as having committed an assault; and the Court before whom such employer is convicted on an indictment shall have the power of awarding compensation not exceeding twenty pounds, to be paid by such employer to the child, or to some person named by the Court on behalf of the child, for the bodily harm so occasioned: Provided that no person shall be punished twice for the same offence.

Sect. 4.—*Evidence of age of child.*]—Whenever any person is charged with an offence against this Act in respect of a child who in the opinion of the Court trying the case is apparently of the age alleged by the informant, it shall lie on the person charged to prove that the child is not of that age. *See* 8 Edw. 7, c. 67, s. 123, *post*, p. 992.

60 & 61 *Vict. c.* 52 (*Dangerous Performances Act*, 1897), *s.* 1.—*Extension of the Act of* 1879.]—The *Children's Dangerous Performances Act*, 1879, shall apply in the case of any male young person under the age of sixteen years, and any female young person under the age of eighteen years, in like manner as it applies in the case of a child under the age of fourteen years.

Sect. 2.—*Limitation on prosecution.*]—(1) Except where an accident causing actual bodily harm occurs to any child or young person, no prosecution or other proceeding shall be instituted for an offence against the *Children's Dangerous Performances Act*, 1879, as amended by this Act, without the consent in writing of the chief officer of the police area in which the offence is committed. (2) For the purposes of this section the expression "chief officer of police," (*a*) with respect to any place in England other than the City of London, has the meaning assigned by the *Police Act*, 1890; (*b*) with respect to the City of London means the Commissioner of City Police.

[*Apparently the consent must be given before any proceedings are taken* (see Thorpe *v.* Priestnall [1897] 1 Q. B. 159; 66 L. J. (Q. B.) 248) *and by the chief officer himself, not by a subordinate acting in his absence.*]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *ss.* 27-32, *and sch.* 1.—*Procedure and evidence under above Acts of* 1879 *and* 1897.]—See post, pp. 987-9.

ASSAULT, ILL-TREATMENT, NEGLECT, ABANDONMENT, OR EXPOSURE OF CHILDREN AND YOUNG PERSONS BY PERSONS OVER SIXTEEN.

Statute.

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *Part II.*, *s.* 12.—*Punishment for cruelty to children.*]—(1) If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, and shall be liable—

(*a*) on conviction on indictment to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

(*b*) on summary conviction, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months;

and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 1 (1), *and* s. 23 (2). See s. 38 (2) *for definitions* (post, p. 991).]

(2) *A person may be convicted of an offence under this section, either on indictment or by a court of summary jurisdiction, notwithstanding that actual suffering or injury to health, or the likelihood of such suffering or injury to health, was obviated by the action of another person.* [*This provision was new in* 1908.]

(3) A person may be convicted of an offence under this section, either on indictment or by a court of summary jurisdiction, notwithstanding the death of the child *or young person* in respect of whom the offence is committed. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 1 (2), *with the addition of the words in italics.*]

(4) Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child or young person of whom he had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under this section in respect of such child or young person, to find the accused guilty of such offence. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 1 (3). *It does not mean that the jury can convict the accused of one of the lesser offences mentioned in the section although they think him guilty of*

manslaughter; it means that they can convict him of the lesser offences if that is what they think the verdict ought to be upon the facts, although he is charged with manslaughter. R. v. Tonks [1916] 1 K. B. 443; 85 L. J. (K. B.) 396; 114 L. T. 81; 80 J. P. 165; 25 Cox, 228; 32 T. L. R. 137; 11 Cr. App. R. 284.]

(5) If it is proved that a person convicted under this section was directly or indirectly interested in any sum of money accruable or payable in the event of the death of the child or young person, and had knowledge that such sum of money was accruing or becoming payable, then—

(*a*) in the case of a conviction on indictment, the Court may in its discretion either increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or, in lieu of awarding any other penalty under this section, sentence the person to penal servitude for any term not exceeding five years; and

(*b*) *in the case of a summary conviction, the Court in determining the sentence to be awarded shall take into consideration the fact that the person was so interested and had such knowledge.* [*As to convictions on indictment this sub-section is in substance taken from* 4 Edw. 7, c. 15, s. 1 (4); *as to summary convictions, it was new in* 1908.]

(6) A person shall be deemed to be directly or indirectly interested in a sum of money under this section, if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable. *This sub-section re-enacts* 4 Edw. 7, c. 15, s. 1 (5).]

(7) A copy of a policy of insurance, certified by an officer or agent of the insurance company granting the policy to be a true copy shall in any proceedings under this section be *primâ facie* evidence that the child or young person therein stated to be insured has been in fact so insured, and that the person in whose favour the policy has been granted is the person to whom the money thereby insured is legally payable. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 1 (6).]

(8) An offence under this section is in this part of this Act referred to as an offence of cruelty. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 1 (7).]

Sect. 13.—8 *Edw. 7, c. 67* (*Children Act*, 1908).—*Suffocation of infants.*]—Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air-passages of the infant) whilst the infant was in bed with some other person over sixteen years of age, and that that other person was at the time of going to bed under the influence of drink, that other person shall be deemed to have neglected the infant in a manner likely to cause injury to its health within the meaning of this part of this Act. [*This section was new law in* 1908.]

Sect. 14.—*Allowing child to be in streets, for purpose of begging, etc.*]—(1) If any person causes or procures any child or young person, or, having the custody, charge, or care of a child or young person, allows that child or young person, to be in any street, premises, or place for the purpose of begging or receiving alms, or of inducing the giving of alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale, or other-

wise, that person shall, on summary conviction, be liable to a fine not exceeding 25*l.* or, alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

(2) If a person having the custody, charge, or care of a child or young person is charged with an offence under this section, and it is proved that the child or young person was in any street, premises, or place for any such purpose as aforesaid, and that the person charged allowed the child or young person to be in the street, premises, or place, he shall be presumed to have allowed him to be in the street, premises, or place for that purpose unless the contrary is proved. [*This section was new law in* 1908.]

Sect. 15.—*Allowing child to be in a room containing an open fire grate.*]—If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of seven years allows that child to be in any room containing an open fire grate not sufficiently protected to guard against the risk of the child being burnt or scalded, without taking reasonable precautions against that risk, and by reason thereof the child is killed or suffers serious injury, he shall on summary conviction be liable to a fine not exceeding 10*l.*

Provided that this section shall not, nor shall any proceedings taken thereunder, affect any liability of any such person to be proceeded against by indictment for any indictable offence. [*This section was new law in* 1908.]

Sect. 16.—*Allowing child to frequent brothel.*]—See post, p. 1026.

Sect. 17, 18.—*Causing or encouraging prostitution of girl under sixteen.*]—See post, p. 1027.

Sect. 19.—*Power to take offenders into custody.*]—(1) Any constable may take into custody, without warrant, any person—

(*a*) who within view of the constable commits an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, where the name and residence of such person are unknown to the constable and cannot be ascertained by the constable; or

(*b*) who has committed, or who the constable has reason to believe has committed, an offence of cruelty or any of the offences mentioned in the First Schedule to this Act, if he has reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable.

(2) Where a constable arrests any person without warrant in pursuance of this section, the superintendent or inspector of police or an officer of police of equal or superior rank, or the officer in charge of the police station to which such person is brought, shall, unless in his belief the release of such person on bail would tend to defeat the ends of justice, or to cause injury or danger to the child or young person against whom the offence is alleged to have been committed, release the person arrested on his entering into such a recognizance, with or without sureties, as may in the judgment of the officer of police be required to secure the attendance of such person upon the hearing of the charge. [*This section is based upon* 4 Edw. 7, c. 15, s. 4.]

Sect. 20.—*Detention of child in place of safety.*]—(1) A constable, or any person authorized by a justice, may take to a place of safety any child or young

person in respect of whom an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, has been, or there is reason to believe has been, committed.

(2) A child or young person so taken to a place of safety, and also any child or young person who seeks refuge in a place of safety, may there be detained until he can be brought before a court of summary jurisdiction, and that court may make such order as is mentioned in the next following sub-section, or may cause the child or young person to be dealt with as circumstances may admit and require, until the charge made against any person in respect of any offence as aforesaid with regard to the child or young person has been determined by the conviction or discharge of such person.

(3) Where it appears to a court of summary jurisdiction or any justice that an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, has been committed in respect of any child or young person who is brought before the Court or justice, and that it is expedient in the interests of the child or young person that an order should be made under this sub-section, the Court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care and detention of the child or young person until a reasonable time has elapsed for a charge to be made against some person for having committed the offence, and, if a charge is made against any person within that time, until the charge has been determined by the conviction or discharge of that person, and in case of conviction for such further time not exceeding twenty-one days as the Court which convicted may direct, and any such order may be carried out notwithstanding that any person claims the custody of the child or young person. [*This section was new law in* 1908.]

Sect. 21.—*Disposal of child by order of Court.*]—(1) Where a person having the custody, charge, or care of a child or young person has been—

(*a*) convicted of committing in respect of such child or young person an offence under this part of this Act or any of the offences mentioned in the First Schedule to this Act; or

(*b*) committed for trial for any such offence; or

(*c*) bound over to keep the peace towards such child or young person,

by any court, that court, either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or at any other time, and also any petty sessional court before which any person may bring the case, may, if satisfied on inquiry that it is expedient so to deal with the child or young person, order that the child or young person be taken out of the custody, charge, or care of the person so convicted, committed for trial, or bound over, and be committed to the care of a relative of the child or young person, or some other fit person, named by the Court (such relative or other person being willing to undertake such care), until he attains the age of sixteen years, or for any shorter period, and that court or any court of like jurisdiction may of its own motion, or on the application of any person, from time to time by order renew, vary, and revoke any such order. [*This sub-section, with sub-s.* 2, *re-enacts* 4 Edw. 7,

c. 15, s. 6 (1). *Apparently no costs can be given on varying an order.* Re O'Halloran, 70 J. P. 8.]

(2) If the child or young person has a parent or legal guardian no order shall be made under this section unless the parent or legal guardian has been convicted of or committed for trial for the offence, or is under committal for trial for having been, or has been proved to the satisfaction of the Court making the order to have been, party or privy to the offence, or has been bound over to keep the peace towards the child or young person, or cannot be found. (See *note to sub-s.* 1.)

(3) Every order under this section shall be in writing, and any such order may be made by the Court in the absence of the child or young person; and the consent of any person to undertake the care of a child or young person in pursuance of any such order shall be proved in such manner as the Court may think sufficient to bind him. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 6 (2).]

(4) Where an order is made under this section in respect of a person who has been committed for trial, then, if that person is acquitted of the charge, or if the charge is dismissed for want of prosecution, the order shall forthwith be void, except with regard to anything that may have been lawfully done under it. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 6 (3).]

(5) The Secretary of State may at any time in his discretion discharge a child or young person from the care of any person to whose care he is committed in pursuance of this section, either absolutely or on such conditions as the Secretary of State approves, and may, if he thinks fit, make rules in relation to children or young persons so committed to the care of any person, and to the duties of such persons with respect to such children or young persons. [*This sub-section is based upon* 4 Edw. 7, c. 15, s. 6 (4).]

(6) The Secretary of State, in any case where it appears to him to be for the benefit of a child or young person who has been committed to the care of any person in pursuance of this section, may empower such person to procure the emigation of the child or young person, but, except with such authority, no person to whose care a child or young person is so committed shall procure his emigation. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 6 (5).]

(7) *Nothing in this section shall be construed as preventing the Court, instead of making an order as respects a child under this section, from ordering the child to be sent to an industrial school in any case in which the Court is authorized to do so under Part IV. of this Act.* [This sub-section was new law in 1908.]

Sect. 22.—*Maintenance of child when committed to care of any person under order of court.*]—(1) Any person to whose care a child or young person is committed under this part of this Act shall, whilst the order is in force, have the like control over the child or young person as if he were his parent, and shall be responsible for his maintenance, and the child or young person shall continue in the care of such person, notwithstanding that he is claimed by his parent or any other person, and if any person—

(*a*) knowingly assists or induces, directly or indirectly, a child or young person to escape from the person to whose care he is so committed; or

(*b*) knowingly harbours, conceals, or prevents from returning to such person,

a child or young person who has so escaped, or knowingly assists in so doing;

he shall on summary conviction be liable to a fine not exceeding twenty pounds or to be imprisoned, with or without hard labour, for any term not exceeding two months.

(2) Any court having power so to commit a child or young person shall have power to make the like orders on the parent of or other person liable to maintain the child or young person to contribute to his maintenance during such period as aforesaid, and such orders shall be enforceable in like manner as if the child or young person were ordered to be sent to a certified school under Part IV. of this Act, but the limit on the amount of the weekly sum which the parent or such other person may be required under this section to contribute shall be one pound a week instead of the limit fixed under Part IV.

(3) Any such order may be made on the complaint or application of the person to whose care the child or young person is for the time being committed, and either at the time when the order for the committal of the child or young person to his care is made, or subsequently, and the sums contributed by the parent or such other person shall be paid to such person as the Court may name, and be applied for the maintenance of the child or young person.

(4) Where an order under this part of this Act to commit a child or young person to the care of some relative or other person is made in respect of a person who has been committed for trial for an offence, the Court shall not have power to make an order under this section on the parent or other person liable to maintain the child or young person prior to the trial of the person so committed.

(5) Any court making an order under this section for contribution by a parent or such other person may in any case where there is any pension or income payable to such parent or other person and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, further order that such part as the Court may see fit of the pension or income be attached and be paid to the person named by the Court. Such further order shall be an authority to the person by whom such pension or other income is payable to make the payment so ordered, and the receipt of the person to whom the payment is ordered to be made shall be a good discharge to such first-mentioned person.

(6) An order under this section may be made by any court before which a person is charged with an offence under this part of this Act, and without regard to the place in which the person to whom the payment is ordered to be made may reside. [*Sect.* 22 *re-enacts* 4 Edw. 7, c. 15, s. 7.]

Sect. 23.—*Religious persuasion of person to whom child or young person is committed.*]—(1) In determining on the person to whose care the child or young person shall be committed under this part of this Act, the Court shall endeavour to ascertain the religious persuasion to which the child or young person belongs, and shall, if possible, select a person of the same religious persuasion, or a person who gives such undertaking as seems to the Court sufficient that the child or young person shall be brought up in accordance with its own religious persuasion, and such religious persuasion shall be specified in the order.

(2) In any case where the child or young person has been placed pursuant

to any such order with a person who is not of the same religious persuasion as that to which the child or young person belongs, or who has not given such undertaking as aforesaid, the Court which made the order, or any court of like jurisdiction, shall, on the application of any person in that behalf, and on its appearing that a fit person, who is of the same religious persuasion, or who will give such undertaking as aforesaid, is willing to undertake the care of the child or young person, make an order to secure his being placed with a person who either is of the same religious persuasion or gives such undertaking as aforesaid.

(3) Where a child or young person has been placed with a person who gives such undertaking as aforesaid, and the undertaking is not observed, the child or young person shall be deemed to have been placed with a person not of the same religious persuasion as that to which the child belongs, as if no such undertaking had been given. [*Sect.* 23 *re-enacts* 4 Edw. 7, c. 15, s. 8.]

Sect. 24.—*Warrant to search for or remove a child.*]—(1) If it appears to a justice on information on oath laid by any person who, in the opinion of the justice, is acting in the interests of a child or young person, that there is reasonable cause to suspect—

(*a*) that the child or young person has been or is being assaulted, ill-treated, or neglected in any place within the jurisdiction of the justice, in a manner likely to cause the child or young person unnecessary suffering, or to be injurious to his health; or

(*b*) that an offence under this part of this Act, or any offence mentioned in the First Schedule to this Act, has been or is being committed in respect of the child or young person,

the justice may issue a warrant authorizing any constable named therein to search for such child or young person, and, if it is found that he has been or is being assaulted, ill-treated, or neglected in manner aforesaid, or that any such offence as aforesaid has been or is being committed in respect of the child or young person, to take him to and detain him in a place of safety, until he can be brought before a court of summary jurisdiction, or authorizing any constable to remove the child or young person with or without search to a place of safety and detain him there until he can be brought before a court of summary jurisdiction; and the Court before whom the child or young person is brought may commit him to the care of a relative or other fit person in like manner as if the person in whose care he was had been committed for trial for an offence under this part of this Act.

(2) A justice issuing a warrant under this section may by the same warrant cause any person accused of any offence in respect of the child or young person to be apprehended and brought before a court of summary jurisdiction, and proceedings to be taken against such person according to law.

(3) Any constable authorized by warrant under this section to search for any child or young person, or to remove any child or young person with or without search, may enter (if need be by force) any house, building, or other place specified in the warrant, and may remove the child or young person therefrom.

(4) Every warrant issued under this section shall be addressed to and executed by a constable, who shall be accompanied by the person laying the information, if such person so desire, unless the justice by whom the warrant is issued

otherwise directs, and may also, if the justice by whom the warrant is issued so directs, be accompanied by a duly qualified medical practitioner.

(5) It shall not be necessary in any information or warrant under this section to name the child or young person. [*Sect.* 24 *re-enacts* 4 Edw. 7, c. 15, s. 10.]

Sect. 25.—*Visitation of homes.*]—(1) The Secretary of State may cause any institution for the reception of poor children or young persons supported wholly or partly by voluntary contributions, and not liable to be inspected by or under the authority of any Government department, to be visited and inspected from time to time by persons appointed by him for the purpose.

(2) Any person so appointed shall have power to enter the institution, and any person who obstructs him in the execution of his duties shall be liable on summary conviction to a fine not exceeding five pounds, and a refusal to allow any person so appointed to enter the institution shall, for the purposes of the provisions of this part of this Act relating to search warrants, be deemed to be a reasonable cause to suspect that an offence under this part of this Act is being committed in respect of a child or young person in the institution.

(3) Where any such institution is carried on in accordance with the principles of any particular religious denomination, the Secretary of State shall, if so desired by the managers of the institution, appoint, where practicable, a person of that denomination to visit and inspect the institution.

(4) Where any such institution is for the reception of girls only, the Secretary of State shall, if so desired by the managers of the institution, appoint, where practicable, a woman to visit and inspect the institution.

(5) Any appointment made under this section may at any time be revoked by the Secretary of State. [Sect. 25 *was new law in* 1908.]

Sect. 26.—*Power as to habitual drunkards.*]—See post, tit. *Offences by Habitual Drunkards.*

Sect. 27.—*Evidence of accused person.*]—As respects proceedings against any person for an offence under this part of this Act, or for any of the offences mentioned in the First Schedule to this Act, the *Criminal Evidence Act*, 1898, shall apply as if in the schedule to that Act (*ante*, p. 466), a reference to this part of this Act and to the First Schedule to this Act were substituted for the reference to the *Prevention of Cruelty to Children Act*, 1894. [*A person jointly indicted and tried together with another for an offence against* 53 & 54 Vict. c. 44 (rep.), *but against whom no case was made out, was held not entitled to be discharged at the close of the case for the prosecution, if the other person charged elected to give evidence under this section, but was required to remain in the dock and take his chance of his fellow-prisoner's evidence making against him.* R. *v.* Martin [1889] 17 Cox, 36, Wills, J.]

Sect. 28.—*Extension of power to take deposition of child.*]—(1) Where a justice is satisfied by the evidence of a duly qualified medical practitioner that the attendance before a court of any child or young person, in respect of whom an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, is alleged to have been committed, would involve serious danger to the life or health of the child or young person, the justice may take in writing the deposition of the child or young person on oath, and shall thereupon subscribe the deposition and add thereto a statement of his

reason for taking the deposition, and of the day when and place where the deposition was taken, and of the names of the persons (if any) present at the taking thereof.

(2) The person taking any such deposition shall transmit it with his statement—

(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the Court for trial at which the accused person has been committed; and

(*b*) in any other case, to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the deposition. [*This section re-enacts* 4 Edw. 7, c. 15, s. 13.]

Sect. 29.—*Admission of deposition of child in evidence.*]—Where, on the trial of any person on indictment for an offence of cruelty, or any of the offences mentioned in the First Schedule to this Act, the Court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the Court of any child or young person in respect of whom the offence is alleged to have been committed would involve serious danger to the life or health of the child or young person, any deposition of the child or young person taken under the *Indictable Offences Act*, 1848, or this part of this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use it as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition. [*This section re-enacts* 4 Edw. 7, c. 15, s. 14. Semble, *the notice must be in writing;* see R. *v.* Shurmer, 17 Q. B. D. 323: R. *v. Katz*, 64 J. P. 807, Darling, J.]

Sect. 30.—*Evidence of child of tender years.*]—Where, in any proceeding against any person for an offence [*under this part of this Act, or for any of the offences mentioned in the First Schedule to this Act, the child in respect of whom the offence is charged to have been committed, or*] any [*other*] child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of the child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of s. 17 of the *Indictable Offences Act*, 1848, or of this part of this Act, shall be deemed to be a deposition within the meaning of that section and that part respectively. [*This part gets rid of the difficulties raised by* R. *v.* Pruntey, 16 Cox, 344. *The words italicized between square brackets have been repealed by* 4 & 5 Geo. 5, c. 58 (see ante, p. 453).]

Provided that—

(*a*) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused [*Refusal by the prisoner to be medically examined is not corroboration under this section;* R. *v.* Gray, 68 J. P. 327. *Where there was sufficient corroborative evidence, but an unsatisfactory direction to the jury, the Court of Criminal Appeal declined to quash a conviction.* R. *v.* Murray, 9 Cr. App. R. 248. *But where there is not such evidence the conviction will be quashed.* R. *v.* Davies, 85 L. J. (K. B.) 208; 114 L. T. 80; 25 Cox, 225; 11 Cr. App. 272.] and

(*b*) Any child, whose evidence is received as aforesaid and who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury, shall, subject to the provisions of this Act, be liable on summary conviction to be adjudged such punishment as might have been awarded had he been charged with perjury and the case dealt with summarily under s. 10 of the *Summary Jurisdiction Act*, 1879. [*Sect.* 30 *re-enacts* 4 Edw. 7, c. 15, s. 15, *and the repealed portion of* 48 & 49 Vict. c. 69, s. 4.]

Sect. 31.—*Power to proceed with case in absence of child.*]—Where in any proceedings with relation to an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, the Court is satisfied that the attendance before the Court of any child or young person in respect of whom the offence is alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child or young person. [*This section re-enacts* 4 Edw. 7, c. 15, s. 16.]

Sect. 32.—*Mode of charging offences and limitation of time.*]—(1) Where a person is charged with committing an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, in respect of two or more children or young persons, the same information or summons may charge the offence in respect of all or any of them, but the person charged shall not be liable to a separate penalty for each child or young person except upon separate informations.

(2) The same information or summons may also charge any person as having the custody, charge, or care, alternatively or together, and may charge him with the offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, and may charge him with committing all or any of these offences in a manner likely to cause unnecessary suffering or injury to health, alternatively or together, but when those offences are charged together the person charged shall not be liable to a separate penalty for each. [*As to charging neglect of, and assault on, an imbecile son*, see R. *v.* Watson, 30 Ir. L. T. R. 135.]

(3) A person shall not be summarily convicted of an offence under this part of this Act, or of an offence mentioned in the First Schedule to this Act, unless the offence was wholly or partly committed within six months before the

information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 27.]

(4) When an offence under this part of this Act, or any offence mentioned in the First Schedule to this Act, charged against any person is a continuous offence, it shall not be necessary to specify in the information, summons, or indictment, the date of the acts constituting the offence. [*Sect.* 32 *re-enacts* 4 Edw. 7, c. 15, s. 18. *In* R. *v.* Miller, 65 J. P. 313, *where dates were specified*, Phillimore, J., *refused to admit evidence of acts on other dates.*]

Sect. 33.—*Appeal from summary conviction to quarter sessions.*]—When, in pursuance of this part of this Act, any person is convicted by a court of summary jurisdiction of an offence, or when in the case of any application to a court of summary jurisdiction under this part of this Act for an order committing a child or young person to the care of any person, or for an order for contribution to the maintenance of a child or young person, any party thereto thinks himself aggrieved by any order or decision of the Court, he may appeal against such a conviction, order, or decision to quarter sessions. [*This section re-enacts* 4 Edw. 7, c. 15, s. 19.]

Sect. 34.—*Institution of proceedings by guardians, etc.*]—(1) A board of guardians may institute any proceedings under this part of this Act for any offence in relation to a child or young person, and may, out of their common fund, pay the reasonable costs and expenses of any proceedings so instituted by them. [*As to costs of prosecution and defence, see* 8 Edw. 7, c. 15 (ante, pp. 267 et seq.).]

(2) The like powers of instituting proceedings may, in London, be also exercised by a local authority for the purposes of Part I. of this Act, and the expenses of such proceedings shall be defrayed as expenses of the authority under Part I. [*Sect.* 34 *re-enacts* 4 Edw. 7, c. 15, s. 21.]

Sect. 35.—*Application of Vexatious Indictments Act*, 22 *&* 23 *Vict. c.* 17.]—Every misdemeanor under this part of this Act shall be deemed to be an offence within, and subject to, the provisions of the *Vexatious Indictments Act*, 1859, and any Act amending that Act. [*This section re-enacts* 4 Edw. 7, c. 15, s. 25.]

Sect. 36.—*Extension of s.* 10 *of* 42 *&* 43 *Vict. c.* 54.]—Sect. 10 of the *Poor Law Act*, 1879, shall be amended so as to include in it as one of the associations or societies to which a board of guardians may, with the consent of the Local Government Board, subscribe, any society or body corporate for the prevention of cruelty to children. [*This section was new law in* 1908.]

Sect. 37.—*Right of parent, etc., to administer punishment.*]—Nothing in this part of this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to such child or young person. [*This section re-enacts* 4 Edw. 7, c. 15, s. 28. See Cleary *v.* Booth [1893] 1 Q. B. 465; 62 L. J. (M. C.) 87.]

Sect. 38.—*Interpretation.*]—(1) In this part of this Act, unless the context otherwise requires, the expression "fit person," in relation to the care of any child or young person, includes any society or body corporate established for

the reception or protection of poor children or the prevention of cruelty to children.

(2) For the purposes of this part of this Act—

Any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain a child or young person shall be presumed to have the custody of the child or young person, and as between father and mother the father shall not be deemed to have ceased to have the custody of the child or young person by reason only that he has deserted, or otherwise does not reside with, the mother and child or young person [*Poole* v. *Stokes*, 78 J. P. 231; 30 T. L. R. 371]; and

Any person to whose charge a child or young person is committed by any person who has the custody of the child or young person shall be presumed to have charge of the child or young person; and

Any other person having actual possession or control of a child or young person shall be presumed to have the care of the child or young person. [See R. *v.* Dyson [1908] 2 K. B. 454; 77 L. J. (K. B.) 813. *As to the liability of a father for his illegitimate children while cohabiting with the mother*, see Liverpool Society for the Prevention of Cruelty to Children *v.* Jones, 30 T. L. R. 584; *and as to the liability of a wife living with her husband*, see R. *v.* Forsyth, Chester Summer Assizes, July 25, 1899, Kennedy, J. (ante, p. 872).]

(3) This part of this Act shall apply in the case of a child or young person who has before the commencement of this Act been committed to the care of a relative or other fit person by an order made under the *Prevention of Cruelty to Children Act*, 1904, as if the order had been made under this part of this Act.

Sect. 114.—*Power to clear court.*]—In addition and without prejudice to any powers which a court may possess to hear proceedings *in camerâ* the Court may, where a person who, in the opinion of the Court, is a child or young person, is called as a witness in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, direct that all or any persons, not being members or officers of the Court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case, be excluded from the Court during the taking of the evidence of the child or young person: Provided that nothing in this section shall authorize the exclusion of *bonâ fide* representatives of a newspaper or news agency. [*This section was new law in* 1908.]

Sect. 115.—*Prohibition on children being present in court during the trial of other persons.*]—No child (other than an infant in arms) shall be permitted to be present in court during the trial of any person charged with an offence, or during any proceedings preliminary thereto, and if so present he shall be ordered to be removed, unless he is the person charged with the alleged offence, or during such time as his presence is required as a witness or otherwise for the purposes of justice.

Provided that this section shall not apply to messengers, clerks, and other persons required to attend at any court for purposes connected with their employment. [*This section was new law in* 1908.]

Sect. 123.—*Presumption and determination of age.*]—(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the Court that he is a child or young person, the Court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the Court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the Court, and the age presumed or declared by the Court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person, and, where it appears to the Court that the person so brought before it is of the age of sixteen years or upwards, that person shall for the purposes of this Act be deemed not to be a child or young person.

(2) Where in a charge or indictment for an offence under this Act, or any of the offences mentioned in the First Schedule to this Act, except an offence under the *Criminal Law Amendment Act*, 1885, it is alleged that the person by or in respect of whom the offence was committed was a child or young person or was under or above any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence a child or young person, or to have been under or above the specified age, as the case may be, he shall for the purposes of this Act be presumed at that date to have been a child or young person or to have been under or above that age, as the case may be, unless the contrary is proved. [*This sub-section re-enacts* 4 Edw. 7, c. 15, s. 17. See R. *v.* Hale [1905] 1 K. B. 126; 74 L. J. (K. B.) 65; 69 J. P. 83.]

(3) Where in any charge or indictment for an offence under this Act or any of the offences mentioned in the First Schedule to this Act it is alleged that the person in respect of whom the offence was committed was a child or was a young person, it shall not be a defence to prove that the person alleged to have been a child was a young person or the person alleged to have been a young person was a child in any case where the acts constituting the alleged offence would equally have been an offence if committed in respect of a young person or child respectively.

(4) Where a person is charged with an offence under this Act in respect of a person apparently under a specified age it shall be a defence to prove that the person was actually of or over that age.

Sect. 124.—*Evidence of wages of defendant.*]—In any proceedings under this Act a copy of an entry in the wages book of any employer of labour, or, if no wages book be kept, a written statement signed by the employer, or by any responsible person in his employ, shall be *primâ facie* evidence that the wages therein entered, or stated as having been paid to any person, have in fact been so paid. [*This section re-enacts* 4 Edw. 7, c. 15, s. 24.]

Sect. 126.—*Reception and maintenance of children in workhouses.*]—Boards of guardians shall provide for the reception of children and young persons brought to a workhouse in pursuance of this Act, and, where the place to which under this Act a child or young person is authorized to be taken is a workhouse, the master shall receive the child or young person into the workhouse if there

is suitable accommodation therein, and any expenses incurred in respect of the child or young person shall be paid out of the common fund.

Sect. 127.—*Variation of trusts for maintenance of child.*]—(1) Where a child or young person is by an order of any court made under this Act removed from the care of any person, and that person is entitled under any trust to receive any sum of money in respect of the maintenance of the child or young person, the Court may order the whole or any part of the sums so payable under the trust to be paid to the person to whose care the child or young person is committed, to be applied by that person for the benefit of the child or young person in such manner as, having regard to the terms of the trust, the Court may direct.

(2) An appeal shall lie from an order of a court of summary jurisdiction under this section to quarter sessions.

Sect. 131.—*General definitions.*]—For the purposes of this Act unless the context otherwise requires—

The expression " child " means a person under the age of fourteen years [*by s.* 128 (1) " *fourteen* " *is substituted for* " *twelve* " *in the definition of child and young person in the* Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), *and the First Schedule of that Act is amended*];

The expression " young person " means a person who is fourteen years of age or upwards and under the age of sixteen years;

The expression " guardian," in relation to a child, young person, or youthful offender, includes any person who, in the opinion of the Court having cognizance of any case in relation to the child, young person, or youthful offender, or in which the child, young person, or youthful offender is concerned, has for the time being the charge of or control over the child, young person, or youthful offender;

The expression " legal guardian," in relation to an infant, child, young person, or youthful offender, means a person appointed, according to law, to be his guardian by deed or will, or by order of a court of competent jurisdiction;

The expression " place of safety " means any workhouse or police station, or any hospital, surgery, or any other suitable place, the occupier of which is willing temporarily to receive an infant, child, or young person.

Sect. 134.—*Short title, commencement, and repeal.*]—(1) This Act may be cited as the *Children Act*, 1908.

(2) Save as otherwise expressly provided, this Act shall come into operation on the first day of April, 1909.

(3) The enactments mentioned in the Third Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule: Provided that nothing in this repeal shall affect any notice or certificate given or any appointment or rules made under any enactment hereby repealed, and every such notice, certificate, appointment, and rules shall have effect as if given or made under this Act.

[*By s.* 38 (1) *of the* Interpretation Act, 1889 (52 & 53 Vict. c. 63), " *where . . . any Act passed after the commencement of this Act repeals and re-enacts with or without modification any provisions of a former Act, references in any*

other Act to the provisions so repealed shall unless the contrary intention appears, be construed as references to the provisions so re-enacted." By virtue of s. 38 (2) *of the same Act* (ante, p. 8), *proceedings for offences committed before April* 1, 1909, *against the repealed enactments may be instituted or continued notwithstanding their repeal.* See R. *v.* Parsons [1904] Lewes Autumn Assizes, Bigham, J. : cf. R. *v.* Webb, 140 Cent. Crim. Ct. Sess. Pap. 627, Walton, J.]

FIRST SCHEDULE.

Any offence under ss. 27 (*ante*, p. 977), 55 (*post*, p. 1008), or 56 (*post*, p. 1014), of the *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100), and any offence against a child or young person under ss. 5 (*ante*, p. 862), 42, 43 (*ante*, p. 926), 52 (*post*, p. 1032), or 62 (*post*, p. 1048) of that Act, or under the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69) (*post*, p. 1024).

Any offence under the *Dangerous Performances Acts*, 1879 and 1897 (42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52) (*ante*, pp. 978, 979).

Any other offence involving bodily injury to a child or young person.

[*This schedule is a re-enactment of the schedule to* 4 Edw. 7, c. 15. *The inclusion in this schedule of* 24 & 25 Vict. c. 100, s. 62, *overrides* R. *v.* Beer, 62 J. P. 120. *It is submitted that the words "any other offence involving bodily injury to a child or young person" are perfectly general* (see Lord Advocate *v.* Fraser, 3 Fraser, Just. 67), *and that* R. *v.* Roberts, 18 Cox, 530, *was wrongly decided.*]

Indictment for ill-treating a Child or Young Person. (8 *Edw.* 7, *c.* 67, *s.* 12 (1), ante, p. 980).

STATEMENT OF OFFENCE.

Cruelty to children, contrary to section 12 (1) of the Children Act, 1908.

PARTICULARS OF OFFENCE.

A. B., being a person over the age of 16, having the custody or charge or care of C. B., E. B., G. B., aged 3, 6, and 10 years respectively, on the —— day of ——, and on divers days between that day and ——, in the county of ——, assaulted, ill-treated or neglected them, or caused or procured them to be assaulted, ill-treated or neglected, in a manner likely to cause them unnecessary suffering or injury to their health.

The provisions of s. 32 (1), (2), (3), ante, p. 989, *permitting the inclusion in one information or summons of charges for more than one offence under s.* 12, *do not apply to indictments. If assault can be proved, it would seem*

that a specific date should be given for each assault except such as are parts of the same transaction. When the offence charged is continuous, it is not necessary to specify in the indictment the date of the acts alleged to constitute the offence (s. 32 (4), ante, p. 990). *As to charging neglect and assault of an imbecile son,* see R. *v.* Watson, 30 Ir. L. T. R. 135.

Misdemeanor: punishable by fine not exceeding 100*l.*, *or alternatively or in default of payment of such fine or in addition thereto imprisonment, with or without hard labour, for any term not exceeding two years.* 8 Edw. 7, c. 67, s. 12 (1) (a) (ante, p. 980).

The Vexatious Indictments Act, 1859 (ante, p. 67), *applies to this offence.* 8 Edw. 7, c. 67, s. 35 (ante, p. 990).

Indictment for Ill-treatment of a Child under Sixteen by a Person interested in Money payable on the Death of a Child. (8 Edw. 7, c. 67, s. 12, sub-ss. (1), (5), ante, pp. 981.)

Add to the description of A. B. in the last example, " and being directly or indirectly interested in a sum of money payable in the event of the death of the said ——, and knowing that the said sum of money was accruing or becoming payable."

In 52 & 53 Vict. c. 44, s. 2 (rep.), *it was provided that " such interest as aforesaid in any sum of money accruable or payable in the event of the death of the child shall be charged in the indictment and put to the jury in the same way, as far as may be, as a previous conviction is now charged and put." This provision prevented the interest of the accused in the death of the child being given in evidence before he had been convicted of the offence, although the proof of such interest would be strong evidence on the hearing of the charge to show that the ill-treatment, etc., was " wilful," which is an express element of the offence.*

It is submitted that it is necessary, in order to justify the increased punishment provided for by 8 Edw. 7, c. 67, s. 12 (5) (a), *to aver specifically in the indictment the existence of such interest as is mentioned in that sub-section. If this were not done, the increased punishment might be open to question on appeal* (ante, p. 300) *on the ground that there did not appear in the indictment the averments necessary to warrant the punishment imposed.* See however 5 & 6 Geo. 5, c. 90, s. 3 and r. 4 (ante, p. 44).

Misdemeanor: punishable as under the last precedent: but the Court may increase the fine to an amount not exceeding 200*l.*, *or in lieu of awarding any other penalty, may sentence the person indicted to penal servitude for not more than five nor less than three years.* 8 Edw. 7, c. 67, s. 12 (1), (5) (a) (ante, pp. 980, 981); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

Evidence.

Over the age of sixteen.]—Sect. 123 (2) of the Act does not apply to the age of the accused, which should be proved to exceed sixteen where the appearance of the accused is such as to leave a possibility of doubt; and the

jury may decide from the appearance of the accused whether he is over sixteen. *R.* v. *Cox*, 18 Cox, 672, 674 (C. C. R.).

Having the custody, charge or care.]—The term "custody" applies to the parent, or legal guardian, and to any person who is by law liable to maintain the child. But a putative father who has not been adjudged so is not a parent within the Act. *Butler* v. *Gregory*, 18 T. L. R. 370; 37 L. J. Newsp. 131. Where evidence is given that a person is a parent, he is presumed to have custody of the child (s. 38 (2)). A parent cannot by leaving his wife and living apart from her divest himself of the custody of his child so as to free himself from liability to conviction for an offence under s. 12 (1) (*ante*, p. 980). The father of illegitimate children, living with them and their mother, may be a person having the custody, charge, or care of the children, though the mother is in law their natural guardian. *Liverpool Society for the Prevention of Cruelty to Children* v. *Jones*, 79 J. P. 20.

Where evidence is given that the child was committed to the charge of the defendant, he is presumed to have charge of the child (s. 38 (2)). And where evidence is given that the defendant had actual possession or control of the child, he is presumed to have "care" of the child. The word "actual" appears to be used to include cases of constructive possession and questions of the legality of the possession.

Any child or young person.]—The effect of s. 123 (2) (*ante*, p. 992) is that where the child appears to the Court to be under sixteen, it is for the defence to prove that the child is older. Notwithstanding the section, the prosecutor should be prepared to prove the age of the child in all cases in which it is not absolutely clear on the view that it is under sixteen. A certificate of birth, coupled with evidence of identity, is legal evidence of the age of the child mentioned in the certificate; but the age may be proved by any other lawful evidence, such as that of persons who have seen the child, or that it attended a public elementary school. *R.* v. *Cox* [1898] 1 Q. B. 179; 67 L. J. (Q. B.) 293; 18 Cox, 672; *and see ante*, p. 413.

Wilfully.]—The term "wilfully" "means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it." *R.* v. *Senior* [1899] 1 Q. B. 283, 290; 67 L. J. (Q. B.) 175; 19 Cox, 219, Russell, L.C.J. And it includes deliberate omission on religious grounds to provide medical attendance for a child. *Id.* Omission on the part of the father to pay any part of his earnings towards the support of his child may constitute wilful neglect, whether he be living with his wife and child (*Cole* v. *Pendleton*, 60 J. P. 359) or apart from them (*R.* v. *O'Connor* [1908] 2 K. B. 26; 77 L. J. (K. B.) 527).

Assault.]—As to evidence of assault, *see ante*, pp. 930 *et seq.*

Ill-treat.]—It seems not to be necessary to prove actual assault or battery (as to which, *see ante*, p. 930), and that bullying and frightening will

suffice, or any course of conduct calculated to cause unnecessary suffering or injury to health.

Neglect.]—"Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind." *R.* v. *Senior*, p. 996, Russell, L.C.J. This includes failure by a parent to resort to the poor law authorities for the means of maintaining his child where he cannot do so out of his own means. *See s.* 12 (1), *ante*, p. 980. Refusal to allow an operation may be, but is not necessarily, such a failure to provide adequate medical aid as to amount to wilful neglect causing injury to health. The question is one of fact to be decided in each case on the evidence. *Oakey* v. *Jackson* [1914] 1 K. B. 216; 23 Cox, 734; 83 L. J. (K. B.) 712; 110 L. T. 41; 78 J. P. 87; 30 T. L. R. 92. Where a father who earned a sufficient wage did not pay over to his wife enough to clothe and feed the children properly, it was held no answer to a prosecution of the father for neglect to say that by resort to the poor law the mother might have obviated the effect of the father's neglect. *Cole* v. *Pendleton*, 60 J. P. 359. Evidence of the possession by the prisoner of such means at a date prior to the neglect as would presumably not be exhausted at the date of the neglect, is some evidence of the possession of means at the date of such neglect. *R.* v. *Jones*, 19 Cox, 678, Kennedy, J. As to manslaughter, *see ante*, p. 894.

"Expose or abandon."]—As to the evidence necessary to prove exposing, *see R.* v. *Williams*, 26 T. L. R. 290; 4 Cr. App. R. 89, *ante*, p. 871. and as to the evidence necessary to prove abandonment, *see ante*, p. 977.

"In a manner likely to cause unnecessary suffering or injury to health."]—Deliberate omission to supply medical or surgical aid to a child is within these words. *R.* v. *Senior* [1899] 1 Q. B. 283; 68 L. J. (Q. B.) 175 (*see ante*, p. 897). See also *Oakey* v. *Jackson* [1914] 1 K. B. 216, cited under "Neglect," *supra*. Direct proof does not seem to be required that the neglect caused, or was likely to cause, unnecessary suffering, and the jury may determine the question on the circumstances proved. *R.* v. *Brenton*, 111 Cent. Cr. Ct. Sess. Pap. 309, Day, J. But a registered medical practitioner should be called to prove the condition of the child.

"Evidence of child and parent."]—The unsworn evidence of any child of tender years may be given. *See* 8 Edw. 7, c. 67, s. 30 (*ante*, p. 988), *and ante*, pp. 429, 453. Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance at court of the injured child would involve serious danger to its life or health, the justice may take its deposition (8 Edw. 7, c. 67, s. 28 (1)), which is admissible in evidence at the trial if reasonable notice (in writing, *see* note to s. 29, *ante*, p. 988) was served on the person against whom it was taken, and that person has had an opportunity of cross-examining the child. The Court may dispense with the attendance of the child at the trial if satisfied that such attendance is not

essential to the just hearing of the case (s. 31). The defendant is a competent but not a compellable witness; 8 Edw. 7, c. 67, s. 27 (*ante*, p. 987); and the husband or wife of the defendant may be required to attend to give evidence as an ordinary witness in the case, and is competent but not compellable to give evidence. *Id.*

It is a defence that the alleged ill-treatment consisted in reasonable correction by parent, teacher, or other person having lawful control of the child (s. 37, *ante*, p. 990).

As to the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36), *see ante*, pp. 458-468; and see also *Charnock* v. *Merchant* [1900] 1 K. B. 474; 69 L. J. (Q. B.) 221, and s. 38 (1) of the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63, *ante*, p. 993).

TAKING CHILD OR YOUNG PERSON ABROAD FOR PURPOSE OF PERFORMING FOR PROFIT.

Statute.

3 & 4 *G.* 5, *c.* 7 (*Children (Employment Abroad) Act*, 1913), *s.* 1.—*Restrictions on children and young persons going abroad for the purpose of performing for profit.*]—(1) If any person causes or procures any child or young person, or, having the custody, charge, or care of any child or young person, allows such child or young person, to go out of the United Kingdom for the purpose of singing, playing, performing, or being exhibited, for profit, that person shall, unless, in the case of a young person, such a licence as is hereinafter mentioned has been granted, be guilty of an offence against this Act.

(2) A constable or any person authorised by a justice may take to a place of safety any child or young person in respect of whom there is reason to believe that an offence under this section has been or is about to be committed, and the provisions of section twenty of the *Children Act*, 1908, shall apply as if such an offence were an offence mentioned in the First Schedule to that Act.

(3) This section shall not apply in any case where it is proved that the child or young person was only temporarily resident in the United Kingdom.

Sect. 2.—*Grant of licences by police magistrates.*]

Sect. 3.—*Penalties and proceedings.*]—(1) A person guilty of an offence against this Act shall, on summary conviction, be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively or in default of payment of such fine, or in addition thereto, to imprisonment with or without hard labour, for any term not exceeding three months:

Provided that, where the offender, by means of any false pretence or false representation, procures the child or young person to go out of the United Kingdom for any such purpose as aforesaid, he shall be liable on conviction on indictment to imprisonment, with or without hard labour, for any term not exceeding two years.

(2) Where proceedings are taken against any person under this Act in respect of any child or young person, and it is proved that the defendant caused or

procured or allowed the child or young person to go out of the United Kingdom, and that the child or young person has, out of the United Kingdom, been singing, playing, performing, or been exhibited, for profit, the defendant shall be presumed to have caused or procured or allowed such child or young person to go out of the United Kingdom for that purpose unless the contrary is proved :

Provided that, where the contrary is proved, the court may order the defendant to take such steps as the court directs to secure the return of the child or young person to the United Kingdom, or to enter into a recognizance to make such provision as the court may direct to secure the health, kind treatment, and adequate supervision of the child or young person whilst abroad, and his return to the United Kingdom at the expiration of such period as the court may think fit.

(3) Proceedings in respect of an offence or for enforcing a recognizance under this Act may be instituted at any time within three months from the first discovery by the person taking the proceedings of the commission of the offence or (as the case may be) the non-observance of the restrictions and conditions contained in the licence.

(4) The wife or husband of a person charged with an offence under this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

Sect. 4.—*Interpretation.*]

Sect. 5.—*Short title, construction, and commencement.*]—(1) This Act may be cited as the Children (Employment Abroad) Act, 1913, and shall be construed as one with the Children Act, 1908; and that Act, the Children Act (1908) Amendment Act, 1910, and this Act may be cited together as the Children Acts, 1908 to 1913.

(2) This Act shall come into operation on the expiration of one month from the passing thereof [15*th August*, 1913].

SECT. 5.

FALSE IMPRISONMENT.

Indictment for Assault and False Imprisonment (Common Law).

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

False imprisonment.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted C. D., and then unlawfully and injuriously imprisoned C. D. and detained him for an hour against the will of the said C. D.

A count for a common assault (see ante, p. 929), *may be added, but is unnecessary, as the jury can convict of common assault on the first count.* See ante, pp. 211 et seq.

False imprisonment is a misdemeanor at common law, punishable by fine or imprisonment with or without hard labour, or both (ante, pp. 239, 241, 246).

Kidnapping.]—There is a form of false imprisonment known as kidnapping, consisting in the stealing or carrying away any person from his own country into another. 1 East, P. C. 429. It is indictable at common law (*see R.* v. *Lesley*, Bell, 220; 29 L. J. (M. C.) 97; 8 Cox, 269: *Phillips* v. *Eyre*, L. R. 4 Q. B. 225, 240; 38 L. J. (Q. B.) 113); and where the person kidnapped is taken abroad, is specially punishable under the *Habeas Corpus Act* (31 Car. 2, c. 2), s. 11. *Designy's case*, Sir T. Raym. 474: *and see* 1 Russ. Cr. (7th ed.) 902 *et seq.* As to kidnapping Pacific Islanders, *see* 35 & 36 Vict. c. 19; Steph. Dig. Cr. L. (6th ed.) 85; 2 Steph. Hist. Cr. L. 58; and for an instance of a trial under the Act and the mode of proving jurisdiction, *see R.* v. *Vos* [1895] 6 Queensland L. J. 215.

Evidence for the Prosecution.

All the prosecutor has to prove is the imprisonment: it is for the defendant to show that he was justified in what he did, and that the imprisonment was lawful.

Every confinement of the person is an imprisonment whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 Co. Inst. 482, 589; Cro. Car. 209; Com. Dig. Imprisonment (G.); 2 Selw. (N. P.) 915 (11th ed.). But merely preventing a man from proceeding along a particular way, when he may go where he desires to go without going along it, is not an imprisonment. *Bird* v. *Jones*, 7 Q. B. 742. When a person sends for a constable and gives another person in charge for felony and the constable tells the party charged that he must go with him, on which the other, without further compulsion, actually does go to a police-office, this is an imprisonment. *Pocock* v. *Moore*, Ry. & M. 321. But where the warrant is used merely as a summons, and no arrest is made thereon, and the party voluntarily goes before the magistrate, this, it seems, is not an imprisonment. *Arrowsmith* v. *Le Mesurier*, 2 B. & P. (N. R.) 211: *Berry* v. *Adamson*, 5 L. J. (K. B.) 218; 6 B. & C. 528. Where a man who had an idiot brother bedridden in his house kept him in a dark room without sufficient warmth or clothing, it was held not to be an imprisonment. *R.* v. *Smith*, 2 C. & P. 449. Detention of a prisoner after expiry of his sentence is false imprisonment. *Migotti* v. *Colvill*, 4 C. P. D. 233; 48 L. J. (C. P.) 695; *and see Moone* v. *Rose*, L. R. 4 Q. B. 486; 38 L. J. (Q. B.) 226. So is detention of a prisoner after acquittal. *Mee* v. *Cruikshank*, 20 Cox, 210, Wills, J.; *and see ante*, p. 227. But detention in obedience to a specific order of court is not actionable if the exigency of the order or warrant is obeyed (*Greaves* v. *Keene*, 4 Ex. D. 73) and the order is valid on the face of it. *Henderson v. Preston*, 21 Q. B. D. 362; 57 L. J. (Q. B.) 607. The offence would seem to be committed by mere detention without violence:

see R. v. *Linsberg* [1905] 69 J. P. 107 : *Hunter* v. *Johnson*, 13 Q. B. D. 225; 53 L. J. (M. C.) 182.

If the prosecutor fail in proving the imprisonment, he may still prove the assault and battery, as directed *ante*, pp. 930 *et seq.*

Evidence for the Defendant.

The defendant must either prove that he did not imprison C. D. at all, or justify the imprisonment. The grounds upon which an imprisonment can be justified may be considered under the following heads :—

1. Arrest under civil process.]—Arrest under civil process is now abolished, except (1) under the circumstances and subject to the restrictions set forth in the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), ss. 4-10, and the *Debtors Act*, 1870 (33 & 34 Vict. c. 76); (2) for contempt of court of a civil nature. The following rules were established under the former law :—

An imprisonment in a civil case cannot be justified except under a writ or order of a court.

An arrest upon a *capias ad satisfaciendum*, out of a superior court, if regular and regularly executed, may be justified by the officer who executed it, whether there be a judgment to warrant it or not (1 Lev. 95; 3 Lev. 20; 1 Salk. (409); but if the plaintiff or his attorney would justify under it, he must show such a judgment as would warrant it (*per* Holt, C.J., Carth. 443 : *Barker* v. *Braham*, 3 Wils. 368; 2 W. Bl. 866 : *Smith* v. *Sydney*, L. R. 5 Q. B. 203; 39 L. J. (Q. B.) 144); and therefore, where a *ca. sa.* was sued out on a judgment against an administratrix, without suggesting a *devastavit*, it was held, that false imprisonment would lie against the plaintiff and his attorney. *Barker* v. *Braham*, *supra*. But it is not necessary that a *ca. sa.* should be returned in order to justify under it. *Rowland* v. *Veale*, 1 Cowp. 18.

Process out of an inferior court to justify imprisonment must show that the Court had jurisdiction of the cause of action (10 Co. Rep. 76 a, 68 b : *cf.* 3 Lev. 141, 243; T. Jones, 165), and that the process was executed within the jurisdiction. 3 Lev. 243. *See ante*, pp. 897 *et seq.*

But if a writ or warrant is void upon the face of it, as if the officer's name be inserted in the warrant after it is sealed (2 Wils. 47), or if the writ is executed after the day on which it expires (2 Esp. 585), or on a Sunday (29 Car. 2, c. 7, s. 6), it will be no justification to the person arresting under it. But neither the officer nor the party is subject to an indictment for false imprisonment for arresting a person privileged from arrest, whether the privilege be permanent (*Tarlton* v. *Fisher*, 2 Doug. 671), or temporary. *Cameron* v. *Lightfoot*, 2 W. Bl. 1190, 1195 n.

2. Arrest under criminal process: (A) By warrant.]—A warrant from a magistrate having general cognizance of the matter of it will justify the officer in executing it, whether there be any grounds in fact for granting it or not (*Shergold* v. *Holloway*, 2 Str. 1002); but on the contrary, if the magistrate had not cognizance of the matter of the warrant; if, for instance, he granted a warrant to take up C. D., to answer in a plea of debt, the constable would not be justified in arresting him. *Id.; and see* Com. Dig. Imprisonment (H.)

8, 9. A conviction by a magistrate having competent jurisdiction over the subject-matter of it, upon which the party has been arrested, is, until reversed or quashed, conclusive evidence in favour even of the magistrate, in a prosecution against him for false imprisonment. 7 T. R. 633 n. *See* 11 & 12 Vict. cc. 42, 43, 44. As to gaolers, *see Greaves* v. *Keene*, 4 Ex. D. 73 : *Henderson* v. *Preston*, 21 Q. B. D. 362; 57 L. J. (Q. B.) 607. As to judges of the superior courts, *see Taaffe* v. *Downes*, 3 St. Tr. (N. S.) 1317. The warrant must be executed within the proper jurisdiction. In the ordinary cases of indictable offences, this is in the county or borough for which the justice granting it acted, or in case of fresh pursuit, within seven miles therefrom. 11 & 12 Vict. c. 42, s. 10; 45 & 46 Vict. c. 50, s. 223; 52 & 53 Vict. c. 63, s. 24. As to execution of warrants by metropolitan police, *see* 2 & 3 Vict. c. 71, s. 17. As to execution of English warrants over the Scottish border, *see* 20 & 21 Vict. c. 72, s. 11. Arrest on Sunday is legal. 29 Car. 2, c. 7, s. 6. The death of the issuing magistrate does not affect the warrant. 42 & 43 Vict. c. 49, s. 37. By 11 & 12 Vict. c. 42, s. 11 (*ante*, p. 82), warrants issued in one county, etc., may be executed in another county, etc., if backed by a justice of the latter jurisdiction. In a case of misdemeanor the officer cannot lawfully arrest unless he has the warrant with him. *Codd* v. *Cabe*, 1 Ex. D. 352; 45 L. J. (M. C.) 101. As to felony, *see Creagh* v. *Gamble*, 24 L. R. Ir. 458.

(B) Without warrant. 1. Common law powers.]—A justice of the peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a felony or breach of the peace in his presence. 2 Hale, 86. And the sheriff or coroner also may apprehend any felon within the county, without warrant. 4 Bl. Com. 289; *and see* 50 & 51 Vict. c. 55, ss. 8, 29.

By constables.]—A constable may arrest any one for a breach of the peace in his presence, and keep him in his house, or the stocks, until he can bring him before a magistrate. 1 Hale, 587. *See Cook v. Nethercote*, 6 C. & P. 741. So a constable may justify arresting a man within his constablewick upon a reasonable charge of felony, although it afterwards appear that the man is innocent, or even that no felony was, in fact, committed. *Samuel* v. *Paine*, 1 Doug. 359 : *Cowles* v. *Dunbar*, 2 C. & P. 565. *See R.* v. *Ford*, R. & R. 329 : *R.* v. *Thompson*, 1 Mood. 80. (*See ante*, p. 898). So, where a felony has been actually committed, a constable may arrest a man upon a reasonable suspicion of his having committed it; 2 Co. Inst. 52; 2 Hale, 90, 91, 92 : *Ledwith* v. *Catchpole*, Cald. 291. The question of reasonable suspicion is matter of law, and should not be left to the jury. *Hill* v. *Yates*, 2 Moore, (C. P.) 80; *and see Mure* v. *Kaye*, 4 Taunt. 34.

A constable may arrest and detain in custody for examination any person whom he finds in the streets at night, and whom there is reasonable ground to suspect of felony, although there be no proof of a felony actually committed. *Lawrence* v. *Hedger*, 3 Taunt. 14; *and see* 2 Hale, 98; 2 Co. Inst. 52.

By private persons.]—A private person, and *à fortiori* a peace officer, if a felony is committed, or a dangerous wound given in his presence, is not only jus-

tified in arresting, but is bound by law to arrest, the felon. 2 Hawk. c. 12, s. 1. So, he is justified in arresting or giving in charge persons engaged in an affray while it is continuing, or if there is reasonable ground for believing that they mean to renew it; *Price* v. *Seeley*, 10 Cl. & F. 28; 8 Eng. Rep. 651; but he cannot arrest any person concerned in it after the affray is over, for in that case a warrant is necessary. 2 Co. Inst. 52: *Timothy v. Simpson*, 1 Cr. M. & R. 757; 4 L. J. (Ex.) 81 (approved in the case last cited). Under the *Riot Act* he is bound to arrest persons not dispersing after proclamation. 1 G. 1, stat. 2, c. 5, s. 3: *R.* v. *Pinney*, 3 St. Tr. (N. S.) 11. So, he may arrest any man about to commit a felony or treason, or any act which would manifestly endanger another's life, and detain him until the intent be presumed to have ceased. 2 Hawk. c. 12, s. 19; Rolle Abr. 559 (E.): *Handcock* v. *Baker*, 2 B & P. 260. At common law, apart from any statute, a private person is entitled to arrest and give into custody another person for having committed a felony, *provided that there has been a felony actually committed, and such private person has reasonable ground to believe that the person whom he has given into custody has committed that felony.* The reason for his having such power is that, where a felony has been committed, in many cases the accused person would escape unless a private person, who has reasonable grounds for suspecting him, were authorized to seize and take him into custody. But that power ought not to be exercised except when there is reason to believe that the man would not be forthcoming. *Allen* v. *London and South Western Rail. Co.*, L. R. 6 Q. B. 66; 40 L. J. (Q. B.) 55, Blackburn, J. *See Beckwith* v. *Philby*, 5 L. J. (M. C.) 132; 6 B. & C. 635: *R.* v. *Hunt*, 1 Mood, 93; *Stonehouse v. Elliott*, 6 T. R. 315. And it must be shown that the particular felony for which the arrest was made was in fact committed. *Walters* v. *W. H. Smith & Son, Ltd.*, [1914] 1 K. B. 595; 83 L. J. (K. B.) 335; 110 L. T. 345: 78 J. P. 118; 30 T. L. R. 158; 58 S. J. 186.

2. Statutory powers.]—Persons found committing any offence against the *Malicious Damage Act*, 1861 (24 & 25 Vict. c. 97), may be apprenhended without warrant by any peace officer, or by the owner of the property, his servant, or person authorized by him (s. 61, *ante*, p. 739). Offenders against s. 1 of the *Night Poaching Act*, 1828, may be arrested by the owner of the land, warren or chase, or manor, and his servants. 9 G. 4, c. 69, s. 2 (*ante*, p. 966). *See R.* v. *Fraser*, 1 Mood. 419. Any person may arrest without warrant a person found committing any offence against the *Larceny Act*, 1861 (24 & 25 Vict. c. 96) (except angling in the daytime), s. 103: or any offence against the *Larceny Act*, 1916 (6 & 7 G. 5, c. 50) (except an offence against s. 31), s. 41 (1) *ante*, p. 504): or any indictable offence against the *Coinage Offences Act*, 1861 (24 & 25 Vict. c. 99), s. 31 (*post*, p. 1089). And by the *Customs Act*, 1876 (39 & 40 Vict. c. 36), s. 190, persons making signals to smuggling vessels may be apprehended by any person. By the *Vagrancy Act*, 1824 (5 G. 4, c. 83), s. 6, persons offending against that Act may be apprehended by any person without warrant.

By 1 & 2 G. 5, c. 27 (*Protection of Animals Act*, 1911), s. 12 (1), a police constable may apprehend without warrant any person whom he has reason to

believe is guilty of an offence under that Act which is punishable by imprisonment without the option of a fine, whether upon his own view thereof or upon the complaint and information of any other person, who shall declare his name and place of abode to such constable. *See ante*, p. 791.

By 2 & 3 G. 5, c. 20 (*Criminal Law Amendment Act*, 1912), s. 1, a constable may take into custody without a warrant any person whom he shall have good cause to suspect of having committed, or of attempting to commit, any offence against s. 2 of the *Criminal Law Amendment Act*, 1885 (which relates to procuration and attempted procuration). *See post*, p. 1034.

By 10 & 11 Geo. 5, c. 43 (*Firearms Act*, 1920), s. 11 (3), a constable making a search of premises under a search warrant may arrest without warrant any person found on the premises whom he has reason to believe to be guilty of an offence against that Act. *See ante*, p. 759).

By 10 & 11 Geo. 5, c. 46 (*Dangerous Drugs Act*, 1920), s. 14, any constable may arrest without warrant any person who has committed, or attempted to commit, or is reasonably suspected by the constable of having committed or attempted to commit, an offence against that Act, if he has reasonable ground for believing that that person will abscond unless arrested, or if the name and address of that person are unknown to and cannot be ascertained by him.

By 14 & 15 Vict. c. 19, s. 11, any person whatsoever may apprehend any person found committing any indictable offence *in the night* (*i.e.*, between 9 p.m. and 6 a.m.), and convey or deliver him to a peace officer. (*See ante*, p 655). And under 24 & 25 Vict. c. 97, s. 57 (*ante*, p. 738); c. 100, s. 66 (*ante*, p. 864); and 6 & 7 G. 5, c. 50, s. 41 (3) (*ante*, p. 504), any constable or peace officer may take into custody, without warrant, any person whom he shall find loitering or lying in any highway, yard, or other place, during the night, or whom he shall have good cause to suspect of having committed or being about to commit any felony against those Acts respectively, and shall take him as soon as reasonably may be before a justice of the peace, to be dealt with according to law. The power given by sect. 12 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) of apprehending persons committing the offences therein specified authorizes the apprehension of persons honestly and upon reasonable grounds believed to be committing the offence at the time of the arrest. *Trebeck* v. *Crondall* [1918] 1 K. B. 158, C. A. Like provisions are contained in other general and local Acts, with respect to particular offences.

3. Arrest for a contempt.]—If a contempt is committed in the face of a court of record (as, by rude and contumelious behaviour; by obstinacy, perverseness, prevarication, or refusal to answer any lawful question; by breach of the peace, or any wilful disturbance whatever), the judge may by parol order the offender to be instantly apprehended and imprisoned, at his (the judge's) discretion, without any further proof or examination. 2 Hale, 86; 2 Hawk. c. 22: 4 Bl. Com. 282, 283: *Spilsbury* v. *Micklethwaite*, 1 Taunt, 146. *See Cropper* v. *Horton*, 8 D. & R. 166: *R.* v. *Charlesworth*, 2 F. & F. 326: *Ex parte Fernandez*, 10 C. B. (N. S.) 3; 39 L. J. (C. P.) 321.

4. Arrest after an escape.]—In civil cases, where a person who has been taken into custody in execution escapes, if it be a negligent escape, the gaoler

or officer may retake him; if a voluntary escape, a retaking would be a false imprisonment. *Jones* v. *Pope*, 1 Saund. 34, *and notes: Allanson* v. *Butler*, 1 Sid. 330: *Buxton* v. *Home*, 1 Show. (K. B.) 174: *Atkinson* v. *Jameson*, 5 T. R. 25. Where a person in custody upon mesne process escapes, if the escape is negligent, the gaoler or officer may retake him; if voluntary, he may not. (*See post tit. Escape*).

In criminal cases, where a prisoner escapes, if the escape is negligent merely, the gaoler or officer may retake him, at any time, without warrant (Dalt. c. 159); if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested (2 Hawk. c. 19, s. 12); but he may be retaken on a fresh warrant, or without warrant in cases where he might have been arrested without warrant originally. Prison officers have now all the powers, duties, etc., of constables. 61 & 62 Vict. c. 41, s. 10.

5. Arrest under other authority.]—Where a *feme covert* appeared before a justice of the peace as a material witness in a case of felony, it was held that he was justified in committing her until the sessions, upon her refusing to appear at the sessions to give evidence or to find sureties for her appearance. *Bennet* v. *Watson*, 3 M. & Sel. 1. Under s. 20 of the *Indictable Offences Act*, 1848 (11 & 12 Vict. c. 42), the examining justice can commit a witness to prison until after the trial of the accused, or until the witness enter into a proper recognizance, if after making a deposition he refuses to enter into a recognizance to attend the trial. Under former statutes it was held that a magistrate might commit an accused person for re-examination; but if the committal were for an unreasonable time, the warrant of commitment was virtually void, and the commitment is an imprisonment. *Davis* v. *Capper*, 7 L. J. (M. C.) 90; 5 Man. & Ryl. 53; 10 B. & C. 28. Remand of the accused in custody on an inquiry as to an indictable offence may not be for over eight days (11 & 12 Vict. c. 42, s. 21); unless for the purpose of dealing summarily with the case. 42 & 43 Vict. c. 49, s. 24. Where the accused is not remanded in custody the adjournment may be for a longer period than eight days. *Ex parte Lebern*, 21 Cox, 431; 71 J. P. 332; *and see R.* v. *Garrett, ex parte De Dryver* [1918] 1 K. B. 6 at p. 10, per Avory, J.

Courts having bankruptcy jurisdiction have power to issue warrants for the arrest of a bankrupt, 4 & 5 Geo. 5 c. 59, ss. 23 (1), 123 (1), and where a prosecution for misdemeanor is ordered, may commit the offender for trial. Ed s. 163. The courts having jurisdiction in bankruptcy are now the High Court of Justice and the county courts (ed. s. 96 (1), and a county court, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, has all the powers and jurisdiction of the High Court. *Id.* s. 103.

Officers in the army and navy have, in many instances, authority to imprison soldiers and seamen under their command, *see* Manual of Military Law; and as to the effect of being under military law, *Marks* v. *Frogley* [1898] 1 Q. B. 396, 888; 67 L. J. (Q. B.) 605. But false imprisonment has been held to lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty and continued beyond all necessary bounds. *Wall* v. *Macnamara*, 1 T. R. 536, cit. So, where a

seaman was confined by his captain for three days, for a supposed breach of duty, and was then liberated by him, without being brought to a court-martial, it was held that false imprisonment would lie. *Swinton* v. *Molloy*, 1 T. R. 537, *cit.*

An arrest and detention under an impress warrant may be lawful, but the party executing it does so at his peril; for if he takes a man not liable to be impressed, as, for instance, a person who has never served at sea, he is guilty of false imprisonment. *Flewster* v. *Royle*, 1 Camp. 187.

Where the master of an English merchant ship contracted with the Chilian Government to take from Valparaiso to England certain persons whom that Government had ordered to be banished to England, this was held to be a false imprisonment as soon as the ship was out of the Chilian territory. *R.* v. *Lesley*, Bell, 220; 29 L. J. (M. C.) 97; 8 Cox, 269.

SECT. 6.

ABDUCTION.

Statutes.

13 *Edw.* 1, *c.* 34.—(*a*) *Abduction of married women.*]—And of women carried away with the goods of their husbands the King shall have the suit for the goods so taken away. . . . (*See ante*, p. 538; 1 Hale, 637).

(*b*). *Abduction of nuns.*]—He that carrieth a nun from her house although she consent shall be punished by three years' imprisonment, and shall make convenient satisfaction to the house from which she was taken, and nevertheless shall make fine at the King's will.

c. 35.—*Abduction of wards.*]—Concerning children, males or females, whose marriage belongeth to another, taken or carried away, if the ravisher have no right in the marriage, though after he restore the child unmarried, or else pay for the marriage, he shall nevertheless be punished for his offence by two years' imprisonment, and if he do not restore or do marry the child after the years of consent, and be not able to satisfy for the marriage, he shall abjure the realm or have perpetual imprisonment. . . .

24 *& 25 Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 53.—*Abduction of a woman on account of her fortune.*]—Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress *or co-heiress*, or presumptive next of kin, *or one of the presumptive next of kin*, to any one having such interest, whosoever shall, from motives of lucre, take away, *or detain* such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, and whosoever shall fraudulently allure, take away, or detain

such woman, being under the age of *twenty-one* years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, *with intent* to marry or carnally know her, *or to cause her to be married or carnally known by any other person*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal serviture for any term not exceeding fourteen years . . . ; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, *or in which she shall have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid;* and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 19, *with the additions italicized.*]

Sect. 54.—*Abduction by force with intent to marry, etc.*]—Whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 10 G. 4, c. 34, s. 22 (1).]

48 *&* 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 20, *and sched.—Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—Post, p. 1017.

61 *&* 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *and sched.—Evidence of accused and husband or wife of accused.*] Ante, pp. 458, 465, 466.

Indictment under first part of 24 *&* 25 *Vict. c.* 100, *s.* 53 (ante, p. 1006).

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Abduction, contrary to section 53 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, from motives of lucre, took away or detained C. D., the possessor of 10,000*l.* invested in the 5 per cent. War Loan, 1929-1947, against her will, with intent to marry her.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 Vict. c. 100, s. 53; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant took away and detained C. D. against her will. If she is taken away in the first instance with her own consent, but afterwards refuses to continue with the offender, and is forcibly detained by him, the offence is within the statute. *See* 1 Hawk. c. 41 (*forcible marriage*), s. 7. Prove also that C. D. had the interest stated in the indictment, from which the motives of lucre may be presumed. Prove the intent stated in the indictment by the declarations or acts of the defendant, or by circumstances from which the intent may be inferred. *See R.* v. *Barratt*, 9 C. & P. 387. Under the old law the woman must have been married or defiled: *Fulwood's case*, Cro. Car. 488: *R.* v. *Swendsen*, 14 St. Tr. 559; 1 Hale, 660, 661; *cf.* 4 Bl. Com. 209: *Brown's case*, Ventr. 243; 3 Keb. 193; *and see ante*, p. 467; but this is no longer necessary, the intent to marry or carnally know being sufficient. *R.* v. *Perry* (2 Russ. Cr. (7th ed.) 2281), cited in *R.* v. *Sergeant*, Ry. & M. 352, 354, Abbott, C.J.; 1 Hawk. c. 41, s. 13, *forcible marriage;* 1 East, P. C. 454. By virtue of s. 4 of the *Criminal Evidence Act*, 1898 (61 & 62 Vict. c. 36), *ante*, p. 465, the husband or wife can be called for the prosecution or for the defence, without the consent of the accused spouse, but appears not to be compellable. *See* 48 & 49 Vict. c. 69, s. 20 (*post*, p. 1017).

The offender is incapable of taking any interest, legal or equitable, in any real or personal property belonging to the woman, or in which she has any such interest, or which shall come to her as any such heiress, etc. And if a marriage shall have taken place, the property shall, on conviction of the offender, be settled in such manner as the High Court (Chancery Division), at the suit of the attorney-general, shall appoint. 24 & 25 Vict. c. 100, s. 53. *R.* v. *Burrell*, L. & C. 354; 33 L. J. (M. C.) 54; 9 Cox, 368, is a decision on that part of s. 53 which relates to the fraudulent taking away of women under the age of twenty-one. The facts proved in that case, which were complicated, were held not sufficient to sustain a conviction.

OF A GIRL UNDER SIXTEEN YEARS OF AGE.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*), *s.* 55.]—Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 9 G. 4, c. 31, s. 20.]

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 20.—*Evidence of defendant and husband or wife of defendant.*]—See post, p. 1017.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *and sched.—Evidence of defendant and husband or wife of defendant.*]—See ante, pp. 458-466.

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *ss.* 27-32 *and sched.—Procedure and evidence.*]—See ante, pp. 987-990, 994.

Sect. 123 (2).—*Presumption as to age of girl.*]—Ante, p. 992.

Indictment. (24 & 25 *Vict. c.* 100, *s.* 55.)

STATEMENT OF OFFENCE.

Abduction of a girl, contrary to section 55 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully took or caused to be taken C. D., an unmarried girl aged fourteen, out of the possession and against the will of her father [*or mother or of* E. F. *then having the lawful care or charge of her.*]

If the offence is continuous it is not necessary to specify the date of the acts alleged to constitute the offence. 8 Edw. 7, c. 67, s. 32 (4) and sched. 1 (ante, pp. 990, 994).

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years.—24 & 25 Vict. c. 100, s. 55. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant took C. D. out of the charge of her father or mother, or of some person having the lawful care or charge of her. *Cf.* s. 7 of the *Criminal Law Amendment Act*, 1885 (48 & 49 Vict. c. 69), and the cases thereon, *post*, pp. 1012, 1013.

Take.]—The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not. *R.* v. *Mankletow*, Dears. 159; 22 L. J. (M. C.) 115; 6 Cox, 143; *see R.* v. *Kipps*, 4 Cox, 167; *R.* v. *Booth*, 12 Cox, 231. Where the defendant went in the night to her father's house, and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, this was held to be a "taking of her out of the possession of her father" within the statute; although she herself proposed the plan to the defendant. *R.* v. *Robins*, 1 C. & K. 456. So, where the girl was persuaded by the defendant to leave her father's house and go away with

him, without the father's consent, and accordingly left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the defendant, and they then went away together, without the intention of returning: this was held to be a taking of the girl out of her father's possession within the statute, since up to the moment of her meeting with the defendant, she had not absolutely renounced her father's protection. *R.* v. *Mankletow* (ante, p. 1009). So, where the defendant, by concert with the girl, met her and stayed with her away from her father's house for several nights, sleeping with her; and the jury found that the father did not consent, and that the defendant knew he did not; and that he took the girl away with him in order to gratify his passions and then to let her return home, and not with the intention of keeping her away from her home permanently; the conviction was held right. *R.* v. *Timmins*, Bell, 276; 30 L. J. (M. C.) 45; 8 Cox, 401. Where a man induces a girl, by promises of what he will do for her, to leave her father's house and live with him, he may be convicted under this statute, although he is not actually present or assisting her at the time she leaves her father's roof. *R.* v. *Robb*, 4 F. & F. 59. If the girl leaves her father, without any persuasion, inducement or blandishment held out to her by the defendant, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her father's custody, yet his not doing so is no infringement of this statute, for the statute does not say he shall restore her, but only that he shall not take her away. *R.* v. *Olifier*, 10 Cox, 402, Bramwell, B.; *R.* v. *Kauffman*, 68 J. P. 189 (*post*, p. 1013). *And see R.* v. *Alexander*, 107 L. T. 240; 76 J. P. 215; 28 T. L. R. 200; 7 Cr. App. R. 110. If the suggestion to go away with the prisoner comes from the girl only, and he takes merely the passive part of yielding to her suggestion, he is entitled to an acquittal. *R.* v. *Jarvis*, 20 Cox, 249, Jelf, J. It is submitted that the ruling to the contrary in *R.* v. *Biswell*, 2 Cox, 279, is not law. *See* discussion of the authorities, *R.* v. *Mackney*, 29 Vict. L. R. 22. And where a young woman persuaded a girl under sixteen to go away with her from her father's house to London, telling her that her (the defendant's) mother wanted a little girl as a servant, and would give her 5*l.* wages, and the girl left her father's house voluntarily for that purpose, this was held not to be a taking within 9 G. 4, c. 31, s. 20, of which 24 & 25 Vict. c. 100, s. 55, is a re-enactment. *R.* v. *Meadows*, 1 C. & P. 399: *see R.* v. *Handley*, 1 F. & F. 648: *sed quære.* If, however, the girl while living with her father, leaves his house for a mere temporary purpose, intending to return to it, she is still in his possession within the meaning of the statute; and if when so out of the house the defendant induces her to run away with him, he is guilty of the misdemeanor created by this statute. *R.* v. *Mycock*, 12 Cox, 28, Willes, J.; *and see R.* v. *Baillie*, 8 Cox, 238. Where a servant girl, under sixteen years of age, had permission from her master to visit her parents from Sunday to Monday night, and went to see them on Sunday for a few hours only, and then told them (by previous arrangement with the prisoner) that she was going back to her service, instead of which she remained with the prisoner all night, and did not return to her service until some days afterwards, it was held (1) that the girl was not in the possession of her father at the time of the alleged offence, but under the lawful

charge of her master, and (2) that the above facts would not warrant a conviction for abduction from the master. *R.* v. *Miller*, 13 Cox, 179, Lush, J.

If the defendant, at the time he took the girl away, did not know, and had no reason to know, that she was under the lawful care or charge of her father, mother, or some other person, he is not guilty of this offence. *R.* v. *Hibbert*, L. R. 1 C. C. R. 184; 38 L. J. (M. C.) 61; 11 Cox, 246. The defendant met a girl in the street, and induced her to go with him to a neighbouring town, where he seduced her. They returned together, and he left her where he had met her. The girl then went to her home, where she lived with her father. The defendant made no inquiry, and did not know who the girl was, or whether she had a father living or not, but he had no reason to, and did not, believe that she was a girl of the town. Upon these facts it was held that the defendant could not be found guilty of an offence against s. 55 of 24 & 25 Vict. c. 100. *Id.* *See also R.* v. *Green*, 3 F. & F. 274.

It was held to be an offence against 4 & 5 Ph. & M. c. 8, s. 3 (of which 24 & 25 Vict. c. 100, s. 55, is in substance a re-enactment), to take away a natural daughter under sixteen from the custody of her putative father. 1 Hawk. c. 41, s. 14 (*seduction*): *R.* v. *Cornforth*, 2 Str. 1162: *R.* v. *Sweeting*, 1 East, P. C. 457. Upon the death of the lawful father, the mother retains her authority, though she marry again, unless the father has disposed of the custody of his child to others; the assent of the second husband is not material. *Ratcliff's case*, 3 Co. Rep. 38.

Against the will, etc.]—Prove also that she was taken away against the will of the person who had the care or charge of her. If the defendant induced the parents, by false and fraudulent representations, to allow him to take the child away, this is an abduction within the statute. *R.* v. *Hopkins*, C. & Mar. 254. It seems to be doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent. *Calthrop* v. *Axtel*, 1 East, P. C. 457; 3 Mod. 168. It was held not to be clear under 4 & 5 Ph. & M. c. 8 (*rep.*), whether it would be an offence to take away a girl against the will of her parent, but by the consent of one who has the temporary care of her. 1 East, P. C. 457. Where the girl's mother had encouraged her in a lax course of life, by permitting her to go out alone at night and dance at public-houses, from one of which she went away with the defendant, Cockburn, C.J., ruled that she could not be said to be taken away against the mother's will within the meaning of 9 G. 4, c. 31, s. 20 (of which the present section is a re-enactment). *R.* v. *Primelt*, 1 F. & F. 50.

Under sixteen, etc.]—Prove that she was under the age of sixteen years and unmarried. As to power of Court to presume her age from her appearance, *see* 8 Edw. 7, c. 67, s. 123 (2) and sched. 1. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older; *R.* v. *Robins*, 1 C. & K. 456: *R.* v. *Olifier*, 10 Cox, 402. *R.* v. *Mycock*, 12 Cox, 28: *R.* v. *Booth*, 12 Cox, 231; or even that the defendant *bonâ fide* believed and had reasonable ground for believing that she was over sixteen. *R.* v. *Prince*, L. R. 2 C. C. R. 154; 44 L. J. (M. C.) 122,

13 Cox, 138. If she was under the age of fourteen years, and taken away by force or fraud, the defendant must be indicted as in the next precedent but one.

The husband or wife of the defendant may be called for the prosecution or defence without the consent of the defendant; 61 & 62 Vict. c. 36, s. 4 (*ante*, p. 465); but appears not to be a compellable witness. 48 & 49 Vict. c. 69, s. 20, *post*, p. 1017; 8 Edw. 7, c. 67, s. 27, *ante*, p. 987; *and see ante*, pp. 458-486.

The act is positively prohibited, and therefore the absence of a corrupt motive is no answer to the charge. *See R.* v. *Booth*, 12 Cox, 231. So, it was held to be no legal excuse that the defendant made use of no other means than the common blandishments of a lover, to induce the girl to elope with and marry him. *R.* v. *Twistleton*, 1 Lev. 257; 1 Sid. 387; 2 Keb. 432; 1 Hawk. c. 41, s. 10, tit. *Seduction*.

OF GIRL UNDER EIGHTEEN YEARS OF AGE, WITH INTENT THAT SHE SHOULD BE CARNALLY KNOWN.

Statute

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 7.—*Abduction of a girl under eighteen with intent that she should be carnally known.*]—Any person who—with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally—takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.

Sect. 17.—*Misdemeanors under this Act to be within Vexatious Indictments Act.—Indictment under this Act not triable at quarter sessions.*]—Every misdemeanor under this Act shall, in England and Ireland, be deemed to be an offence within, and subject to, the provisions of the *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17), and any Act amending the same (*see ante*, pp. 69, 70), and no indictment under the provisions of this Act shall in England be tried by any court of quarter sessions. (*See ante*, pp. 106 *et seq.*)

Sect. 18.—*Costs.*]—Repealed as to England 8 Edw. 7, c. 15, s. 10. (*See ante*, pp. 267 *et seq.*)

Sect. 20.—*Evidence of accused and husband or wife of accused.*]—See post, p. 1017.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *sched.*—*Evidence of accused and husband and wife of accused.*]—See ante, pp. 458-466.

Indictment under 48 & 49 *Vict. c.* 69, *s.* 7 (ante, p. 1012.)

STATEMENT OF OFFENCE.

Abduction of girl, contrary to section 7 of the Criminal Law Amendment Act, 1885.

PARTICULARS OF OFFENCE.

As in last precedent except that the girl may be under eighteen, and charging " with an intent unlawfully to have carnal knowledge of the girl " [*or* " *that she should be carnally known by* E. F. *or generally.*"]

Misdemeanor: punishable by imprisonment for not more than two years, with or without hard labour. 48 & 49 Vict. c. 69, s. 7 (supra).

Evidence.

For the evidence necessary to support this indictment, *see ante*, pp. 1009-1011, *mutatis mutandis*.

In order to support an indictment under this section it is necessary to prove that the girl was *taken* out of the possession of her father or mother or other person having lawful care or charge or her, against the will of such person, and for this purpose the parent or guardian must be called (*R.* v. *Nash*, Times, July 2, 1903, Wright, J.), or that she left her father, etc., in consequence of some persuasion, inducement or blandishment held out to her by the defendant. *R.* v. *Henkers*, 16 Cox, 257, Common Serjeant, after consulting Wills, J., following *R.* v. *Olifier*, 10 Cox, 402 (*ante*, p. 1010). Where the girl has left her home without any inducement from the defendant, he is not guilty of abduction, even though it be proved that before she so left he had taken her about to places of entertainment, and had had connection with her. *R.* v. *Kauffman*, 68 J. P. 189, Bosanquet, Common Serjeant; *and cf. R.* v. *Mackney*, 29 Victoria L. R. 22, where the English cases are considered. Whether the girl was in possession of her father is a question for the jury. *R.* v. *Mace*, 50 J. P. 776. Upon an indictment under this section for taking a girl out of the possession of her father, the proof was that at the time of the commission of the alleged offence she was employed by another person as barmaid at a distance from her father's home. It was held that she was under the lawful charge of her employer and not in the possession of her father, and that therefore the defendant could not be convicted of the offence with which he was charged. *R.* v. *Henkers*, *supra*. On an indictment under this section the age of the girl must be proved by the prosecution, *as ante*, p. 413. The presumption of 8 Edw. 7, c. 67, s. 123 (2) (*ante*, p. 992), does not apply to this offence.

It is a defence if the prisoner, at the time of taking the girl from lawful custody, had reasonable cause to believe that she was eighteen, though he did not inquire till after the taking. *R.* v. *Packer*, 16 Cox, 57, Pollock, B.

STEALING CHILDREN UNDER THE AGE OF FOURTEEN YEARS.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 56].—Whosoever shall *unlawfully*, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of *fourteen* years, with intent to deprive any parent, *guardian*, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained, as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, . . . or to be imprisoned, . . . and, if a male under sixteen years of age, with or without whipping: Provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof, on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof. [*This section re-enacts* 9 G. 4, c. 31, s. 21, *with increase in the age from ten to fourteen and inserting* " *guardian.*"]

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *ss.* 27-32, *sched.* 1.—*Procedure and evidence.*]—See ante, pp. 987-990, 994.

Sect. 123.—*Presumption as to age.*]—See ante, p. 992.

Indictment under the first part of 24 & 25 *Vict. c.* 100, *s.* 56 (*supra*).

STATEMENT OF OFFENCE.

Child-stealing, contrary to section 56 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by force or fraud took away, or decoyed, or enticed away [*or detained*] C. D., a child of the age of ten years, with intent to deprive E. F., the father of the said C. D. [*guardian or other person having the lawful care or charge*], of the possession of the said C. D.

A second count may be added charging the intent as being " with intent to steal the necklace of the said C. D."

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping. 24 & 25 Vict. c. 100, s. 56; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace,* 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

Prove that the defendant took and enticed the child away: that the child was under the age of fourteen years. As to presumption of age, *see* 8 Edw. 7, c. 67, s. 123 (2), sched. 1, (*ante*, pp. 992, 994). As to unsworn evidence by child of tender years and mode of taking evidence of children, *see* 8 Edw. 7, c. 67, ss. 30, 31 (*ante*, pp. 988, 989). Prove the intent from circumstances from which the jury may infer it, *i.e.*, proof that E. F. was the father of the child will prove the intent stated in the first count, because the natural consequence of taking the child must be to deprive the father of its possession. It is not necessary to show that the accused intended to deprive the parent permanently of the possession of the child. *R.* v. *Powell*, 79 J. P. 272; 24 Cox, 229; correcting *R.* v. *Jones*, 22 Cox, 212; 76 J. P. 272; Bosanquet, Common Serjeant. The defendant may prove that he claimed to have a right to the possession of the child, for such persons are specially exempted from the operation of this section of the Act. 24 & 25 Vict. c. 100, s. 56. The prisoner being indicted under this section for that she did feloniously and unlawfully, by fraud, detain a child, under the age of fourteen, with intent to deprive the mother of its possession, it was held that she was rightly convicted upon evidence that the child had been in the service of the prisoner, and was missing and could not be discovered; and that she gave different accounts of what had become of the child, but implying that she had given it up to some third person, although there was no evidence that the child was still in her actual custody, nor indeed, any evidence where it was. *R.* v. *Johnson*, 15 Cox, 481 (C. C. R.). An indictment under this section is supported by evidence of force or fraud exercised upon the guardian of the child, or upon the child so taken or detained, or any other person. *R.* v. *Bellis*, 62 L. J. (M. C.) 155 (C. C. R.), overruling *R.* v. *Barrett*, 15 Cox, 658. As to evidence by the husband or wife of the defendant, *see* 61 & 62 Vict. c. 36, s. 4 (*ante*, p. 465), and 8 Edw. 7, c. 67, s. 27 (*ante*, p. 987).

SECT. 7.

RAPE, ETC.

RAVISHING WOMEN.

Common Law.

RAPE is the unlawful carnal knowledge of a woman by force and against her will. 1 East, P. C. 434. It was anciently a felony at common law, and after being made a misdemeanor by 3 Edw. 1, c. 13, it was again made felony by 13 Edw. 1, st. 1, c. 34, and punishable with death without benefit of clergy by 18 Eliz. c. 7 (*rep.*); *and see* 1 Hale, 627 *et seq.*

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 48.]—Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . [*This section re-enacts* 9 G. 4, c. 31, s. 16.]

Sect. 63.—*Carnal knowledge defined.*—Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only. [*Irrespective of this statute, the law remains the same as it has been since* 9 G. 4, c. 31, *namely, that where carnal knowledge constitutes a crime, that crime is complete without emission, upon proof of penetration.* R. *v.* Marsden [1891] 2 Q. B. 149; 60 L. J. (M. C.) 171. *As to earlier law*, see 1 East, P. C. 436-440.]

48 *& 49 Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 4 (*last paragraph*).]—Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be guilty of rape. [*This gets rid of the decision in* R. *v.* Barrow, L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20, *which was rejected in Ireland.* R. *v.* Dee, 14 L. R. Ir. 468; 15 Cox, 579.]

Sect. 5, sub-s. 2.—*Carnally knowing imbecile women under circumstances not amounting to rape.*]—Any person who . . . (2) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour. . . .

53 & 54 *Vict. c.* 5 (*Lunacy Act*, 1890), *s.* 324.—*Abuse of female lunatics.*]—If any manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics), or workhouse, or any person having the care or charge of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment as a lunatic in the institution or workhouse, or as a single patient, he shall be guilty of a misdemeanor, and on conviction on indictment shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years, and no consent or alleged consent of such female thereto shall be any defence to any indictment or prosecution for such offence. [*This section was extended to Ireland by* 1 Edw. 7, c. 17, s. 2.]

Sect. 325, sub-s. 2.—*Prosecution in England only by consent of attorney-general or order of commissioners in lunacy, or visitors.* [*Now, by* 3 & 4 *Geo.* 5, *c.* 28 (Mental Deficiency Act, 1913), *s.* 65 (1), *all the powers and duties of the commissioners in lunacy have been transferred to the Board of Control.*]

48 & 49 *Vict. c.* 69, *s.* 9.—*Power, on indictment for rape or for felony under s.* 4 *of the Criminal Law Amendment Act*, 1885, *to convict of certain misdemeanors.*]—If upon the trial of any indictment for rape, or any offence made felony by s. 4 of this Act (*post*, p. 1024), the jury shall be satisfied that the defendant is guilty of an offence under ss. 3 (*post*, p. 1035), 4 (*post*, p. 1024), or 5 (*ante*, p. 1016, and *post*, p. 1024), of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same (*see ante*, p. 215), then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted for such offence as aforesaid, or for the misdemeanor of indecent assault.

8 *Edw.* 7, *c.* 45 (*Punishment of Incest Act*, 1908), *s.* 4 (3).—*Power on indictment for rape to convict of incest.*]—See post, p. 1043.

3 & 4 *Geo.* 5, *c.* 28 (*Mental Deficiency Act*, 1913), *s.* 56 (5).—*Power on indictment for rape to convict of unlawful carnal knowledge or attempt to have unlawful carnal knowledge of any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under the Mental Deficiency Act*, 1913.]—See post, p. 1039.

48 & 49 *Vict. c.* 69, *s.* 20.—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*] Every person charged with an offence under this Act or under s. 48 and ss. 52-55, both inclusive, of the *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100), and the husband or wife of the person so charged shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *sched.*]—See ante, pp. 458-466.

Indictment for Rape. (24 & 25 *Vict. c.* 100, *s.* 48, ante, p. 1016).

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Rape.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, had carnal knowledge of C. D., without her consent.

The offence is a felony at common law, but the punishment is statutory. An indictment is good which charges that A. committed a rape, and that B. was present aiding and abetting him in the commission of the felony; for the party aiding may be charged either as, as he was in law, a principal in the first degree or, as he was in fact, a principal in the second degree. R. *v.* Crisham, C. & Mar. 187. *A general conviction of a defendant charged both as principal in the first degree, and as an aider and abettor of other men in rape, is valid on the count charging him as principal. And on such an indictment, evidence may be given of several rapes on the same woman, at the same time, by the defendant and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed.* R. *v.* Folkes, 1 Mood. 354 : R. *v.* Gray, 7 C. & P. 164. Under the *Indictments Act*, 1915, *ante*, p. 57, in such a case the rapes can now be included in the same indictment.

As to the conviction of the defendant upon this indictment of other offences than that charged against him in the indictment, see 48 & 49 Vict. c. 69, s. 9 (ante, p. 1017).

Felony : penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, for not more than two years. 24 & 25 Vict. c. 100, s. 48; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Who may be convicted.]—If it is proved that the defendant is under the age of fourteen years, he must be acquitted, whatever may be the nature of the evidence against him; for a boy under the age of fourteen years is presumed by law incapable of being a principal in the first degree in rape; 1 Hale, 630; and this presumption was not affected by 9 G. 4, c. 31, s. 18 (*rep.*) of which 24 & 25 Vict. c. 100, s. 63, is a re-enactment. *R.* v. *Groombridge*, 7 C. & P. 582. Nor is evidence admissible against him to show that in fact he has attained the full state of puberty, and was capable of committing the crime. *R.* v. *Philips*, 8 C. & P. 736; *R.* v. *Jordan*, 9 C. & P. 118. But in *R.* v. *Brimilow*, 2 Mood. 122; 9 C. & P. 366, a boy under fourteen indicted for rape was held properly convicted of assault under 7 W. 4 & 1 Vict. c. 85, s. 11 (*rep.*). *Quære*,

however, whether he might not be convicted on this indictment of an indecent assault, under 48 & 49 Vict. c. 69, s. 9 (*ante*, p. 1017). A woman may be convicted as principal in the second degree in rape. *R.* v. *Ram*, 17 Cox, 609, 610 n., Bowen, L.J. It is a general proposition that a husband cannot be guilty of a rape upon his wife. 1 Hale, 629; but it would seem that the proposition does not necessarily extend to every possible case: *see* the remarks of the judges in *R.* v. *Clarence*, 22 Q. B. D. 23. But both a husband and a boy under fourteen may be principals in the second degree. 1 Hale, 630. *See R.* v. *Eldershaw*, 3 C. & P. 396: *R.* v. *Waite* [1892] 2 Q. B. 600; 61 L. J. (M. C.) 187: *R.* v. *Williams* [1893] 1 Q. B. 320; 62 L. J. (M. C.) 29.

Evidence of husband or wife.]—Under 48 & 49 Vict. c. 69, s. 20 (*ante*, p. 1017), the defendant and his wife, and, in the case of a female accessory, her husband, are competent but not compellable witnesses on the trial of the indictment, but not before the grand jury. This enactment appears to be superseded as to the defendant by 61 & 62 Vict. c. 36, s. 1, (*ante*, p. 458), and the husband or wife of the defendant appears now to be a competent witness for the prosecution or defence without the consent of the defendant, but not to be a compellable witness. 61 & 62 Vict. c. 36, s. 4 (*ante*, p. 465).

Consent.]—It must be proved that the rape was committed on C. D. by force and without her consent. *See R.* v. *Bradley*, 74 J. P. 247; 4 Cr. App. R. 225. If, however, she yielded through fear of death or through duress, it is rape. 1 Hawk. c. 41, s. 6: *R.* v. *Jones*, 4 L. T. (O. S.) 154: cf. *R.* v. *Hallett*, 9 C. & P. 748: *R.* v. *Rudland*, 4 F. & F. 495. If the connection took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner (though the liquor was given only for the purpose of exciting her), it is a rape. *R.* v. *Camplin*, 1 Den. 89; 1 C. & K. 746; 1 Cox, 220. So, also, if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her while in that state, he is guilty of rape. *R.* v. *Mayers*, 12 Cox, 311: *R.* v. *Young*, 14 Cox, 114, Lush, J. It is no excuse that the woman consented at first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact. 1 Hawk. c. 41, s. 7. Even that the woman was a common strumpet, or the concubine of the ravisher, is no excuse; *Id.*; 1 Hale, 628, 629; although such circumstances should certainly operate strongly with the jury as to the probability of the fact that connection was had with the woman against her consent. An indictment for rape will lie against one who *ravishes* a girl of or above the age of thirteen years and under the age of sixteen years, although 48 & 49 Vict. c. 69, s. 5, sub-s. 1 (*post*, p. 1024), makes the mere unlawful carnal knowledge of such a girl a misdemeanor. Under 38 & 39 Vict. c. 94, s. 4 (*rep.*), which enacted that whosoever should unlawfully and carnally know and abuse any girl being above the age of twelve and under the age of thirteen years, whether with or *without her consent*, should be guilty of a misdemeanor, it was held that an indictment for rape would still lie against one who ravished a girl between the ages of twelve and thirteen. *R.* v. *Ratcliffe*, 10 Q. B. D. 74; 52 L. J. (M. C.) 40. The words "without her con-

sent," which alone gave rise to the doubt in that case, are not contained in 48 & 49 Vict. c. 69, s. 4 (*post*, p. 1024).

Connection with women of weak intellect.]—If the connection was with a woman of weak intellect, incapable of distinguishing right from wrong, and the jury found that she was incapable of giving consent, or of exercising any judgment upon the matter, and that (though she made no resistance) the defendant had carnal knowledge of her by force, and *without her consent*, that is a rape. *R.* v. *Fletcher* [1859] Bell, 63; 28 L. J. (M. C.) 85; 8 Cox, 131; *see R.* v. *Ryan*, 2 Cox, 115. It was, however, afterwards held that the mere fact of connection with an idiot girl who was capable of recognizing and describing the prisoner, and who was a fully developed woman, who, notwithstanding her imbecile condition, might have strong animal instincts, is not sufficient evidence of rape to be left to a jury. *R.* v. *Fletcher* [1866] L. R. 1 C. C. R. 39; 35 L. J. (M. C.) 172; 10 Cox, 248. These cases agree on the principle, and only differ as to the amount of evidence of consent adduced. The prisoner was convicted of attempting to rape a girl of fourteen years of age, who had been blind from six weeks old, and wrong in her mind, hardly capable of understanding anything that was said to her, but could go up and down stairs by herself. She passively obeyed all directions given to her, but was obliged to be dressed and undressed. She was unable to do any work. There were no marks of violence on her person, but the surgeon thought that there had been recent connection, and that she had been in the habit of having connection. She was unable to give evidence in court. The prisoner had known the girl and her family for upwards of two years. It was held that there was sufficient evidence of the girl's incapacity to consent to support the finding of the jury that the prisoner attempted to have connection with her without her consent, and the conviction was affirmed. *R.* v. *Barratt*, L. R. 2 C. C. R. 81; 43 L. J. (M. C.) 7; 12 Cox, 498. Where the prosecutrix, an apparent idiot, proved that the prisoner had had connection with her, but it appeared from her examination that although she knew he was doing wrong, she made no resistance, and the prisoner on being apprehended and charged with committing rape upon the prosecutrix "against her will," said "Yes, I did; and I am very sorry for it," it was held that there was evidence to go to the jury of a rape. *R.* v. *Pressy*, 10 Cox, 635 (C. C. R.).

By 48 & 49 Vict. c. 69, s. 5, sub-s. 2 (*ante*, p. 1016), connection, or an attempt to have connection, with "any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile," is a misdemeanor punishable with two years' imprisonment. The word "imbecile," as used in this section, was defined by Wills, J., as follows: "A person to answer that description under this Act must be either incapable of appreciating the nature and quality of the act in question, or incapable of exercising an act of her own will in giving or withholding her consent, and this incapacity must arise from want of understanding." *R.* v *Turner*, C. C. C. Sess. Papers, September 17th, 1886. In *R.* v. *F*—— 74 J. P. 384, Grantham, J., held that an idiot is a person who from birth has

had no mind, and that an imbecile woman is a woman who, having once had a mind of some kind, owing to decay or to other mental or physical causes ceases to have a mind.

Connection by personating husband.]—It is rape for a man to have carnal knowledge of a woman by a fraud which induces her to suppose he is her husband. 48 & 49 Vict. c. 69, s. 4 (*ante*, p. 1016). This enactment gets rid of decisions to the contrary in *R.* v. *Barrow*, L. R. 1 C. C. R. 156; 38 L. J. (M. C.) 20; 11 Cox, 191: *R.* v. *Clarke*, Dears. 397; 24 L. J. (M. C.) 25; 6 Cox, 412, *and see* 413 n.: *R.* v. *Sweenie*, 8 Cox, 223 (Sc.). *R.* v. *Barrow* had been disapproved by some English judges in *R.* v. *Flattery*, 2 Q. B. D. 410; 46 L. J. (M. C.) 630; and by the Irish judges in *R.* v. *Dee*, 15 Cox, 579; 14 L. R. (Ir.) 468. Though not rape before 48 & 49 Vict. 69, s. 4, the offence seems to have been an assault; *R.* v. *Williams*, 8 C. & P. 286: *R.* v. *Saunders*, 8 C. & P. 265; and if the woman was asleep the offence was always held rape (*ante*, p. 1019).

Connection by false pretences.]—Where a medical man had connection with a girl of fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, and she made no resistance, owing solely to the *bonâ fide* belief that such was the case, this was held to be certainly an assault, and, it was suggested, a rape. *R.* v. *Case*, 1 Den. 580; 19 L. J. (M. C.) 174; 4 Cox, 220. Where the prosecutrix, a girl of nineteen, consulted the prisoner, a quack doctor, with respect to illness from which she suffered, and he advised a surgical operation, and under pretence of performing it, had connection with her, she submitting to what was done, not with any intention that he should have connection with her, but under the belief that he was merely performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner, it was held that the prisoner was guilty of rape. *R.* v. *Flattery*, 2 Q. B. D. 410; 46 L. J. (M. C.) 130; 13 Cox, 388. By 48 & 49 Vict. c. 69, s. 3 (2) (*post*, p. 1035), any person who by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection shall be guilty of a misdemeanor; and it has been held (*R.* v. *O'Shay*, 19 Cox, 76, Ridley, J.; *c.f.* Steph. Dig. Cr. L. (6th ed.) p. 207) that the effect of this section is to render *R.* v. *Flattery*, *supra*, no longer law. But in the later case the attention of the judge does not seem to have been called to 48 & 49 Vict. c. 69, s. 16, which enacts "that this Act shall not exempt any person from any proceeding for an offence which is punishable at common law or under any Act of Parliament other than this Act, so that a person be not punished twice for the same offence" (*and see ante*, p. 160).

Evidence of woman ravished.]—The party ravished is a competent witness and corroboration of her testimony is not in law essential; *see* 1 Russ. Cr. (7th ed.) 941, 943; but is in practice required. (*a*) For instance, if the witness

(*a*) *Semble*, where there is no such corroboration as will justify conviction of rape, or the attempt, the jury may convict of indecent assault, as to which corroboration is not essential. *R.* v. *McGee* [1895], 6 Queensland L. J., Griffith, C.J.

is of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But, on the other hand, if she is of evil fame, and stands unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned. 4 Bl. Com. 213. And the prisoner may give evidence of the woman's notoriously bad character for want of chastity or common decency, or that she is a common prostitute, *per* Stephen J., in *R.* v. *Riley*, *infra;* or that she has had connection before with the prisoner himself; *R.* v. *Riley*, 18 Q. B. D. 481; 56 L. J. (M. C.) 52; but *R.* v. *Hodgson*, R. & R. 211 : *R.* v. *Clarke*, 2 Stark. (N. P.) 241 : *R.* v. *Barker*, 3 C. & P. 589 : *R.* v. *Martin*, 6 C. & P. 562. The prosecutrix may on cross-examination be asked whether she has had connection with men, named to her, other than the prisoner, but if she denies having done so, those men cannot be called to contradict her, and the cross-examining party is bound by her answer. *R.* v. *Holmes*, L. R. 1 C. C. R. 334; 41 L. J. (M. C.) 12 : *R.* v. *Cockcroft*, 11 Cox, 410 : *R.* v. *Hodgson*, R. & R. 211. A ruling to the contrary in *R.* v. *Robins*, 2 M. & Rob. 512, was noticed and overruled in *R.* v. *Holmes*, *supra*. *See also R.* v. *Cargill* [1913] 2 K. B. 271; 82 L. J. (K. B.) 655; 23 Cox, 382; 108 L. T. 816; 77 J. P. 347; 29 T. L. R. 382. It has been held that the prosecutrix is not bound to answer such a question. *R.* v. *Hodgson* (*supra*); but this is open to doubt. *See Cundell* v. *Pratt*, M. & M. 108, and other cases cited *ante*, p. 474. It has been held that if the prosecutrix is cross-examined with a view to show that she consented or was of unchaste life, under 61 & 62 Vict. c. 36, s. 1 (*f*) (*ante*, p. 458), the prisoner, if called, may be cross-examined as to previous convictions. *See R.* v. *Fisher*, 34 L. J. Newsp. 100; Jelf on Criminal Evidence, p. 70; but this is doubtful. *See R.* v. *Sheean*, 72 J. P. 232; 24 T. L. R. 459; *and R.* v. *Preston* [1909] 1 K. B. 568, 577; and see generally on this subject *ante*, p. 462.

Evidence of complaint.]—In the case of rape or kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged offence, and the particulars of such complaint, may be given in evidence so far as they relate to the prisoner, not as evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with her evidence, given at the trial. *R.* v. *Lillyman* [1896] 2 Q. B. 167; 65 L. J. (M. C.) 195, where the prior rulings were considered; and it was held that the prevalent practice had been wrong in limiting the questions to whether the prosecutrix made a complaint or mentioned a name. As to the present state of the law on this subject, *see R.* v. *Osborne* [1905] 1 K. B. 551; 74 L. J. (K. B.) 311; 69 J. P. 189; 92 L. T. 393; 53 W. R. 494 : *R.* v. *Hedges*, *Id.* 262, and *ante*, pp. 372, 373.

Carnal knowledge.]—To constitute the offence of rape, there must be a penetration. *R.* v. *Hill*, 1 East, P. C. 439. But any, the slightest, penetration

will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was held to be sufficient to constitute the crime of rape. *R.* v. *Russen*, 1 East, P. C. 438, 439; *see R.* v. *M'Rue*, 8 C. & P. 641; *R.* v. *Allen*, 9 C. & P. 31. Proof of the rupture of the hymen is unnecessary. *R.* v. *Hughes*, 2 Mood. 190; 9 C. & P. 752: *and see R.* v. *Lines*, 1 C. & K. 393, overruling *R.* v. *Gammon*, 5 C. & P. 321.

Until the passing of 9 G. 4, c. 31, s. 18 (re-enacted in 24 & 25 Vict. c. 100, s. 63, *ante*, p. 1016), it was also necessary to prove emission, which might be proved either positively, by the evidence of the woman that she felt it; or it might be presumed from circumstances, as, for instance, that the defendant, after having connection with the prosecutrix, arose from her voluntarily, without being interrupted in the act. *R.* v. *Harmwood*, 1 East P. C. 440: *R.* v. *Sheridan*, *Id.* 438: *R.* v. *Burrows*, R. & R. 519. It is under the statutes cited now unnecessary to prove the actual emission of seed, in order to constitute a carnal knowledge; carnal knowledge is deemed complete upon proof of penetration only. *See R.* v. *Marsden* [1891] 2 Q. B. 149; 60 L. J. (M. C.) 171; 17 Cox, 297. And it has been held that even though the jury negative the emission, or the circumstances be proved to have been such that no emission did or could take place, the offence is complete if the penetration is proved *R.* v. *Jennings*, 4 C. & P. 249; 1 Lew. 93: *R.* v. *Cox*, 1 Mood. 337; 5 C. & P. 297: *R.* v. *Allen*, 9 C. & P. 31.

Conviction of another offence.]—If actual penetration is not proved, the defendant may, nevertheless, on this indictment, be convicted of an attempt to commit a rape. 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215). As to the evidence necessary to prove the attempt, *see R.* v. *Lloyd*, 7 C. & P. 318: *R.* v. *Wright*, 4 F. & F. 967. And where an indictment charged H. with rape, and W. as an aider and abettor, and the jury found H. guilty of attempting to commit a rape and W. of aiding H. in the attempt, and it was contended that this finding amounted to an acquittal of W., as the case was not within 14 & 15 Vict. c. 100, s. 9, the objection was overruled and the conviction of W. for misdemeanor was affirmed. *R.* v. *Hapgood*, L. R. 1 C. C. R. 221; 38 L. J. (M. C.) 83; S. C. as *R.* v. *Wyatt*, 39 L. J. (M. C.) 83. A boy under fourteen cannot be convicted of an assault with intent to commit a rape. *R.* v. *Eldershaw*, 3 C. & P. 396; *R.* v. *Waite* [1892] 2 Q. B. 600; 61 L. J. (M. C.) 187: *R.* v. *Williams* [1893] 1 Q. B. 320; 62 L. J. (M. C.) 29. An acquittal upon an indictment for rape is no bar to a subsequent indictment on the same facts for a common assault. *R.* v. *Dungey*, 4 F. & F. 99. And if upon the trial of an indictment for rape, the jury are satisfied that the defendant is guilty of an offence under ss. 3 (*post*, p. 1035), 4 (*post*, p. 1024), or 5 (*ante*, p. 1016, *and post*, p. 1024) of the *Criminal Law Amendment Act*. 1885, or of an indecent assault, but are not satisfied that the defendant is guilty of rape, or of an attempt to commit the same, the jury may acquit the defendant of the rape, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for an indecent assault. 48 & 49 Vict. c. 69, s. 9 (*ante*, p. 1017); *see R.* v. *West*,

4 Cr. App. R. 179. As to conviction of incest on a charge of rape, etc., *see post*, p. 1043. As to whether on acquittal for rape the defendant can be prosecuted for assault with intent to commit rape, *see R.* v. *Gisson*, 2 C. & K. 781, doubted in 2 Russ. Cr. (7th ed.) 1988 n.

CARNAL KNOWLEDGE OF GIRLS UNDER THIRTEEN, AND GIRLS OF OR OVER THIRTEEN AND UNDER SIXTEEN YEARS OF AGE, AND ALLOWING CHILDREN UNDER SIXTEEN TO RESIDE IN BROTHELS, AND CAUSING THE SEDUCTION, ETC., OF GIRLS UNDER SIXTEEN.

Statute.

48 & 49 *Vict* c. 69 (*Criminal Law Amendment Act*, 1885), *s.* 4.—*Defilement of girl under thirteen years of age.*]—Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*For indictment*, see post, p. 1027.]

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour. [*This clause gets rid of the decision in* R. *v.* Cockburn, 3 Cox, 543 (*see post*, p. 1027).]

Whipping.]—Provided that in the case of an offender whose age does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by the *Whipping Act*, 1862 (25 & 26 Vict. c. 18), and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned. . . . [*The rest of s.* 4 *is repealed and in substance re-enacted by* 8 Edw. 7, c. 67, s. 30, and sched. 3, *except the last paragraph, which is set out* ante, p. 1016. *An offender whose age exceeds sixteen years at the date of conviction, though he was under sixteen when he committed the offence, cannot be sentenced to be whipped.* R. *v.* Cawthorn [1913] 3 K. B. 168; 82 L. J. (K. B.) 981; 109 L. T. 412; 77 J. P. 460; 29 T. L. R. 600.]

Sect. 5, sub-s. 1.—*Defilement of girl between thirteen and sixteen years of age.—Defence.—Limitation of prosecution.*]—Any person who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour. [*Sub-s.* 2 *is printed* ante, p. 1016.]

Provided that it shall be a sufficient defence to any charge under sub-s. 1 of this section if it shall be made to appear to the Court or jury before whom

the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years. [*To constitute a defence under this proviso the accused must have reasonable cause to believe and in fact believe that the girl was of or above the age of sixteen.* R. *v.* Banks [1916] 2 K. B. 621; 85 L. J. (K. B.) 1657; 80 J. P. 432; 12 Cr. App. R. 74.]

Provided also, that no prosecution shall be commenced for an offence under sub-s. 1 of this section more than three months (*now altered from* "three months to six months" *by* 4 Edw. 7, c. 15, s. 27, infra) after the commission of the offence. [*As to limitation and what is commencement of prosecution under sub-s.* 1, see R. *v.* West [1898] 1 Q. B. 174; 67 L. J. (Q. B.) 62; 18 Cox, 675 (ante, p. 65). *The limitation does not exclude evidence of other acts of carnal knowledge of the girl by the accused more than six months before the commencement of the prosecution.* R. *v.* Shellaker [1914] 1 K.B. 414; 83 L. J. (K. B.) 413; 110 L. T. 351; 78 J. P. 159; 30 T. L. R. 194; overruling on this point R. *v.* Beighton, 18 Cox, 535. *For indictment*, see post, p. 1027.]

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *s.* 27.—*Amendment of second proviso to* 48 & 49 Vict. c. 69, s. 5, supra.]—The limit of time mentioned in the second proviso of s. 5 of the *Criminal Law Amendment Act*, 1885, shall be six months after the commission of the offence. [*The question whether the extended time for prosecution given by this section applied to offences committed within three months before October* 1, 1904 (*when the section came into force*), *was considered in* R. *v.* Chandra Dharma [1905] 2 K.B. 335; 74 L. J. (K. B.) 450; 21 T. L. R. 353; 69 J. P. 198; 53 W. R. 431 (C. C. R.), *where it was held that the section related to procedure and applied to offences committed before it came into force.* (*a*)]

48 *&* 49 *Vict. c.* 69, *s.* 6.—*Owner, occupier, etc., of premises permitting defilement of girls under thirteen, and between thirteen and sixteen years of age on his premises.—Defence.*]—Any person who, being the owner or occupier of any premises, or, having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, (1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*for minimum term of penal servitude and alternative punishment*, see 54 & 55 Vict. c. 69, s. 1, ante, pp. 238, 239]; and (2) if such girl is of or above the age of thirteen and under the age of sixteen years, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury before whom the charge shall

(*a*) But if an offence was barred under the limitation of time in the repealed clause, it could not be revived by the extension of time for prosecution in the amending clause. *Id., and see R. v. Peard* [1906], 25 N. Z. L. R. 568.

be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

[*The prisoner was convicted under the above section, of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in that section. The girl was the prisoner's daughter, and the premises were her home, where she resided with the prisoner. It was held that the conviction was good.* R. *v.* Webster, 16 Q. B. D. 134; 55 L. J. (M. C.) 63; 15 Cox, 775. But see R. *v.* Merthyr Tydfil Justices, 10 Rep. 189; 10 T. L. R. 375: *where a mother was held not within s.* 6, *who, for the purpose of obtaining conclusive evidence against a man who had seduced her daughter, permitted him to come to her house to repeat his unlawful intercourse.*]

Sect. 9.—*Power to convict of misdemeanors under ss.* 3, 4, *or* 5 *of this Act, or of an indecent assault, on indictment for rape or for felony under s.* 4 *of this Act.*]—Ante, pp. 1017, 1023.

Sect. 12.—*Power of Court on trial of offence under this Act, in certain cases, to make provision for custody of girl under age of sixteen.*]—Where on the trial of any offence under this Act it is proved to the satisfaction of the Court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress it shall be in the power of the Court to divest such father, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the Court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect. (*Cf.* 8 Edw. 7, c. 67, s. 21, *ante*, p. 983.)

Sect. 17.—*Misdemeanors under this Act to be within Vexatious Indictments Act* (ante, p. 67).—*Indictment under this Act not triable at quarter sessions.*] —Ante, p. 106.

Sect. 20.—*Person charged and husband or wife of person charged to be a competent but not compellable witness.*]—Ante, p. 1017.

61 *&* 62 *Vict. c.* 36, *ss.* 1, 4.—*Criminal Evidence Act*, 1898.]—Ante, pp. 458-466.

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 16.—*Allowing children to reside in or frequent brothels.*]—(1) If any person having the custody, charge, or care of a child or young person between the ages of four and sixteen allows that child or young person to reside in or to frequent a brothel, he shall be guilty of a misdemeanor and shall be liable on conviction on indictment or on summary conviction to a fine not exceeding twenty-five pounds, or alternatively or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months. [*As to brothels*, see post, *tit.* "*Disorderly Houses.*"

(2) Nothing in this section shall affect the liability of a person to be indicted under s. 6 of the *Criminal Law Amendment Act*, 1885 (*ante*, p. 1025), but upon the trial of a person under that section it shall be lawful for the jury, if they

are satisfied that the accused is guilty of an offence under this section, to find the accused guilty of such offence. [*This section was new law in* 1908.]

Sect. 17.—*Punishment of person causing, etc., prostitution of young girl.*]—(1) If any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution [or unlawful carnal knowledge] of that girl, he shall be guilty of a misdemeanor and shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years.

(2) For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution [or unlawful carnal knowledge] (as the case may be) of a girl who has been seduced or become a prostitute [or been unlawfully carnally known] if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character. [*This section was new law in* 1908. *The words in square brackets were added by* 10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 25 (*Children Act*, 1910), *s.* 1. *As to what constitutes "causing or encouraging,"* see R. *v.* Ralphs, 9 Cr. App. R. 87 : R. *v.* Chainey [1914] 1 K. B. 137; 83 L. J. (K. B.) 306; 23 Cox, 620; 109 L. T. 752; 78 J. P. 127; 30 T. L. R. 51. *As to "seduction,"* see R. v. Moon [1910] 1 K. B. 818; 79 L. J. (K. B.) 505; 74 J. P. 231.]

Sect. 18.—*Power to bind over person having custody of young girl to exercise proper care.*]—(1) Where it is shown to the satisfaction of a court of summary jurisdiction, on the complaint of any person, that a girl under the age of sixteen years is, with the knowledge of her parent or guardian, exposed to the risk of seduction or prostitution, [or of being unlawfully carnally known] or living a life of prostitution, the Court may adjudge her parent or guardian to enter into a recognizance to exercise due care and supervision in respect of the girl.

(2) The provisions of the *Summary Jurisdiction Act*, 1879, with respect to recognizances to be of good behaviour (including the provisions as to the enforcement thereof) shall apply to recognizances under this section. [*This section was new law in* 1908.]

Sects. 27-32.—*Procedure and evidence.*]—See ante, pp. 987-990.

Indictment for carnally knowing a Girl under Thirteen Years.
(48 *& 49 Vict.* c. 69, *s.* 4, ante, p. 1024).

STATEMENT OF OFFENCE.

Carnal knowledge of girl under thirteen, contrary to section 4 of the Criminal Law Amendment Act, 1885.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, had carnal knowledge of C. D., a girl of the age of ten years.

By s. 9 of 48 & 49 Vict. c. 69 (ante, p. 1017), *the defendant may on this indictment be convicted of an indecent assault or of a misdemeanor under ss. 3, 4, or 5 of the Act.*

Felony : penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—48 & 49 Vict. c. 69, s. 4; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 237-239). *As to the sentence in the case of an offender whose age does not exceed sixteen years*, see 48 & 49 Vict. c. 69, s. 4 (ante, p. 1024).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106; 48 & 49 Vict. c. 69, s. 17 (ante, p. 984).

Evidence.

The evidence is the same as in rape, with this exception, that it is immaterial whether the act was done with or without the consent of the female. If it was in fact without her consent, an indictment for rape will lie, notwithstanding the age of the child. *R.* v. *Dicken*, 14 Cox, 8, Mellor, J. So, where the prisoner was indicted for an *attempt* to commit the felony, and the evidence was that he had attempted to have carnal knowledge of the girl, but that she had consented to the attempt, it was held that the fact of her consent was immaterial, and that the prisoner was properly convicted. *R.* v. *Beale*, L. R. 1 C. C. R. 10; 35 L. J. (M. C.) 60; 10 Cox, 157. In order to prove carnal knowledge under s. 4, it is not necessary to prove emission. *R.* v. *Marsden* [1891] 2 Q. B. 149; 60 L. J. (M. C.) 171; 17 Cox, 297. As to the admissibility of statements made by the girl immediately after the commission of the alleged offence, *see R.* v. *Lillyman* (*ante*, p. 1022) : *R.* v. *Osborne* [1905] 1 K. B. 551; 74 L. J. (K. B.) 311; 92 L. T. 393; 69 J. P. 189, 53; W. R. 494 (*ante*, pp. 372, 373). As to the admissibility of statements made in the prisoner's presence, and of his behaviour when they are made, *see R.* v. *Christie* [1914] A. C. 545; 83 L. J. (K. B.) 1097; 24 Cox, 249; 30 T. L. R. 471; 10 Cr. App. R. 141; explaining and in part overruling *R.* v. *Norton* [1910] 2 K. B. 496; 79 L. J. (K. B.) 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550 (*ante*, p. 393).

Upon the trial of an indictment charging a felony under s. 4 the prisoner cannot be found guilty of a misdemeanor except by statute; a prisoner, therefore, who is indicted for a felony under s. 4 of 48 & 49 Vict. c. 69 cannot be convicted of a *common* assault merely, notwithstanding the provisions of s. 9 of that Act (*ante*, p. 1017), whereby it is enacted that if on the trial of an indictment for rape or for an offence made felony by s. 4 the jury are satisfied that the defendant is guilty of an offence under ss. 3, 4, or 5 of that Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in the indictment or of an attempt to commit the same, the jury may acquit the defendant of the felony, and find him guilty of such offence as aforesaid, or of an indecent assault. *See R.* v. *Catherall*, 13 Cox, 109, Amphlett, B. (decided before 1885).

Evidence of children of tender years.]—Where the evidence of a child is given unsworn, the provisions of the *Children Act*, 1908, s. 30, as amended by the *Criminal Justice Administration Act*, 1914 (*ante*, p. 988), apply. Evidence

not upon oath given before the committing magistrate under the provisions of 8 Edw. 7, c. 67, s. 30, and reduced into writing, signed and returned by him with the depositions of the other witnesses in the case, can, when the circumstances so warrant, be read against the prisoner on his trial, as the provisions of 11 & 12 Vict. c. 42, s. 17, have been extended to such evidence by 8 Edw. 7, c. 67, s. 30, overruling *R.* v. *Pruntey*, 16 Cox, 344.

Proof of age.]—The provisions of s. 123 of the *Children Act*, 1908 (8 Edw. 7, c. 67), *ante*, p. 992, as to presumption or determination of age, do not apply to offences under the *Criminal Law Amendment Act*, 1885 (see s. 123 (2)), but do apply to offences under ss. 16, 17, 18 of the Act of 1908 (*ante*, pp. 1026, 1027). The girl must be proved to have been under thirteen years of age when the offence was committed. The safer way of doing this is to produce a duly certified copy of the certificate of birth, coupled with evidence of identity; but the age may be proved by any other legal means. *See R.* v. *Cox* [1898] 1 Q. B. 179; 18 Cox, 672; and the other cases collected (*ante*, p. 414). Where a certificate of birth is put in there must be evidence of identity as well. *R.* v. *Rogers*, 79 J. P. 16. Where the offence was committed on the 5th of February, 1842, and the child's father proved that on his return home, after an absence of a few days, on the 9th of February, 1832, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that the child had been baptized on the 9th of February, 1832: this evidence was held not sufficient to prove the age of the child, it being under the then state of the law necessary to prove that the child was under the age of *ten* years at the time of the alleged offence. *R.* v. *Wedge*, 5 C. & P. 298. *See R.* v. *Nicholls*, 10 Cox, 476: *R.* v. *Weaver*, L. R. 2 C. C. R. 85; 43 L. J. (M. C.) 13: *R.* v. *Bellis*, 6 Cr. App. R. 283: *R.* v. *Rogers*, 10 Cr. App. R. 276 (*post*, p. 1031). As to evidence by the defendant and his wife, *see ante*, pp. 458-468.

The presumption of law that a male under the age of fourteen cannot be guilty of the felony of carnal knowledge of a female (*ante*, pp. 11, 402), is not rebutted by 48 & 49 Vict. c. 69, s. 4. *R.* v. *Waite* [1892] 2 Q. B. 600; 61 L. J. (M. C.) 187; 17 Cox, 554. But although a boy under fourteen, who is tried on an indictment under s. 4 of the *Criminal Law Amendment Act*, 1885, charging him with having had carnal knowledge of a girl under thirteen, is entitled to be acquitted of that offence, he may be convicted of an indecent assault under s. 9 of that Act. *R.* v. *Williams* [1893] 1 Q. B. 320; 62 L. J. (M. C.) 29.

Indictment for carnally knowing and abusing a Girl of or above Thirteen and under Sixteen Years. (48 & 49 *Vict. c.* 69, *s.* 5, *sub-s.* 1, ante, p. 1024).

STATEMENT OF OFFENCE.

First Count:

Carnal knowledge of girl, contrary to section 5 (1) of the Criminal Law Amendment Act, 1885.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, had carnal knowledge of C. D., a girl of the age of fourteen years.

Add a count charging an indecent *assault, for the form of which* see post, p. 1033.

The Vexatious Indictments Act (ante, p. 67) *applies to an indictment for this offence.* 48 & 49 Vict. c. 69, s. 17 (ante, p. 1026).

A girl of thirteen and under sixteen cannot be indicted for "abetting" or "inciting" to the commission of this offence on herself. R. v. Tyrrell [1894] 1 Q. B. 710; 63 L. J. (M. C.) 58; 17 Cox, 716.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 48 & 49 Vict. c. 69, s. 5.

This offence is not triable at quarter sessions. 48 & 49 Vict. c. 69, s. 17 (ante, p. 1026).

Evidence.

The evidence is the same as in rape, with this exception, that it will be no defence that the girl consented. If she did not consent, it will be a rape, and the defendant may be indicted accordingly. *R.* v. *Ratcliffe*, 10 Q. B. D. 74; 52 L. J. (M. C.) 40 (*ante*, p. 1020). As to the admissibility of statements made by the girl immediately after the commission of the alleged offence, *see R.* v. *Lillyman* (*ante*, p. 1022): *R.* v. *Osborne* [1905] 1 K. B. 551; 74 L. J. (K. B.) 311; 92 L. T. 393; 69 J. P. 189; 53 W. R. 494 (*ante*, pp. 372, 373). In *R.* v. *Neale*, 1 Den. 36; 1 C. & K. 591, on an indictment under 7 G. 4, c. 31, s. 17 (*rep.*), for carnally knowing a girl over ten and under fourteen, it was held that proof that the girl did not consent did not take the case out of the statute, nor afford any defence to the indictment, though such facts would have justified indictment and conviction for rape. *See also* 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 215). In order to prove carnal knowledge under s. 5, it is not necessary to prove emission. *R.* v. *Marsden* [1891] 2 Q. B. 149; 60 L. J. (M. C.) 171; 17 Cox, 297.

Age.]—The child must be proved to be of or above the age of thirteen years, and under the age of sixteen years. 8 Edw. 7, c. 67, s. 123, *ante*, p. 992, does not apply to this offence. Where on an indictment under 7 Geo. 4, c. 31, s. 17, for carnally knowing a girl over ten and under fourteen, the mother of the child

stated that she was ten years of age last March, although on cross-examination it appeared that the witness knew neither the year nor the month of the child's birth, and she also gave confused and inconsistent answers as to the ages of her children, it was held that there was evidence to go to the jury of the age of the child. *R.* v. *Nicholls*, 10 Cox, 476. The age of the child may be proved by the production of a certified copy of the entry of its birth in the register of births kept under 6 & 7 W. 4, c. 86 (*R.* v. *Weaver*, L. R. 2 C. C. R. 85; 43 L. J. (M. C.) 13), coupled with identification of the child with that named in the certificate. *See ante*, p. 414, *and R.* v. *Wedge*, 5 C. & P. 298: *R.* v. *Bellis*, 6 Cr. App. R. 283: *R.* v. *Rogers*, 10 Cr. App. R. 276 (*ante*, p. 1029). But this mode of proof does not exclude evidence of age by persons who know the child. *R.* v. *Cox* [1898] 1 Q. B. 179; 67 L. J. (Q. B.) 293; 18 Cox, 672.

Defence.]—It is a sufficient defence to this charge if it is made to appear to the Court or jury before whom the charge shall be brought, that the defendant had reasonable cause to believe that the girl was of or about sixteen years of age. 48 & 49 Vict. c. 69, s. 5, sub-s. 1 (*ante*, p. 1024).

Limitation of time.]—No prosecution can be commenced for this offence more than six months after its commission. 4 Edw. 7. c. 15, s. 27 (*ante*, p. 1025); as to what is a commencement of the prosecution, *see R.* v. *West* [1898] 1 Q. B. 174; 67 L. J. (Q. B.) 62; *R.* v. *Wakeley* [1920] 1 K. B. 688; 89 L. J. (K. B.) 97; 84 J. P. 31; 14 Cr. App. R. 121; *and ante*, p. 65. Evidence of prior offences by the accused against the same girl outside the six months' limit may be given for the prosecution. *R.* v. *Shellaker* [1914] 1 K. B. 414; 83 L. J. (K. B.) 413; overruling *R.* v. *Beighton*, 18 Cox, 535.

Evidence of wife or husband.]—The defendant's wife is a competent witness for the prosecution or the defence, even without his consent (48 & 49 Vict. c. 69, s. 20, *ante*, p. 1017, and 8 Edw. 7, c. 67, s. 27, and sched. 1, *ante*, pp. 987, 994); but she is not a compellable witness. *R.* v. *Leach* [1912] A. C. 305; 81 L. J. (K. B.) 616; 22 Cox, 721; 106 L. T. 281; 76 J. P. 201; 28 T. L. R. 289 (*ante*, p. 468).

Conviction of other offences.]—On an indictment for either of the offences mentioned in these two sections (4, 5) the defendant may, whether the girl consented or not (*R.* v. *Beale*, L. R. 1 C. C. R. 10; 35 L. J. (M. C.) 60: *R.* v. *Ryland*, 11 Cox, 101), be convicted of an attempt to commit the felony or misdemeanor charged, if the facts proved warrant such a finding; 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215); and may have sentence of imprisonment not exceeding two years, with or without hard labour, such sentence being authorized where the girl is under thirteen by 48 & 49 Vict. c. 69. s. 4, and where the girl is thirteen or over, but under sixteen, by s. 5 of the same statute. It is said that on an indictment for the statutory misdemeanor under s. 5, sub-s. 1 (*ante*, p. 1024) the defendant cannot, if the girl's age is proved to be under thirteen years, be convicted; for 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 213), has been held to apply only where an indictment for misdemeanor is proved by facts amounting to a felony. *R.* v. *Shott*, 3 C. & K. 206.

If upon the trial of an indictment under s. 5, the offence of carnally knowing is disproved, the defendant may nevertheless be found guilty of a common assault, if the facts proved warrant such a verdict. *R.* v. *Bostock*, 17 Cox, 700, Charles, J.: *R.* v. *Guthrie*, L. R. 1 C. C. R. 241; 39 L. J. (M. C.) 95; unless the girl is over thirteen and consented. *See R.* v. *Meredith*, 8 C. & P. 589, and other cases (*ante*, p. 931).

Corroboration.]—Corroboration is not necessarily required; but it is proper to caution the jury that it is dangerous to act on the evidence of the girl alone against that of the man. *R.* v. *Graham*, 74 J. P. 246; 4 Cr. App. R. 218, 220: *R.* v. *Brown*, 6 Cr. App. R. 24; *R.* v. *Pitts*, 8 Cr. App. R. 126; *R.* v. *Dossi*, 13 Cr. App. R. 158. If counsel does so, the judge is not obliged, in every case, to repeat the warning. See *R.* v. *Quinn*, 6 Cr. App. R. 269.

INDECENT ASSAULT ON FEMALES.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 52.—*Indecent assault on females.*]—Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.

24 & 25 *Vict.* c. 100, *s.* 62.—*Indecent assault on males.*]—Post, p. 1048.

43 & 44 *Vict. c.* 45 (*Criminal Law Amendment Act*; 1880), *s.* 2.]—It shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency. [*This enactment got rid of the decisions in* R. *v.* Read, 1 Den. 377; 2 C. & K. 957: R. *v.* Johnson, L. & C. 632; 34 L. J. (M. C.) 192: R. *v.* Wollaston, 12 Cox, 180. *As to consent by children of tender years*, see R. *v.* Lock, L. R. 2 C. C. R. 10; 42 L. J. (M. C.) 5, and ante, p. 931. *As to consent by defectives*, see Mental Deficiency Act, 1913, s. 56 (3), post, p. 1039.]

48 & 49 *Vict. c.* 69, *s.* 9.—*Power on indictment for rape or felony under s.* 4 *of Criminal Law Amendment Act*, 1885, *to convict of indecent assault.*]—Ante, p. 1017.

Sect. 20.—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—Ante, p. 1017.

61 & 62 *Vict. c.* 36, *ss.* 1, 4, *sched.*—*Evidence by person charged and husband or wife of person charged.*]—Ante, pp. 458-466.

8 *Edw.* 7, *c.* 67, *ss.* 27-32, *and sched.* 1.—*Procedure and evidence in case of offences under* 24 & 25 *Vict. c.* 100, *s.* 52, *against a girl under sixteen.*]—Ante, pp. 987-990.

Sect. 123.—*Presumption of age of child or young person.*]—See ante, p. 992.

Sect. 128 (2).—*Summary trial of adult by his consent for indecent assault on a female who in the opinion of the Court is under sixteen.*]—See R. v. Dickenson [1910] 1 K. B. 469; 79 L. J. (K. B.) 256.

Indictment. (24 & 25 *Vict. c.* 100, *s.* 52, supra.)

STATEMENT OF OFFENCE.

Indecent assault, contrary to section 52 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, indecently assaulted C. D.

Where the assault is on a girl under thirteen, the fact that she is so should be stated in the indictment, because of 43 & 44 Vict. c. 45. s. 2, supra; *and because of the provisions as to presuming age in* 8 Edw. 7, c. 67, s. 123 (2), and sched. 1 (ante, pp. 992, 994). But an indictment is not bad for want of such averment. R. *v.* Stephenson [1912] 3 K. B. 341; 82 L. J. (K. B.) 287; 23 Cox, 214; 107 L. T. 656; 76 J. P. 408; 56 S. J. 764; *and see* now Indictments Act, 1915, *ante*, p. 26.

The Vexatious Indictments Act (ante, p. 67) *applies to indecent assault.*

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 Vict. c. 100, s. 52. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 71 (ante, p. 865).

Evidence.

Prove an assault, accompanied with circumstances of indecency on the part of the defendant.

Consent.]—If the person assaulted is under thirteen, his or her consent is no defence. 43 & 44 Vict. c. 45. s. 2. In *R.* v. *Osborne* [1905] 1 K. B. 551; 74 L. J. (K. B.) 311; 92 L. T. 393; 69 J. P. 189; 53 W. R. 494 (*ante*. pp 372, 373), it was held that *R.* v. *Lillyman* (*ante*, p. 1022) applied to a charge of indecent assault on a girl under thirteen, although consent is not a material element in such an offence, and that a statement by the girl in answer to a question made immediately after the alleged offence was admissible, if the question was neither leading, suggestive, nor of an intimidating character. This decision overrules *R.* v. *Kingham*, 66 J. P. 393, and *R.* v. *Merry*, 19 Cox, 442. *See also R.* v. *Norcott* [1917] 1 K. B. 347; 86 L. J. (K. B.) 78; 25 Cox, 698; 12 Cr. App. R. 166, *ante*, p. 373, and *R.* v. *Wilbourne*, 12 Cr. App. R. 280. It has been held that, if on an indictment for an indecent assault it appears

that the woman consented to the assault, but that her consent was procured by fraud, *e.g.*, under the pretence of a medical operation, such consent constitutes no defence. *R.* v. *Case*, 1 Den. 580; 19 L. J. (M. C.) 174: *and see ante*, p. 931. If the facts of the case are such that the jury may reasonably infer consent, there ought to be a direction on the point; otherwise, and particularly if in the conduct of the case the issue of consent has been made secondary to the main defence, such a direction is unnecessary. *R.* v. *May* [1912] 3 K. B. 572; 82 L. J. (K. B.) 1; 23 Cox, 327; 108 L. T. 351; 77 J. P. 31; 29 T. L. R. 24. *See also R.* v. *Horn*, 76 J. P. 271; 28 T. L. R. 336; 7 Cr. App. R. 200.

Cross-examination of prosecutrix.]—Where, on the trial of such an indictment, the prosecutrix denies, on cross-examination, having had intercourse with a third person named to her, such person cannot be called to contradict her upon this answer; *R.* v. *Holmes*, L. R. 1 C. C. R. 334; 41 L. J. (M. C.) 12; 12 Cox, 137 (*ante*, p. 1022); but if on cross-examination she denies having had previous intercourse *with the prisoner*, evidence may be given to contradict her. *R.* v. *Riley*, 18 Q. B. D. 481; 56 L. J. (M. C.) 52; 16 Cox, 191; *and see R.* v. *Cargill* [1913] 2 K. B. 271.

If the child assaulted is of tender years, the Court may take unsworn evidence from her or any other child witness, subject to corroboration. 8 Edw. 7, c. 67, s. 30 (*ante*, p. 988). As to effect of non-resistance by a girl over thirteen to indecent acts by her schoolmaster, *see R.* v. *McGavaran*, 6 Cox, 64. As to proof of the age of the child, *see ante*, pp. 414, 1029; 8 Edw. 7, c. 67, s. 123 (2), and sched. 1 (*ante*, pp. 992, 994). As to evidence by the defendant or the husband or wife of the defendant, *see ante*, pp. 458-468.

PROCURATION OF WOMEN AND GIRLS.

Statute.

48 *& 49 Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 2.—*Procuration.*]—Any person who—

(1) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the King's dominions (*a*), with any other person or persons; or

(2) procures or attempts to procure any woman or girl to become, either within or without the King's dominions, a common prostitute; or

(3) procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of [*or frequent*] a brothel elsewhere; or

(*a*) As to procuration, etc., without the King's dominions, *see R.* v. *Blythe* [1895] 1 Canada Cr. Cas. 263; *Re Gertie Johnson* [1904] 8 Canada Cr. Cas. 243.

(4) procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of [*or frequent*] a brothel within or without the King's dominions, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour [*and, if a male person, may, at the discretion of the court, and in addition to any term of imprisonment awarded in respect of the said offence, be sentenced to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence*].

Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused. [*The words between square brackets in sub-ss. 3 and 4 express the effect of amendments enacted by* 2 & 3 G. 5, c. 20, ss. 2, 3, post, p. 1037.]

Sect. 3.—*Procuring defilement of woman or girl by threats, fraud, or administering stupefying drug.—Evidence.*]—Any person who—

(1) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without the King's dominions; or

(2) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the King's dominions; or

(3) applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.

Sect. 6.—*Owner, occupier, etc., of premises, permitting defilement of girls under thirteen and between thirteen and sixteen years of age on his premises.*]—*Ante*, p. 1025.

Sect. 7.—*Abduction of girl under eighteen years of age with intent that she should be carnally known.*]—Ante, p. 1012.

Sect. 8.—*Unlawful detention of woman or girl with intent that she should be carnally known or in any brothel.*]—Any person who detains any woman or girl against her will—

(1) in or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or

(2) in any brothel,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour.

Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connection, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.

Sect. 9.—*Power to convict of misdemeanor under s.* 3 *of this Act on indictment for rape or for felony under s.* 4 *of this Act.*]—Ante, p. 1017.

Sect. 10.—*Power of search under justice's warrant for woman or girl supposed to be detained on any premises for immoral purposes, and of arrest of persons unlawfully detaining her.*]—See Hope *v.* Evered, 17 Q. B. D. 338; 55 L. J. (M. C.) 146 : Lea *v.* Charrington, 23 Q. B. D. 45, 272; 58 L. J. (Q. B.) 461.

Sect. 12.—*Power of Court on trial of offence under this Act in certain cases to make provision for custody of girls under age of sixteen.*]—Ante, p. 1026.

Sect. 13.— *Suppression of brothels, etc.*]—Post, *tit.* "*Disorderly Houses.*"

Sect. 20.—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—Ante, p. 1017.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *sched.*]—Ante, pp. 458-466.

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *ss.* 27-32, *and sched.* 1.—*Procedure and evidence.*]—See ante, pp. 988-990.

"**Procure or attempt to procure.**"]—There must be some real procuration either completed or attempted, and this may be negatived by evidence which shows that the girl was not really procured, because she needed no procuring at all, and acted of her own free will; *R.* v. *Christian*, 23 Cox, 540; 78 J. P. 112; or was a prostitute before. *R.* v. *Gold & Cohen*, 71 J. P. 360, Bosanquet, Common Serjeant. As to the difference between an attempt and an intention, *see R.* v. *Landow*, 23 Cox, 457; 109 L. T. 48; 77 J. P. 364; 29 T. L. R. 373.

"**Any girl.**"]—As to the meaning of this, *see R.* v. *Sarah Jones*, 23 Cox, 48; 106 L. T. 1024; 76 J. P. 8; 6 Cr. App. R. 290.

"**Any other person.**"]—This means any other person than the accused. *R.* v. *C.*, 74 J. P. 208. As to conspiracy with the procurer, *see R.* v. *Mackenzie & Higginson*, 75 J. P. 159; 27 T. L. R. 152; 6 Cr. App. R. 64.

"**Common prostitute.**"]—This includes a woman who offers her body commonly for acts of lewdness for payment although there is no act or offer of an act

of ordinary sexual connection. *R.* v. *De Munck* [1918] 1 K. B. 635; 82 J. P. 160; 13 Cr. App. R. 113; 26 Cox, 302.

2 & 3 *G.* 5, *c.* 20 (*Criminal Law Amendment Act*, 1912), *s.* 1.—*Power to arrest without warrant persons offending against* 48 & 49 *Vict. c.* 69, *s.* 2.]—A constable may take into custody without a warrant any person whom he shall have good cause to suspect of having committed, or of attempting to commit, any offence against section two of the *Criminal Law Amendment Act*, 1885 (which relates to procuration and attempted procuration). [*See ante*, p. 1004.]

Sect. 2.—*Amendment of* 48 & 49 *Vict. c.* 69, *s.* 2.]—In paragraphs (3) and (4) of section two of the *Criminal Law Amendment Act*, 1885, the words "or frequent" shall be inserted after the words "an inmate of" wherever those words occur. [*See ante*, pp. 1034, 1035.]

Sect. 3.—*Increased penalties for procurers.*]—Any male person who is convicted under section two of the *Criminal Law Amendment Act*, 1885, may, at the discretion of the court, and in addition to any term of imprisonment awarded in respect of the said offence, be sentenced to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence. [*See ante*, p. 1035.]

Indictment for an Offence under 48 & 49 *Vict. c.* 69, *s.* 3, *sub-s.* 2 (ante, p. 1035).

Commencement as ante, p. 865.

STATEMENT OF OFFENCE.

Procuration, contrary to section 3 (2) of the Criminal Law Amendment Act, 1885.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, procured C. D., a woman not being a common prostitute or of known immoral character, to have unlawful carnal connection with himself [*or with E. F., as the case may be*] by falsely pretending or representing to her that [*state in ordinary language the false pretence or representation*].

It is immaterial whether the intercourse is procured with the accused or with another. R. *v.* Williams, 62 J. P. 310; 33 L. J. Newsp. 253: and see R. *v.* Jones [1896] 1 Q. B. 4; 65 L. J. (M. C.) 28. *It has been ruled that the false pretences must be set out*, R. *v.* Field, C. C. C. Sess. Pap. 1891-1892, p. 757, Grantham, J., *but that they need not be expressly negatived.* R. *v.* Clarke, 59 J. P. 248, Collins, J. *See now forms under the* Indictments Act, ante, p. 693.

Misdemeanor: imprisonment for not more than two years, with or without hard labour. 48 & 49 Vict. c. 69, s. 3, sub-s. 2.

The Vexatious Indictments Act (ante, p. 67) *applies to this offence.*

This offence is not triable at quarter sessions. 48 & 49 Vict. c. 69, s. 17, ante, p. 1017.

Evidence.

Prove the pretences or representations made by the defendant to C. D., and their falsehood (*see ante*, pp. 709, 711 *et seq.*). Seduction by a married man of a woman under promise of marriage by false representation has been held to be within the section. *R.* v. *Williams*, 62 J. P. 310; 33 L. J. Newsp. 253. Prove, also, that by means of these false pretences or representations the defendant induced C. D. to have carnal connection with the man named in the indictment; and that she was then not a common prostitute, nor a known immoral character. It may be that under the general rule that the defendant should prove a negative proviso (*ante*, pp. 46, 352) it is not necessary for the prosecution in the first instance to prove that the woman was not a common prostitute nor of known immoral character, but that it will lie upon the defendant to prove that she was a prostitute or of known immoral character. No person can be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused. 48 & 49 Vict. c. 69, s. 3. *And see R.* v. *Staub*, 2 Cr. App. R. 6: *R.* v. *Cohen*, 3 Cr. App. R. 234. Where there is no such evidence the Court of Criminal Appeal may quash the conviction on appeal. *R.* v. *Goldstein*, 11 Cr. App. R. 27. As to evidence by the defendant and the wife or husband of the defendant, *see ante*, pp. 458-466.

OFFENCES AGAINST MENTAL DEFECTIVES.

Statute.

3 & 4 *G.* 5, *c.* 28 (*Mental Deficiency Act*, 1913), *s.* 56.—*Protection of defectives from acts of sexual immorality, procuration, etc.*]—(1) Any person—(*a*) who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act; or (*b*) who procures, or attempts to procure, any woman or girl who is a defective to have unlawful carnal connection, whether within or without the King's dominions, with any person or persons; or (*c*) who causes or encourages the prostitution, whether within or without the King's dominions, of any woman or girl who is a defective; or (*d*) who, being the owner or occupier of any premises, or having or acting or assisting in the management or control thereof, induces or knowingly suffers any woman or girl who is a defective to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; or (*e*) who, with intent that any woman or girl who is a defective should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes to be taken such woman or girl out of the possession and against the will of her parent or any

other person having the lawful care or charge of her; shall be guilty of a misdemeanor and shall be liable upon conviction on indictment to be imprisoned, with or without hard labour, for any term not exceeding two years unless he proves that he did not know, and had no reason to suspect, that the woman or girl was a defective.

(2) Section ten of the *Criminal Law Amendment Act*, 1885, shall apply in the case of a woman or girl who is a defective in the same manner as it applies in the case of a girl who is under the age of sixteen years. [See *ante*, p. 1036.]

(3) Without prejudice and in addition to the provisions of the *Criminal Law Amendment Act*, 1880, no consent shall be any defence in any proceedings for an indecent assault upon any defective, if the accused knew or had reason to suspect that the person in respect of whom the offence was committed was a defective. [*See ante*, p. 1034.]

(4) No indictment under this section shall be tried at quarter sessions.

(5) If on the trial of an indictment for rape the jury are satisfied that the accused is guilty of an offence under paragraph (*a*) of subsection (1) of this section, but are not satisfied that he is guilty of rape, the jury may acquit him of rape and find him guilty of such offence as aforesaid, and in that event he shall be liable to be punished as if he had been convicted on an indictment for such offence as aforesaid. [*See ante*, p. 1017.]

(6) Section four of the *Criminal Evidence Act*, 1898, shall have effect as if this section of this Act were included in the Schedule to that Act. [*See ante*, p. 465.]

Sect. 1.—*Definition of defectives.*]—See ante, p. 975.

Sect. 71.—*Interpretation.*]—See ante, p. 976.

TRADING IN PROSTITUTION.

Statutes.

61 & 62 *Vict. c.* 39 (*Vagrancy Act*, 1898), *s.* 1.—*Persons trading in prostitution.*]—(1.) Every male person who—(*a*) knowingly lives wholly or in part on the earnings of prostitution; or (*b*) in any public place persistently solicits (*see Horton* v. *Mead* [1913] 1 K. B. 154; 82 L. J. (K. B.) 200; 23 Cox, 279) or importunes for immoral purposes, shall be deemed a rogue and vagabond within the meaning of the *Vagrancy Act*, 1824, and may be dealt with accordingly [*provided that the period of imprisonment with hard labour which may be awarded to a person deemed to be a rogue and vagabond under this Act shall be increased to six months, but such person shall not be liable to be dealt with as an incorrigible rogue within the meaning of the* Vagrancy Act, 1824; *and such person may, instead of being proceeded against in England as a rogue and vagabond or in Ireland summarily, be proceeded against on indictment, and on conviction on indictment shall be liable to imprisonment, with or without*

hard labour, for a term not exceeding two years, and, in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment, the court may in addition to any term of imprisonment awarded, sentence him to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence].

(2.) If it is made to appear to a court of summary jurisdiction by information on oath that there is reason to suspect that any house or any part of a house is used by a female for purposes of prostitution, and that any male person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the court may issue a warrant authorising any constable to enter and search the house and to arrest that male person.

(3.) Where a male person is proved to live with or to be habitually in the company of a prostitute [*or is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, or compelling her prostitution with any other person or generally*] he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution. [*The words between square brackets express the amendments enacted by* 2 & 3 G. 5, c. 20, s. 7 (1), (2), (5), infra.]

2 & 3 *G.* 5, *c.* 20 (*Criminal Law Amendment Act*, 1912), *s.* 7.—*Amendments of* 61 & 62 *Vict. c.* 39.]—(1) In section one of the *Vagrancy Act*, 1898, . . . in sub-section (3) (which deals with the evidence of living on the earnings of prostitution) there shall be substituted for the words "and has no visible means of subsistence" the words "or is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, or compelling her prostitution with any other person or generally."

(2) The period of imprisonment with hard labour which may be awarded to a person deemed to be a rogue and vagabond under the *Vagrancy Act*, 1898, . . . shall be increased to six months, but such person shall not be liable to be dealt with as an incorrigible rogue within the meaning of the *Vagrancy Act*, 1824. [*This gets rid of the decision in* R. *v.* Herion [1913] 1 K. B. 284; 82 L. J. (K. B.) 82; 23 Cox, 387. *A person charged before a court of summary jurisdiction as a rogue and vagabond under s.* 1 *of the* Vagrancy Act, 1898 (ante, p. 996), *has no right to claim to be tried by a jury under s.* 17 *of the* Summary Jurisdiction Act, 1879 (ante, p. 7), *on account of the increased punishment to which he is liable under this sub-section.* R. *v.* Dickinson, ex parte Grandioli [1917] 2 K. B. 393; 81 J. P. 209; 25 Cox, 765.] Save as aforesaid, nothing in this sub-section shall affect the powers of a court of summary jurisdiction to deal with a person deemed to be a rogue and vagabond under the *Vagrancy Act*, 1898, anything in any other Act to the contrary notwithstanding.

(3) The *Vagrancy Act*, 1898, as amended by this section, shall extend to Ireland with this modification, that for the words "be deemed a rogue and vagabond within the meaning of the *Vagrancy Act*, 1824, and be liable to be dealt with accordingly," there shall be substituted the words "be liable on

summary conviction to imprisonment for a term not exceeding six months with hard labour."

(4) Every female who is proved to have, for the purposes of gain, exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting, or compelling her prostitution with any person, or generally, shall be guilty of an offence under the *Vagrancy Act*, 1898, . . . and [*that Act*] as amended and extended by this section shall apply accordingly.

(5) A person charged with an offence under the *Vagrancy Act*, 1898, . . . may, instead of being proceeded against in England as a rogue and vagabond, or in . . . Ireland summarily, be proceeded against on indictment, and on conviction on indictment shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years, and, in the case of a second or subsequent conviction being a conviction on indictment, the court may, in addition to any term of imprisonment awarded, sentence the offender if a male to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

(6) The wife or husband of a person charged with an offence under [*this Act*] may be called as a witness either for the prosecution or defence and without the consent of the person charged, but nothing in this provision shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person. [*This gets rid of the decision in* Director of Public Prosecutions *v.* Blady [1912] 2 K. B. 89; 81 L. J. (K. B.) 613; 22 Cox, 715.]

Indictment for an Offence under 61 *&* 62 *Vict. c.* 39, *s.* 1, *sub-s.* 1 (a) (ante, p. 1039).

STATEMENT OF OFFENCE.

Living on prostitution, contrary to section 1 of the Vagrancy Act, 1898.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, knowingly lived wholly or in part on the earnings of the prostitution of C. D.

Misdemeanor: imprisonment for not more than two years, with or without hard labour; and in the case of a second or subsequent conviction, such second or subsequent conviction being a conviction on indictment, the court may, in addition to any term of imprisonment awarded, sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.—2 & 3 Geo. 5, c. 20, s. 7 (5). The preceding conviction need not be a conviction on

indictment. *R.* v. *Austin* [1913] 1 K. B. 551; 82 L. J. (K. B.) 387; 23 Cox, 346; 108 L. T. 574; 77 J. P. 271; 29 T. L. R. 245.

The Vexatious Indictments Act (ante, p. 67) *does not apply to this offence.*

This offence is triable at quarter sessions. R. *v.* Hill [1914] 2 K. B. 386; 83 L. J. (K. B.) 820; 78 J. P. 303; 10 Cr. App. R. 56.

Evidence.

Prove that C. D., at the time of the commission of the offence, was a prostitute, and that the defendant knowingly lived wholly or in part on the earnings of her prostitution. This is usually proved by evidence that the prostitute paid the rent of rooms where both were living together, or paid for the defendant's food, or supplied him with money, or paid for drink consumed by him in public-houses, or the like. A woman is not necessarily the accomplice of a man who lives upon her immoral earnings; but it is proper to warn the jury to be cautious in accepting her evidence without corroboration. *R.* v. *King*, 30 T. L. R. 476; 10 Cr. App. R. 117.

Under s. 1 (3) the onus of proving that he was not knowingly living on the earnings of prostitution is usually shifted on to the defendant.

The defendant's wife is a competent but not compellable witness for the prosecution. *R.* v. *Leach* [1912] A. C. 305; 81 L. J. (K. B.) 616; 22 Cox, 721; 106 L. T. 281; 76 J. P. 201; 28 T. L. R. 289.

In an indictment for this offence a person may be charged with having committed the offence on one specified day only. *R.* v. *Hill* [1914] 2 K. B. 386. Evidence is admissible to show what the defendant's relations with the woman in question had been either before or after the day specified in the indictment. *Id.*

Sect. 8.

INCEST.

Statute.

8 *Edw.* 7, c. 45 (*Punishment of Incest Act*, 1908), *s.* 1.—*Incest by males.*]—(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanor, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour: Provided that if, on an indictment for any such offence, it is alleged in the indictment and proved that the female person is under the age of thirteen years, the same punishment may be imposed as may be imposed under s. 4 of the *Criminal Law Amendment Act*, 1885 (which deals with the defilement of girls under thirteen years of age).

(2) It is immaterial that the carnal knowledge was had with the consent of the female person.

(3) If any male person attempts to commit any such offence as aforesaid, he shall be guilty of a misdemeanor, and upon conviction thereof shall be liable at the discretion of the Court to be imprisoned for any time not exceeding two years with or without hard labour.

(4) On the conviction before any court of any male person of an offence under this section, or of an attempt to commit the same, against any female under twenty-one years of age, it shall be in the power of the Court to divest the offender of all authority over such female, and, if the offender is the guardian of such female, to remove the offender from such guardianship, and in any such case to appoint any person or persons to be the guardian or guardians of such female during her minority or any less period :

Provided that the High Court may at any time vary or rescind the order by the appointment of any other person as such guardian, or in any other respect.

Sect. 2.—*Incest by females of or over sixteen.*]—Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son, as the case may be) shall be guilty of a misdemeanor, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.

Sect. 3.—*Test of relationship.*]—In this Act the expressions " brother " and " sister " respectively, include half-brother and half-sister, and the provisions of this Act shall apply whether the relationship between the person charged with an offence under this Act and the person with whom the offence is alleged to have been committed, is or is not traced through lawful wedlock.

Sect. 4.—*Prosecution of offences.*]—(1) An offence under this Act shall be deemed to be an offence within, and subject to, the provisions of the *Vexatious Indictments Act*, 1859, and any Act amending the same (*ante*, pp. 67 *et seq.*).

(2) A court of quarter sessions shall not have jurisdiction to inquire of, hear. or determine any indictment for an offence against this Act, or for an attempt to commit any such offence.

(3) If, on the trial of any indictment for rape (*ante*, p. 1018), the jury are satisfied that the defendant is guilty of an offence under this Act, but are not satisfied that the defendant is guilty of rape, the jury may acquit the defendant of rape and find him guilty of an offence under this Act, and he shall be liable to be punished accordingly.

If, on the trial of any indictment for an offence under this Act, the jury are satisfied that the defendant is guilty of any offence under ss. 4 or 5 of the *Criminal Law Amendment Act*, 1885 (*ante*, pp. 1016, 1024), but are not satisfied that the defendant is guilty of an offence under this Act, the jury may acquit the defendant of an offence under this Act and find him guilty of an offence under ss. 4 or 5 of the *Criminal Law Amendment Act*, 1885, and he shall be liable to be punished accordingly. [*This means that on an indictment for incest where the jury find the accused not guilty of incest, they may find him guilty of*

any offence of which he could have been found guilty had he been indicted under ss. 4 or 5 of the Criminal Law Amendment Act, 1885; e.g., *indecent assault, by virtue of s. 9 of the* Criminal Law Amendment Act. R. *v.* Simmonite [1916] 2 K. B. 821; 86 L. J. (K. B.) 15; 25 Cox, 544; 12 Cr. App. R. 142.]

(4) Sect. 4 of the *Criminal Evidence Act*, 1898 (*ante*, p. 465), shall have effect as if this Act were included in the schedule to that Act.

Sect. 5.—*Proceedings to be held* in camerâ.]—All proceedings under this Act are to be held *in camerâ* (*see ante*, p. 199).

Sect. 6.—*Sanction of attorney-general, etc.*]—No prosecution for any offence under this Act shall be commenced without the sanction of his Majesty's attorney-general, but this section shall not apply to any prosecution commenced by or on behalf of the Director of Public Prosecutions (*see ante*, p. 122).

Sect. 7.—*Extent.*]—This Act shall not extend to Scotland.

Sect. 8.—*Short title and commencement.*]—This Act may be cited as the *Punishment of Incest Act*, 1908, and shall come into operation on the first day of January, 1909.

Indictments for Incest.

(a) *By a male person.*

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Incest, contrary to section 1 of the Punishment of Incest Act, 1908.

PARTICULARS OF OFFENCE.

A. B., being a male person, on the —— day of ——, in the county of ——, had carnal knowledge of C. D., who is and was to his knowledge his daughter [*if under thirteen add her age.*]

[*An indictment which charged the offence as having been committed "on divers days" between January*, 1909, *and October*, 1910, *and in another count between October*, 1910, *and February*, 1913, *was held to be bad for duplicity; but an appeal on this ground was dismissed under s. 4 (1) of the* Criminal Appeal Act, 1907, *the Court finding that there had been "no substantial miscarriage of justice."* R. *v.* Thompson [1914] 2 K. B. 99; 83 L. J. (K. B.) 643; 110 L. T. 272; 78 J. P. 212; 30 T. L. R. 223.]

Count 1.—*Misdemeanor: penal servitude for not more than seven nor less than three years or imprisonment for any term not exceeding two years, with or without hard labour.* 8 Edw. 7, c. 45, s. 1 (1). *If the female is proved to be*

under thirteen, penal servitude for life or any term not less than three years may be imposed. 8 Edw. 7, c. 45, s. 1 (1); 48 & 49 Vict. c. 69, s. 4 (ante, p. 1024). *As to power to convict of incest on an indictment for rape*, see 8 Edw. 7, c. 45, s. 4 (3). *As to power on an indictment for incest to convict of offences under* 48 & 49 Vict. c. 69, ss. 4, 5 (ante. p. 1024), see 8 Edw. 7, c. 45, s. 4 (3). *The jury may convict of an attempt to commit incest, which is punishable under* 8 Edw. 7, c. 45, s. 1 (3) (see ante, p. 1043).

The Vexatious Indictments Act (ante, p. 67) *applies to incest.* 8 Edw. 7, c. 45, s. 4 (1).

Incest is not triable at quarter sessions. Id. s. 4 (2), and see ante, p. 106.

(b) *By a female person.*

STATEMENT OF OFFENCE.

Incest, contrary to section 2 of the Punishment of Incest Act, 1908.

PARTICULARS OF OFFENCE.

A. B., being a female person of the age of eighteen, on the —— day of ——, in the county of ——, with her consent permitted C. D., who is and was to her knowledge her father, to have carnal knowledge of her.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for any term not exceeding two years with or without hard labour. 8 Edw. 7, c. 45, s. 2.

Evidence.

The consent of the other party is no defence to an indictment under the Act (8 Edw. 7, c. 45, ss. 1 (2), 2); but if one of the parties to the incriminated act is called for the Crown, the evidence of such party needs corroboration if she be an accomplice (*see ante*, p. 455). Mere submission, as distinguished from permission, is insufficient to constitute the female an accomplice. *R.* v. *Dimes*, 76 J. P. 47; 7 Cr. App. R. 43. If there is evidence to go to the jury that the female was a consenting party, they must be cautioned that if they find her to have consented she then becomes an accomplice and her evidence requires corroboration. *R.* v. *Stone*, 6 Cr. App. R. 89.

The relationship of the parties may be proved by oral evidence or by certificates of marriage and birth, coupled with identification. (*a*)

The commission of the offence may be inferred from all the circumstances. Evidence tending to show pre-existent sexual passion between the parties is admissible. *R.* v. *Ball* [1911] A. C. 47; 80 L. J. (K. B.) 691; 22 Cox, 366; 103 L. T. 738; 75 J. P. 180; 27 T. L. R. 162: *R.* v. *Bloodworth*, 9 Cr. App. R. 80.

Where the prisoner was charged with committing incest with his daughter, who had been born two months after his marriage, he was permitted to prove that he was not the father of the girl. *R.* v. ——, *Times Newsp.*, 20th June, 1919, Darling, J.

(*a*) *See* 1 Russ. Cr. (7th ed.) 973 for decisions on colonial statutes as to this offence.

SECT. 9.

SODOMY, BESTIALITY, AND INDECENCY WITH MALE PERSONS.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 61.—*Punishment.*]—Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 9 G. 4, c. 31, s. 15, *except as to punishment. The minimum punishment, which used to be ten years' penal servitude, was reduced by* 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to threats to accuse another of this offence*, see ante, pp. 681, 682.]

Sect. 63.—*Carnal knowledge.*]—Ante, p. 1016.

Indictment for Sodomy.

Commencement as ante, p. 1044.

STATEMENT OF OFFENCE.

Buggery, contrary to section 61 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, committed buggery with C. D.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 61, *as modified by* 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

The offence consists in penetration *per anum*. *R.* v. *Jacobs*, R. & R. 331. Where the defendant forced open a child's mouth, and put in his private parts, and proceeded to the completion of his lust, the judges were of opinion that this did not constitute the offence of sodomy. *R.* v. *Jacobs*, R. & R. 331 (*see* 1 Russ. Cr. (7th ed.) 976; *and* 48 & 49 Vict. c. 69, s. 11, *post*, p. 1048). It was first made punishable in the common law courts by 25 H. 8, c. 6 (*rep*). 1 Hawk. c. 4; 1 Hale, 669; 12 Co. Rep. 37. The evidence for the most part is the same as in rape (*see ante*, pp. 1018 *et seq.*), and as in that case, penetration alone is now sufficient to constitute the offence. *R.* v. *Reekspear*, 1 Mood. 342. As to medical evidence of the commission of the offence, *see* Taylor's Medical Jurisprudence (7th ed.), Vol. II., p. 299. Prior to 9 G. 4, c. 31, s. 18 (now re-enacted

as 24 & 25 Vict. c. 100, s. 63, *ante*, p. 1016), emission must have been proved. *R.* v. *Russell*, 1 M. & Rob. 122: *R.* v. *Jacobs*, R. & R. 331: *R.* v. *Reekspear*, *supra*.

It is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and both agent and patient (if consenting) are equally guilty.

In *R.* v. *Wiseman*, Fortesc. (K. B.) 91, where the defendant was indicted for having committed this offence with a woman, a majority of the judges held that this was within the statute, but two or three of them held that it was not: no opinion was publicly given. But it seems to be settled that the offence can be committed with a woman. Swinburne on Wills, 97; Fost. 91; 1 Russ. Cr. (7th ed.) 976, 977. In *R.* v. *Jellyman*, 8 C. & P. 604, it was held that a married woman who consented to her husband committing an unnatural offence with her was an accomplice in the felony, and, as such, her evidence required confirmation, although her consent or non-consent was quite immaterial to the offence.

With respect to offences of this kind corroboration of evidence by an accomplice is particularly required. *R.* v. *Tate* [1908] 2 K. B. 680; 77 L. J. (K. B.) 1043.

It is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not, that a warning should be given to the jury as to acting on the evidence of young boys. *R.* v. *Cratchley*, 9 Cr. App. R. 232. If the offence is committed *on* a boy under fourteen years of age, it is felony in the agent only, on the ground that the boy is under the age of discretion. 1 Hale, 670; 3 Co. Inst. 59; 1 East P. C. 480 (and the same, it would seem, as to a girl under twelve, the age by which at common law a girl is marriageable). If *by* a boy under fourteen, it is felony in the patient, if the patient is an adult. *R.* v. *Allen*, 1 Den. 364; 2 C. & K. 869; 18 L. J. (M. C.) 72; 3 Cox, 270. It would seem that the presumption applicable to boys under fourteen applies to this offence as well as to rape where the boy is the agent (*see ante*, p. 402). As to cases where a boy under fourteen is the patient, *see* 1 Hale, 670.

If the evidence fails to make out the entire charge against the defendant, he may nevertheless be convicted of the attempt to commit the felony charged. 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215).

Evidence is not admissible to prove that the defendant has a general disposition to commit the offence. *R.* v. *Cole*, 1 Russ. Cr. (7th ed.) 977; *and see* *R.* v. *Barron* (No. 1), 110 L. T. 350; 78 J. P. 184; 30 T. L. R. 187; 9 Cr. App. R. 236; *and ante*, pp. 363 *et seq.*

Indictment for Bestiality.

As in last precedent, except alleging the offence with a cow [or as the case may be].

The offence may be committed by a woman. 3 Co. Inst. 59: 1 Russ. Cr. (7th ed.) 976.

Felony: 24 & 25 Vict. c. 100. s. 61. *For punishment*, see *notes to the last precedent. The defendant may upon this indictment be convicted of an attempt to commit the felony charged, if the evidence warrants such finding.* 14 &

15 Vict. c. 100, s. 9 (ante, p. 215). *An indictment for an attempt to commit this offence may readily be framed from this and the next precedent. It is punishable in the same manner as the attempt to commit sodomy.* 24 & 25 Vict. c. 100, s. 62, *infra. There is no statutory time for prosecuting the offence, but delay in prosecution has been made a ground for directing acquittal.* R. *v.* Robins, 1 Cox, 114.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the carnal knowledge as in rape or sodomy, *ante*, pp. 1022, 1046.

ASSAULT WITH INTENT TO COMMIT SODOMY AND ACTS OF GROSS INDECENCY BETWEEN MALE PERSONS.

Statutes.

24 & 25 *Vict*, *c.* 100, (*Offences against the Person Act*, 1861), *s.* 62.]—Whosoever *shall attempt to commit the said abominable crime*, or shall be guilty *of any assault with intent to commit the same, or* of any indecent assault upon any male person, shall be guilty of a misdemeanor, *and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years. . . .* [*The italicized parts of this section were new in* 1861.]

43 & 44 *Vict. c.* 45 *s.* 2.—*Consent of male person under thirteen to indecent assault no defence.*]—Ante, p. 1032.

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 11.—*Acts of gross indecency by male person with another male person.*]—Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This enactment covers such acts as were proved in* R. *v.* Jacobs, R. & R. 331, ante, p. 1046. R. *v.* Wollaston, 12 Cox, 180; R. *v.* Rowed, post, p. 1050. *For indictment*, see post, p. 1049.]

Sect. 17.—*Misdemeanors under this Act to be within Vexatious Indictments Act* (ante, p. 67).—*Indictment under this Act not triable at quarter sessions.*] —Ante, pp. 106, 1026.

Sect. 20.—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—Ante, p. 1017.

61 & 62 *Vict. c.* 36, *ss.* 1, 4, *sched.*]—See ante, pp. 458, 465, 466.

8 *Edw.* 7, *c.* 67, *ss.* 27-32, 123, *and sched.* 1.—*Procedure and evidence in offences under* 24 & 25 Vict. c. 100, s. 62, *and* 48 & 49 Vict. c. 69, s. 11. *against a person under sixteen.*]—Ante, pp. 987—994.

Sect. 128 (2).—*Summary trial of adult by his consent for indecent assault on a male who in the opinion of the Court is under sixteen.*]—See ante, p. 1033.

Indictment for Attempt to commit Sodomy. (24 & 25 *Vict. c.* 100, *s.* 62.)

STATEMENT OF OFFENCE.

First Count:

Attempted buggery, contrary to section 62 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, attempted to commit buggery with C. D.

STATEMENT OF OFFENCE.

Second Count:

Assault with intent to commit buggery, contrary to section 62 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, assaulted C. D. with intent to commit buggery with the said C. D.

STATEMENT OF OFFENCE.

Third Count:

Indecent assault on male person, contrary to section 62 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——. in the county of ——, indecently assaulted C. D., a male person [*where the person assaulted is under thirteen add the age*].

[*Misdemeanor: penal servitude for not more than ten nor less than three years, or imprisonment for not more than two years, with or without hard*

labour. 24 & 25 Vict. c. 100, s. 62; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace and being of good behaviour,* 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

Prove an attempt to commit sodomy, the offence under s. 62 being complete without evidence of penetration (ante, p. 1048). If the complete evidence of sodomy is proved, it seems that the defendant will not be entitled to be acquitted; but the judge may, if he thinks fit, discharge the jury, and direct the defendant to be indicted for the felony. 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 213). Where the defendant was indicted under this section (24 & 25 Vict. c. 100, s. 62), for an indecent assault upon a male person, and it appeared that the person alleged to have been assaulted consented to what was done to him by the defendant, it was held that the indictment could not be sustained. *R.* v. *Wollaston*, 12 Cox, 180 (C. C. R.). Mere submission, however, is not consent, and therefore, where before 1880 two boys of eight years of age submitted to indecent acts on the part of a man, in ignorance of the nature of the acts done, the man was held to be rightly convicted of an indecent assault, on the ground that the boys, being thus ignorant, could not be held to have consented in the true meaning of that word. *R.* v. *Lock*, L. R. 2 C. C. R. 10; 42 L. J. (M. C.) 5. And *consent* is now no defence to an indictment for an indecent assault, where the person assaulted is under the age of thirteen years. 43 & 44 Vict. c. 45, s. 2 (*ante*, p. 1032). It is therefore now unnecessary in such cases to consider the distinction between mere submission and consent drawn in *R.* v. *Wollaston* and *R.* v. *Lock*, *supra.*

The unsworn evidence of a child too young to understand the nature of an oath is rendered admissible on a charge for this offence by 8 Edw. 7, c. 67, s. 30, and sched. 1. Such evidence must be corroborated by some other material evidence in support thereof implicating the accused (*ante*, p. 453). Apart from this, it is generally desirable that the jury should be directed to receive the evidence of witnesses of tender age with caution. *R.* v. *Cratchley*, 9 Cr. App. R. 232. As to presumption of age of victim, *see* 8 Edw. 7, c. 67, s. 123 (2), *ante*, p. 992.

As to attempts to commit bestiality, which are within 24 & 25 Vict. c. 100, s. 62, *see ante*, p. 1048. As to conspiracy or incitement to commit sodomy, etc., *see R.* v. *Boulton*, 12 Cox, 87. As to threats to accuse of these offences, *see ante*, pp. 681 *et seq.*

Indictment for Misdemeanor under 48 & 49 Vict. c. 69, s. 11 (ante, p. 1048).

STATEMENT OF OFFENCE.

Gross indecency, contrary to section 11 of the Criminal Law Amendment Act, 1885.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being a male person, committed, or was a party to the commission of, or procured or attempted to procure the commission of, an act of gross indecency with C. D., a male person.

Counts for an indecent assault or an attempt to commit sodomy may be joined.

Misdemeanor: imprisonment for any term not exceeding two years, with or without hard labour. 48 & 49 Vict. c. 69, s. 11 (ante, p. 1048).

The Vexatious Indictments Act (ante, p. 67) *applies to this offence* (ante, p. 68).

This offence is not triable at quarter sessions. 48 & 49 Vict. c. 69, s. 17 (ante, pp. 106, 1026).

Evidence.

It is an offence within 48 & 49 Vict. c. 69, s. 11, for a male person to procure the commission with himself of an act of gross indecency by another male person. *R.* v. *Jones* [1896] 1 Q. B. 4; 18 Cox, 207.

The evidence of the other male person, if a consenting party, will, it would seem, need corroboration, *see R.* v. *Tate* (*ante*, p. 1047), *and ante*, p. 455.

The unsworn evidence of a child of tender years is admissible on a charge under this section, but must be corroborated. 8 Edw. 7, c. 67, s. 30, as amended by the *Criminal Justice Administration Act*, 1914 ,(*ante*, pp. 453, 989). Sect. 123 (2) of that Act (*ante*, p. 992) does not apply to this offence.

The rule as to admissibility of fresh complaints (*ante*, p. 372) has been held not to apply to this offence on the ground that consent of the other male person is immaterial. *R.* v. *Hoodless*, 64 J. P. 282. But in proceedings under the *Clergy Discipline Act* against a clergyman for an unnatural offence with a choir boy, evidence of a complaint by the boy to his mother in answer to questions was admitted by Sir Lewis Dibdin. *Chesney* v. *Newsholme* [1908] Prob. 301. It is submitted that the last case was rightly decided, because the principle on which fresh complaints are admitted in offences against women and girls does not depend on the materiality or otherwise of consent, but simply on the opportunity thereby afforded to the jury to judge of the consistency of the conduct of the prosecutrix with her evidence given at the trial. *R.* v. *Lillyman* [1896] 2 Q. B. 167; 65 L. J. (M. C.) 195: *R.* v. *Osborne* [1905] 1 K. B. 551; 74 L. J. (K. B.) 311. In neither of those cases was consent material. *See ante*, p. 372.

Evidence of the possession of articles commonly found in the possession of persons who commit the crime of gross indecency may be admissible as evidence

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of the identity of the accused. Where T. was accused of committing acts of gross indecency with two boys on March 16th and was arrested after having spoken and given money to the same boys on March 19th, and the case for the prosecution was that an appointment had been made by the person who committed the offence on the earlier date to meet on the later date, and the defence was an alibi, it was held on appeal to the Court of Criminal Appeal and on further appeal to the House of Lords that evidence given at the trial of the finding of powder-puffs upon the person of the accused on arrest and of indecent photographs of boys in his room was admissible on the issue of identity. *Thompson* v. *Director of Public Prosecutions* [1918] A. C. 221; 87 L. J. (K. B.) 478; 82 J. P. 145; 13 Cr. App. R. 61. Such evidence is, *semble*, not however admissible, if it merely tends to show the bad character of the accused. *Id. But see R.* v. *Twiss* [1918] 2 K. B. 853, 13 Cr. App. R. 177, where it was held that evidence of the possession of indecent photographs by the accused was admissible to show what his practice was.

PART II.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

OFFENCES AGAINST THE CROWN AND GOVERNMENT.

SECT. 1.

HIGH TREASON.

Statutes.

25 *Edw.* 3, *st.* 5, *c.* 2 (*Treason Act*, 1351).—*Declaration of Treasons (as printed in Revised Statutes, 2nd edition).*]—Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth, that is to say; when a man doth compass

or imagine the death of our lord the King, or of our lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably (*"provablement"*) attainted of open deed by the people of their condition . . . (*as to counterfeiting the King's seals or coin* (rep.), 11 G. 4 & 1 W. 4, c. 66; 2 & 3 W. 4, c. 34, s. 1); and if a man slea (*sic*) the chancellor, treasurer, or the King's justices of the one bench, or the other (*see* Steph. Dig. Cr. L. (6th ed.) 45 n.), justices in eyre or justices of assise, and all other justices assigned to hear and determine, being in their places doing their offices: and it is to be understood that in the cases above rehearsed, that ought to be judged treason which extends to our lord the King and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our sovereign lord as well of the lands and tenements holden of other as of himself. (*As to forfeitures*, see 33 & 34 Vict. c. 23, s. 1, post, p. 1062: *as to petty treason*, see 24 & 25 Vict. c. 100, s. 8, ante, p. 863). And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time; it is accorded that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be showed and declared before the King and his parliament, whether it ought to be judged treason or other felony. And if per-case any man of the realm ride armed overtly (*see* 2 Steph. Hist. Cr. L. 269) or secretly with men of arms against any other, to slay him, or rob him, or take him, or retain him till he hath made fine or ransom for to have his deliverance, it is not in the mind of the King nor his council that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old time used, and according as the case requireth. . .[*Rest rep.* 50 & 51 Vict. c. 53, s. 3 (Stat. Law Revision). *This statute was passed after petition by the Commons to the King representing that certain justices had lately given judgment in their courts for treason and accroachment of royal power, and praying that it might be declared in parliament to what cases this accroachment of royal power extended* (2 Rot. Parl. 166, n. 15; Rot. Parl. 25 Edw. 3, p. 2, n. 17; Luders on High Treason, p. 11; 1 Hale, 86, 87; 1 East, P. C. 37; 2 Chit. Cr. L. 60). *It is said to be declaratory of the common law* (3 Co. Inst. 1; Sindercombe's case, 5 St. Tr. 848: Bellew's case (1672) 1 Vent. 254 note: R. *v.* Smith O'Brien, 7 St. Tr. (N. S.) 349, 397; 2 H. L. C. 465; 3 Cox, 360, Blackburne, L.C J.; 2 Steph. Hist. Cr. L. 243); R. *v.* Casement, [1917] 1 K. B. 98, 124, 25 Cox, 481.

"Elsewhere:" that is, out of the realm of England. The realm of England comprehends the narrow seas and Wales, but not Ireland (Lord McGuire's case, 4 St. Tr. 653), *nor Scotland, nor the Channel Islands* (1 Hale, 153, 154). *The operation of this statute was extended to Ireland by* Poyning's Act (10 H. 7, c. 22, Ir.): see R. *v.* Smith O'Brien, supra; *and to Scotland by* 7 Anne, c. 21, s. 1, *which superseded the Scots law relating to offences which in England amount to high treason.* Id. s. 10; and see further, post, p. 1073.

11 *H.* 7, *c.* 1, *s.* 1.—*Service in war under the King* de facto *for the time being not to be deemed treason against the King* de jure.]—See Steph. Dig. Cr. L. (6th ed.); 2 Steph. Hist. Cr. L. 254; Sir Harry Vane's case, 6 St. Tr. 119.

28 *H.* 8, *c.* 15, ss. 1-3.—*Treasons in admiralty jurisdiction to be tried in England and punished as if committed on land.*]—Ante, pp. 30, 31.

35 *H.* 8, *c.* 2 ("*An act concerning the trial of treasons committed out of the King's Majesty's Dominions*"), *s.* 1.—*Venue for treasons committed abroad.*] —Forasmuch as some doubts and questions have been moved, that certain kinds of treasons, misprisions, and concealments of treason done, perpetrated, or committed out of the King's majesty's realm of England cannot ne (*sic*) may by the common laws of this realm be inquired of, heard, and determined within this his said realm of England: for a plain remedy, order, and declaration therein to be had and made, be it enacted by authority of this present parliament that all manner of offences being already made, declared, or hereafter to be made or declared, by any the laws and statutes of this realm, to be treasons, misprisions of treasons, or concealments of treasons, and done, perpetrated, or committed, or hereafter to be done, perpetrated, or committed, by any person or persons out of this realm of England, shall be from henceforth inquired of, heard, and determined before the King's justices of his bench for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept, or else before such commissioners and in such shire of the realm as shall be assigned by the King's majesty's commission, and by good and lawful men of the same shire, in like manner and form to all intents and purposes as if any such treasons, misprisions of treasons, or concealments of treasons had been done, perpetrated, and committed within the same shire where they shall be so inquired of, heard, and determined as is aforesaid. (*a*) (*As to the mode of trial of treasons committed without the realm before the passing of this statute*, see 2 Hawk. c. 25, s. 48: quoted with approval in R. *v.* Casement [1917] 1 K. B. 98, 125: Platt's case, 1 Leach, 168: Peter Gallon's case, Fitz. Abr. Trial, s. 54; 3 Co. Inst. 11; Co. Litt. 261. *This statute* (*as to the operation of which* see *Mr. Prynne's argument in* 4 St. Tr. 408) *regulates the trial in England of all foreign treasons.* 3 Co. Inst. c 1, p. 11; c. 2, pp. 24, 25; 1 Inst. 261 n.; Co. Litt. 261; 2 Hawk. c. 25, ss. 48, 49, 53; Fost. 238; 1 Hale, 169; 1 East, 104: R. *v.* Lynch [1903] 1 K. B. 444;

(*a*) In 1775 the law officers (Thurlow, A.-G., and Wedderburn, S.-G.) had been informed—

(1) That in 13 Anne an Act against high treason had been passed in the province of New Hampshire.

(2) That the said Act was disallowed by Order in Council in 1718.

(3) That it was conceived that there was no law of that province at present existing for the trial and punishment of that offence.

They were asked in what manner it was proper to proceed against persons for high treason committed in New Hampshire.

They replied: "We are humbly of opinion that it requires no Act of a provincial legislature to constitute the offence of high treason in any of his Majesty's plantations. The crime may be prosecuted in the Superior Court of New Hampshire (which by 11 W. 3 hath the full criminal jurisdiction within that government which his Majesty's Court of King's Bench exercises here), or in this country under the statutes of 35 H. 8 as the occasion may require" (14 Ap. 1775).

72 L. J. (K. B.) 167; R. *v.* Casement [1917] 1 K. B. 98, 124; and see post, pp. 1071 et seq.)

Sect. 2.—*Saving of right of peers to be tried by their peers.*]

5 *& 6 Edw.* 6, *c.* 11, *s.* 4.—*Treasons abroad.*]— . . . If any of the King's subjects, denizens, or other, do commit or practise out of the limits of this realm in any outward part any the offences which by this Act are made or heretofore now standing in force (*sic*) have been made treason, that then such treasons, whatsoever they be or wheresoever they shall happen so to be done or committed, shall be inquired and presented by the oaths of twelve good and lawful men, upon good and probable evidence and witness, in such shire and county of this realm and before such persons as it shall please the King, his said heirs and successors, to appoint by commission under his great seal; in like manner and form as treasons committed within this realm have been used to be inquired and presented; and that upon every indictment and presentment found and made of any such treasons and certified into the King's Bench, like process and other circumstance shall be there made and had against the offenders as if the said treason so presented had been lawfully found to be done and committed within the limits of this realm. . . . [*This enactment provides for inquiry and presentment before commissioners by a body whose functions are to be similar to those of a grand jury, but gives no power to the commissioners to hear and determine. It has not been specifically repealed, but there is no trace in the text books or in reported cases or in those of which the record is preserved in the Record Office, of the trial of any foreign treason by any other procedure than that provided by* 35 H. 8, c. 2, s. 1, supra.]

1 *Mary, st.* 1, *c.* 1, *s.* 1.—*No act to be treason or misprision of treason but such as was declared to be so by* 25 Edw. 3, st. 5, c. 2.]

1 *& 2 Ph. & M. c.* 10, *s.* 6.—*Trial of Treason.*]— . . . *All trials hereafter to* be had, awarded, or made for any treason shall be had and used only according to the due order and course of the common laws of this realm, and not otherwise. (*See* Fost. 237 : *R.* v. *Vaughan*, 13 St. Tr. 485, 533, Holt, C.J. : *R.* v. *Casement* [1917] 1 K. B. 98, 127, where the doubt expressed by the judges in 1555 whether this statute had not repealed 35 H. 8, c. 2, *supra*, referred to in Dyer, 131 (*b*), is considered.)

Sect. 8.—*Misprision of treason.*]—Provided always . . . that concealment or keeping secret of any high treason be deemed and taken only misprision of treason, and the offenders therein to forfeit and suffer as in cases of misprision of treason hath heretofore been used, anything above mentioned to be the contrary notwithstanding.

7 *& 8 W.* 3, *c.* 3 (*Treason Act*, 1695), *s.* 1.—*Indictment and defence by counsel.*]— . . . (*From and after 25th March*, 1696.) All and every person and persons whatsoever that shall be accused and indicted for high treason whereby any corruption of blood may or shall be made to any such offender or offenders or to any the heir or heirs of [any] such offender or offenders or for misprision of such treason shall have a true copy of the whole indictment (*as*

to the caption, see post, p. 1068), delivered unto them or any of them "five days" (*now ten days:* 7 Anne, c. 21, s. 14 (post, p. 1058); 6 G. 4. c. 50, s. 21, post, p. 1061) "at the least" before he or they shall be arraigned for the same whereby to enable them or any of them respectively to advise with counsel thereupon to plead and make their defence his or their attorney or attorneys agent or agents of any of them requiring the same and paying the officer his reasonable fees for writing thereof not exceeding five shillings for the copy of every such indictment. And that every such person so accused and indicted arraigned or tried for any such treason as aforesaid or for misprision of such treason from and after the said time shall be received and admitted to make his and their full defence by counsel learned in the law and to make any proof that he or they can produce by lawful witness or witnesses who shall then be upon oath for his and their just defence in that behalf. And in case any person or persons so accused or indicted shall desire counsel the Court before whom such person or persons shall be tried or some judge of that court shall and is hereby authorized and required immediately upon his or their request to assign to such person and persons such and so many counsel not exceeding two as the person or persons shall desire to whom such counsel shall have free access at all seasonable hours any law or usage to the contrary notwithstanding. [*In* R. *v.* Casement [1917] 1 K. B. 98, 114, *a third counsel not assigned to the prisoner was heard as* amicus curiæ].

Sect. 2.—*Corroboration.—Challenge of jurors.*]—And (*from and after 25th March*, 1696) no person or persons whatsoever shall be indicted tried or attainted of high treason whereby any corruption of blood may or shall be made to any such offender or offenders or to any of the heir or heirs of any such offender or offenders or of misprision of such treason but by and upon the oaths and testimony of two lawful witnesses either both of them to the same overt act or one of them to one and another of them to another overt act of the same treason unless the party indicted and arraigned or tried shall willingly without violence in open court confess the same or shall stand mute or refuse to plead or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury any law statute or usage to the contrary notwithstanding. [*This altered the law as laid down in Sir W. Raleigh's case*, 2 St. Tr. 15; and see 2 Hawk. c. 43, s. 5.

Sect. 3.—*Proviso as to outlawry.*]—See ante, p. 85; post, p. 1062.

Sect. 4.—*Corroboration as to overt acts.*]—And . . . if two or more distinct treasons of diverse heads or kinds shall be alleged in one bill of indictment one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons shall not be deemed or taken to be two witnesses to the same treason within the meaning of this Act.

Sect. 5.—*Limitation of prosecution.*]—And to the intent that the terror and dread of such criminal accusations may in some reasonable time be removed be it further enacted [by the authority aforesaid] that from and after the said five and twentieth day of March in the year of our Lord one thousand six hundred and ninety-six no person or persons whatsoever shall be indicted tried or prosecuted for any such treason as aforesaid or for misprision of such treason that shall be committed or done within the kingdom of England dominion of

Wales or town of Berwick upon Tweed after the said five and twentieth day of March in the year of our Lord one thousand six hundred and ninety-six unless the same indictment be found by a grand jury within three years next after the treason or offence done and committed. . . . (*See ante*, p. 63).

Sect. 6.—*Exceptions to s.* 5.]—Always provided and excepted that if any person or persons whatsoever shall be guilty of designing endeavouring or attempting any assassination on the body of the King by poison or otherwise such person or persons may be prosecuted at any time notwithstanding the aforesaid limitation. (*See post*, 36 G. 3, c. 7; 39 & 40 G. 3, c. 93; 5 & 6 Vict. c. 51, s. 1.)

Sect. 7.—*Jury panel.*]—And that all and every person and persons who shall be accused indicted [or] tried for such treason as aforesaid or for misprision of such treason after the said five and twentieth day of March in the year of our Lord one thousand six hundred and ninety-six shall have copies of the panel of the jurors who are to try them duly returned by the sheriff and delivered unto them and every of them so accused and indicted respectively two days at the least before he or they shall be tried for the same. And that all persons so accused and indicted for any such treason as aforesaid shall have the like process of the Court where they shall be tried to compel their witnesses to appear for them at any such trial or trials as is usually granted to compel witnesses to appear against them. (*See* 6 G. 4, c. 50, s. 21, *post*, p. 1061.)

Sect. 8.—*No evidence of overt acts not pleaded.*]—And . . . no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever.

Sect. 9.—*Defects in indictments.*]—Provided also . . . that no indictment for any of the offences aforesaid nor any process or return thereupon shall be quashed on the motion of the prisoner or his counsel for miswriting misspelling false or improper Latin unless exception concerning the same be taken and made in the respective Court where such trial shall be by the prisoner or his counsel assigned before any evidence given in open court upon such indictment. Nor shall any such miswriting misspelling false or improper Latin after conviction on such indictment be any cause to stay or arrest judgment thereupon. [*Rest of section rep.* 7 Edw. 7, c. 23, s. 22 and sched.]

Sect. 10.—*Proceedings on trial of peers.*]—*As to mode of trying peers*, see ante, p. 169.

Sect. 11.—*Procedure on impeachment not affected by the Act.*

1 *Anne, st.* 2, *c.* 21 (c. 17 in the common printed editions), *s.* 3.—*High treason to attempt by overt acts to hinder the succession to the crown as limited by the Act of Settlement* (12 & 13 W. 3, c. 2).

6 *Anne, c.* 41 (*Succession to the Crown Act*, 1707), *s.* 1.—*High treason to maintain by writing or printing that any person has a right to the crown, except in accordance with* 1 W. & M. sess. 2, c. 2; 12 & 13 W. 3, c. 2; *and* 6 *Anne, c.* 11.

7 *Anne, c.* 21 (*Treason Act*, 1708), *s.* 14 (*s.* 11 *in Ruffhead*).—*List of witnesses.*]—And . . . that . . . when any person is indicted for high treason

or misprision of treason a list of the witnesses that shall be produced on the trial for proving the said indictment, *and of the jury*, mentioning the names, profession, and abode of the said witnesses *and jurors*, be also given at the same time that the copy of the indictment is delivered to the party indicted, and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial, and in the presence of two credible witnesses, any law, statute, or custom to the contrary notwithstanding. [*This section is repealed as to the list of the jury in England by* 6 G. 4, c. 50, s. 62, *and replaced by s.* 21 *of that Act* (post, p. 1061).]

20 *G.* 2, *c.* 30.—*Counsel allowed to persons impeached for treason by the House of Commons.*

30 *G.* 3, *c.* 48 (*Treason Act*, 1790), *s.* 1.—*Punishment of female traitors.*]—. . . From and after the 5th day of June, 1790, the judgment to be given and awarded against any woman or women convicted of the crime of high treason, *or of the crime of petit treason, or of abetting, procuring, or counselling any petit treason*, shall not be that such woman or women shall be severally drawn to the place of execution and there burned to death, but that such woman or women shall be severally drawn to the place of execution, and be there hanged by the neck until she or they be severally dead, any law or usage to the contrary thereof in any wise notwithstanding. [*As to this Act*, see 33 & 34 Vict. c. 23, s 31, post, p. 1062. *The part in italics is virtually repealed by* 24 & 25 Vict. c. 100, s. 8, ante, p. 863.]

36 *G.* 3, *c.* 7 (*Treason Act*, 1796), *s.* 1 (*Preamble*).—*Plots to kill, etc., the sovereign or his or her heirs and successors.*]—If any person or persons whatsoever, after the day of the passing of this Act (18th December, 1795), during the natural life of our most gracious sovereign lord the King, . . . and until the end of the next session of parliament after a demise of the Crown, shall, within the realm or without, compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of his Majesty, his heirs and successors (*part here omitted* rep. 11 & 12 Vict. c. 12, s. 1), . . . and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons so as aforesaid offending shall be deemed, declared and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit as in cases of high treason. [*Made perpetual by* 57 G. 3, c. 6, s. 1, post, p. 1061.]

Sect. 2.—*Persons accused of offences against s.* 1 *to be entitled to benefit of* 7 & 8 W. 3, c. 3 (ante, p. 1056), *and* 7 Anne, c. 21 (ante. p. 1058).

Sect. 6.—*Act not to prevent prosecution at common law if no prior prosecution under Act.*]—Cf. 52 & 53 Vict. c. 63, s. 33, ante, p. 160.

39 & 40 G. 3, c. 93 (*Treason Act*, 1800), s. 1.—*Trial for plots against the King's life, etc.*]—. . . In all cases of high treason in compassing or imagining the death of the King, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of the King, or any direct attempt against his life, or any direct attempt against his person whereby his life may be endangered or his person may suffer bodily harm, the person charged with such offence shall and may be indicted, arraigned, tried, and attainted in the same manner and according to the same evidence, and according to the same course and order of trial in every respect and upon the like evidence, as if such person or persons stood charged with murder [7 & 8 W. 3, c. 3, (*ante*, p. 1056), *and* 7 Anne, c. 21 (*ante*, p. 1058), *not to apply*]; but upon conviction upon such indictment judgment shall be nevertheless given, and execution done, as in other cases of high treason.

54 G. 3, c. 146 (*Treason Act*, 1814), s. 1.—*Punishment.*]—Whereas in certain cases of high treason, as the law now stands, the sentence or judgment required by law to be pronounced or awarded against persons convicted or adjudged guilty of the said crime in such cases is that they should be drawn on a hurdle to the place of execution and there be hanged by the neck, but not until they are dead, but that they should be taken down again, and that when they are yet alive their bowels should be taken out and burnt before their faces, and that afterwards their heads should be severed from their bodies, and their bodies be severed in four quarters, and their heads and quarters to be at the King's disposal: And whereas it is expedient in the said cases of high treason to alter the sentence or judgment now required by law: Be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in all cases of high treason in which as the law now stands the sentence or judgment ordained by law is as aforesaid, the sentence or judgment to be pronounced or awarded from and after the passing of this Act against any person convicted or adjudged guilty shall be that such person shall *be drawn on a hurdle to the place of execution, and* be there hanged by the neck until such person be dead, *and that afterwards the head shall be severed from the body of such person, and the body, divided into four quarters, shall be disposed of as his Majesty and his successors shall think fit.* [*The italicized parts of this section are repealed as to England and Ireland by* 33 & 34 Vict. c. 23, s. 31, post, p. 1062. *For old form of sentence*, see R. *v.* Walcot, 1 Eng. Rep. 87.]

Sect. 2.—*Power to alter mode of execution.*]—And be it further declared and enacted, that in case his Majesty or his successors shall so think fit, his Majesty or his successors, after such sentence or judgment shall be pronounced or awarded, may, by warrant under his or their sign manual, countersigned by one of his Majesty's principal secretaries of state, declare it to be his or their will and pleasure, and may direct and order that such person as aforesaid shall not be drawn, but shall be taken in such manner as in the said warrant shall be expressed to the place of execution, and that such person shall not be hanged

by the neck, but that instead thereof the head shall be there severed from the body of such person whilst alive, *and in such warrant may direct and order how and in what manner the body, head, and quarters of such person shall be disposed;* and it shall be lawful for the sheriff or other person or persons to whom such warrant shall be addressed, and whom it shall concern, to carry the same into execution accordingly. [*The italicized portions of this section are repealed as to England and Ireland by* 33 & 34 Vict. c. 23, s. 31, post, p. 1062.]

57 *G.* 3, *c.* 6 (*Treason Act*, 1817), s. 1.]—*Recites* 36 *G.* 3, *c.* 7 (ante, p. 1059), *and enacts that* " all and every the hereinbefore recited provisions which relate to the heirs and successors of his Majesty the sovereign of these realms shall be and the same are hereby made perpetual." [*The portions of this Act referring to the portions of* 36 G. 3, c. 7, *repealed* by 11 & 12 Vict. c. 12, s. 1, *are repealed by the latter statute.*]

Sect. 4.—*Persons tried under the Act to be entitled to the benefit of* 7 & 8 W. 3, c. 3, *and* 7 Anne, c. 21 (ante, pp. 1056, 1058), " save and except in cases of high treason in compassing or imagining the death of any heir or successor to his Majesty, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of any heir or successor of his Majesty, or any direct attempt against the life of any heir or successor of his Majesty, or any direct attempt against the person of any heir or successor of his Majesty whereby the life of such heir or successor may be endangered or the person of such heir or successor may suffer bodily harm." (*See* 39 & 40 G. 3, c. 93, *ante*, p. 1060.)

Sect. 5.—*Act not to prevent prosecutions to which persons would have been subject if the Act had not passed, unless the party is first prosecuted under the Act.*]—Cf. 52 & 53 Vict. c. 63, s. 33, ante, p. 160.

Sect. 6.—54 G. 3, c. 146 (ante, p. 1060), *extended to sentences for offences under this Act.*

6 *G.* 4, *c.* 50 (*Juries Act*, 1825), *s.* 21.—*Jury panel.*]—When any person is indicted for high treason or misprision of treason in any court other than the Court of King's Bench, a list of the petit jury, mentioning the names, profession, and place of abode of the jurors, shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason or misprision of treason in the Court of King's Bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid; but a list of the petit jury, made out as aforesaid, may be delivered to the party indicted at any time after the arraignment, so that the same be delivered ten days before the day of trial: Provided always, that nothing herein contained shall anyways extend to any indictment for high treason in compassing or imagining the death of the King, or for misprision of such treason, where the overt act or overt acts of such treason alleged in the indictment shall be assassination or killing of the

King, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person may suffer bodily harm [*see* 39 & 40 G. 3, c. 93 (ante, p. 1060); 57 G. 3. c. 6, s. 1 (supra); *the rest of* 6 G. 4, c. 50, s. 21, *relates to treason by counterfeiting coin, great seal, privy seal, sign manual, etc., which is abolished. As to challenge of jurors on an indictment for treason*, see 7 & 8 W. 3, c. 3, s. 2 (ante, p. 1058), *and* 6 G. 4, c. 50, s. 21 (ante, p. 1061)].

5 & 6 *Vict. c.* 51 (*Treason Act*, 1842), *s.* 1.]—In all cases of high treason in compassing or imagining any bodily harm tending to the death or destruction, maiming, or wounding of the King, and in all cases of misprision of any such treason where the overt act or overt acts of such treason alleged in the indictment shall be any attempt to injure in any manner whatsoever the person of the King, the person or persons charged with such offence shall and may be indicted, arraigned, tried, and attainted in the same manner and according to the same course and order of trial in every respect upon the like evidence as if such persons stood charged with murder [7 & 8 W. 3, c. 3 (*ante*, p. 1056); 7 Anne, c. 21 (*ante*, p. 1058); 6 G. 4, c. 50, s. 21 (*ante*, p. 1061) *not to apply*]; but upon conviction upon such indictment judgment shall nevertheless be given, and execution be done, as in other cases of high treason, any law, statute, or usage to the contrary notwithstanding.

11 & 12 *Vict. c.* 12 (*Treason Felony Act*, 1848), *s.* 2.]—Such of the said recited provisions [of 36 G. 3, c. 7 (*ante*, p. 1059)] made perpetual by the said Act of the 57 G. 3 [c. 6 (*ante*, p. 1061)] as are not hereby repealed shall extend to and be in force in that part of the United Kingdom called Ireland.

Sects. 3, 6-8.]—*Post*, p. 1077.

17 & 18 *Vict. c.* 26.]—*After reciting the Treason Act*, 1708 (7 Anne, c. 21), s. 14 (ante, p. 1058), *enacts that* "the enactments in the *Treason Act*, 1708, contained and hereinbefore recited shall apply to Ireland, and that as fully as if the same enactments were here repeated." (*As to former law in Ireland*, see Smith O'Brien *v.* R., 7 St. Tr. (N. S.) 1; 2 H. L. C. 465.)

33 & 34 *Vict. c.* 23 (*Forfeiture Act*, 1870), *s.* 1.]—From and after the passing of the Act (4th July, 1870) no confession, verdict, inquest, or judgment of or for any treason . . . shall cause any attainder or corruption of blood or any forfeiture or escheat: provided that nothing in this Act shall affect the law of forfeiture consequent on outlawry. [*This section does not appear to affect the mode of trial for treason.* See 7 & 8 W. 3, c. 3 (ante, p. 1056).]

Sect. 31.]—From and after the passing of this Act (4th July, 1870) such portions of the *Treason Act*, 1790 (30 G. 3, c. 48, *ante*, p. 1059), and the *Treason Act*, 1814 (54 G. 3, c. 146, *ante*, p. 1060), as enact that the judgment required by law to be awarded against persons adjudged guilty of high treason shall include the drawing of the person on a hurdle to the place of execution, and after execution the severing of the head from the body and the dividing of the body into four quarters shall be and are hereby repealed. [*Rep.* S. L. R. 1893. *The repeal does not revive the former law*, 52 & 53 Vict. c. 63, s. 38, sub-s. 2 (*a*) (*ante*, p. 8).]

Indictment for compassing the King's Death. (25 *Edw.* 3, *st.* 5. *c.* 2. ante, p. 1053.)

Commencement as post, p. 1071, *or at Assizes.*

STATEMENT OF OFFENCE.

High treason by compassing the King's death, contrary to the Treason Act, 1351.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days, between that date and the —— day of ——, in the county of——, being on the said days a British subject, compassed or imagined the death of our Lord the King.

OVERT ACTS OF THE SAID TREASON.

[*State them in ordinary language*—see post, p. 1071.]

Any number of overt acts may be laid in the same count, but proof of any one sufficient overt act will maintain the count. Kel. (J.) 8; 1 Hale, 122; Fost. 294.

The punishment of high treason is death by hanging, unless the King by warrant under the sign manual, countersigned by a secretary of state, substitutes death by decapitation. 30 G. 3, c. 48, s. 1 (ante, p. 1059); 54 G. 4, c. 146 (ante, p. 1060); 33 & 34 Vict. c. 23, s. 31 (ante, p. 1062).

High treason, misprision of treason, offences against the King's title, prerogative, person, or government, or against either house of parliament, are not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Venue.]—*As to the venue in cases of compassing the King's death out of the realm*, see 35 H. 8, c. 2, s. 1 (ante, p. 1055). *Most of the cases cited* post, p. 1073, *from the State Trials* (a) *as containing counts for adhering to the King's enemies, contain also counts for compassing the King's death in this country; in the following cases the offence of "compassing, etc.," is charged as having been committed "in parts beyond the seas." viz.*, R. *v.* Hesketh. K. B. Roll, 1592: R. *v.* Assheton, Id.: R. *v.* Skinner, Id.: R. *v.* Smith. Baga de Secretis, 1713.

Allegiance.]—"High treason, being an offence committed against the duty of allegiance, it may be proper . . . to consider from whom and to whom allegiance is due. With regard to natural born subjects, there can be no doubt. They owe allegiance to the Crown at all times and in all places. This

(a) Except where otherwise specially stated, the references to the State Trials in the present edition of this work are to Howell's State Trials, and to State Trials (New Series). For table showing references to Hargrave's State Trials, *see* vol. 34 of Howell.

is what we call natural allegiance in contradistinction to that which is local. . . . Natural allegiance is founded on the relation every man standeth in to the Crown considered as the head of that society whereof he is born a member: and on the peculiar privileges he deriveth from that relation which are with great propriety called his birthright; this birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance which ariseth out of it and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual." Fost., C. L. 183, quoted with approval in *R.* v. *Casement* [1917] 1 K. B. 98, 130; 86 L. J. (K. B.) 467. "The subjects of the King owe him allegiance and the allegiance follows the person of the subject. He is the King's liege wherever he may be and he may violate his allegiance in a foreign country just as well as he may violate it in this country." *R.* v. *Casement* [1917] 1 K. B. 98, 137.

Liability of aliens.]—Alien friends may be convicted of high treason (*R.* v. *De la Motte*, 21 St. Tr. 687, 814), but alien enemies cannot (*Calvin's case*, 7 Co. Rep. 1, 6 b; *and see* 4 St. Tr. 1182; Forsyth, Cas. Const. Law, 200), unless they accept British protection during the war (Fost. 185). A British subject is not exempt from the penalties of treason because he holds a commission in the enemy's forces, *Napper Tandy's case*, 27 St. Tr. 1191: *Macdonald's case*, Fost. 59, 183; 18 St. Tr. 857: *Townley's case*, Fost. 7; 18 St. Tr. 1329: *R.* v. *Lynch* [1903] 1 K. B. 444; *and see post*, p. 1075. An alien resident within British territory owes allegiance to the Crown, and if he assists invaders while his Majesty's forces, for strategical or other reasons, are temporarily withdrawn, he is liable to conviction of high treason. *De Jager* v. *Att.-Gen. of Natal* [1907] A. C. 326; *and see* 3 Co. Inst. 4; 1 Hale, 94; Fost. 185.

Overt acts.]—The following acts have been decided or have been deemed by writers upon the subject to be sufficient overt acts of compassing the death of the sovereign within the *Treason Act*, 1351 (*ante*, p. 1053). That statute is declaratory of the common law (*ante*, p. 1054); but all the law of treason now rests on statute, and the doctrine of constructive treason is discouraged, if not exploded. *See* 1 Mary, st. 1, c. 1, s. 1 (*ante*, p. 1056); *and* 3 St. Tr. 368, 1466, 1472; 6 St. Tr. 902 n.; 15 St. Tr. 522, and note; 24 St. Tr. 877; 32 St. Tr. 431.

Everything wilfully or deliberately done or attempted, whereby the King's life may be endangered, is an overt act of compassing his death. Fost. 195. Killing the King is an overt act of compassing his death, and was so laid in the case of the regicides. Kel. (J.) 8. So, going armed for the purpose of killing the King; *R.* v. *Somerville*, 1 Anderson, 104; providing arms, ammunition, poison, or the like, for the purpose of killing the King; 1 Hale, 108; 3 Co. Inst. 12; conspirators meeting and consulting on the means of killing the King; Fost. 195: *R.* v. *Sir H. Vane*, Kel. (J.) 15; 6 St. Tr. 119: *R.* v. *Tonge*, Kel. (J.) 17; 6 St. Tr. 225; *and see* Kel. (J.) 81; or of deposing him, or of usurping the powers of government; *R.* v. *Hardy*, 1 East, P. C. 60; 24 St. Tr. 199; or resolving to do it; *R.* v. *Rookwood*, 13 St. Tr. 139: *R.* v. *Charnock*,

12 St. Tr. 1377; 2 Salk. 631; acting as counsel against the King, in order to take away his life; *R.* v. *Cook*, Kel. (J.) 12; 2 St. Tr. 1077; *and see R.* v. *Harrison*, 5 St. Tr. 1008; 2 Steph. Hist. Cr. L. 241: all these, and the like, are sufficient overt acts of compassing the King's death.

So, other species of high treason, which are distinct heads of treason in themselves, may be laid as overt acts of compassing the King's death (*see* 39 & 40 G. 3, c. 93, *ante*, p. 1060). Thus, the following have been held to be sufficient overt acts of compassing the King's death: levying war *directly* against the King; Fost. 197, 210, 211; 1 Hale, 122, 123, 151; Kel. (J.) 21; 3 Co. Inst. 12; 13 St. Tr. 110, 113: *R.* v. *Hensey*, 19 St. Tr. 1341 (but not a mere constructive levying of war, such as pulling down all inclosures, or the like, 1 Hale, 123; *see post*, p. 1070); or even a conspiracy to levy war directly against the King, for the purpose of dethroning him, or of obliging him to change his measures, or the like; Fost. 197, 211; 1 Hale, 119, 121: *R.* v. *Freind*, 13 St. Tr. 1: *R.* v. *Darrel*, 10 Mod. 321; *R.* v. *Layer*, 16 St. Tr. 93: *R.* v. *Campion*, Sav. 3: *R.* v. *Lord Russell*, 9 St. Tr. 577: *R.* v. *Sidney*, 9 St. Tr. 817: *R.* v. *Cook*, 13 St. Tr. 311 (but not a conspiracy to effect a rising for the purpose of throwing down all inclosures, or any other species of constructive levying of war; Fost. 213; *per* Holt, C.J., Holt 682; *per cur.*, 10 Mod. 322); adhering to the King's enemies: Fost. 196, 197: *H.* v. *Harding*, 2 Vent. 315: *R.* v. *Lord Preston*, 12 St. Tr. 645: *R.* v. *Stone*, 25 St. Tr. 1155: 6 T. R. 527; inciting foreigners to invade the realm; Fost. 196; 1 Hale, 120: 3 Co. Inst. 14: *R.* v. *Dr. Story*, 3 Dyer, 298A, 300B; 1 St. Tr. 1087 (where the indictment is incorrectly set out (*see* K. B. Rolls, 1571)): *R.* v. *Parkyns*, 13 St. Tr. 63.

Writings which import a compassing of the King's death are sufficient overt acts of this species of treason, if published; 1 Hale, 118; 3 Co. Inst. 14; Fost. 198; 1 Hawk. c. 17, s. 31; as, for instance, writings inciting persons to kill the King; *R.* v. *Twyn*, Kel. (J.) 22; 6 St. Tr. 513 n.; or the like. See *the cases collected in Pyne's case*, Cro. Car. 117. So, words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act which would of itself (if committed) be a sufficient overt act. Fost. 195, 200: *R.* v. *Charnock*, 12 St. Tr. 1377; 2 Salk 631. So, words may be laid in the indictment to explain an act; as, for instance, an act seemingly innocent in itself may be shown to be an overt act of treason, by its connection with words spoken by the party at the time. 1 Hale, 115; *and see R.* v. *Parkyns*, 13 St. Tr. 63: *R.* v. *Crohagan*, Cro. Car. 332: *R.* v. *Lee*, 1 St. Tr. 1403. But loose words which have no reference to any act or design, or which are not words of persuasion or advice, cannot be deemed overt acts of treason. Fost. 200-207: *R.* v. *Theving*, 3 Harg. St. Tr. 79-90.

Where words or writings are laid as overt acts, it is sufficient to set forth the substance of them: *R.* v. *Francia*, 15 St. Tr. 897: *R.* v. *Lord Preston*, 12 St. Tr. 645: *R.* v. *Watson*, 2 Stark (N. P.) 137; 32 St. Tr. 1; for in no case is it necessary that the whole detail of the evidence should be set forth: it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprised of its nature, and may be prepared to answer it. Fost. 194.

Evidence.

The evidence must be applied to the proof of the overt acts, and not to the proof of the principal treason: for the overt act is the charge to which the prisoner must apply his defence. And whether the overt act proved be a sufficient overt act of the principal treason laid in the indictment, is a matter of law to be determined by the Court. No evidence may be admitted of any overt act not laid in the indictment: 7 & 8 W. 3, c. 3, s. 8 (*ante*, p. 1056); that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charged, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid amounts to a direct proof of any other overt act which is laid, it may be given in evidence to prove such overt act. *R.* v. *Rookwood*, 13 St. Tr. 139, 661: *R.* v. *Deacon*, 18 St. Tr. 365, 369; Fost. 9: *R.* v. *Lowicke*, 13 St. Tr. 267: *R.* v. *Layer*, 16 St. Tr. 93. Words spoken or written and published may constitute an overt act if relating to a treasonable act or design. 5 St. Tr 983; 10 St. Tr. 277, 295; 22 St. Tr. 480 n.: *R.* v. *Wedderburne*, 18 St. Tr. 425; Fost. 22: *and see* 1 St. Tr. xxvi., xxxviii.

Although unpublished writings cannot be laid as an overt act, yet, if they tend to prove an overt act laid, they may be admitted in evidence for that purpose. *R.* v. *Lord Preston*, 12 St. Tr. 645: *R.* v. *Layer*, 16 St. Tr. 93, 280: *Anderton's case*, 12 St. Tr. 1245: *R.* v. *Twyn*, 6 St. Tr. 513 n.; and *R.* v. *Hensey*, 1 Burr. 642, 644; 19 St. Tr. 1344. In *R.* v. *Algernon Sidney* (Fost. 198; 9 St. Tr. 817), if the papers found in his closet had been plainly referable to the other treasonable practices charged in the indictment, they might indisputably have been read in evidence against him, although not published. And it is no objection that the writings, or any other articles, were not found until after the apprehension of the defendant *R.* v. *Watson*, 2 Stark. (N. P.) 137; 32 St. Tr. 1.

Where words of incitement have reference to an act, after giving evidence of the words, you may give evidence of the act, in order fully to explain them. *R.* v. *Lord G. Gordon*, Doug. 590, 593; 21 St. Tr. 485.

Where a conspiracy is laid as an overt act, the acts of any of the conspirators in furtherance of the common design may be given in evidence against all. *R.* v. *Horne Tooke*, 1 East, P. C. 98: *R.* v. *Hardy*, 1 East, P. C. 99; 24 St. Tr. 199: *R.* v. *Stone*, 25 St. Tr. 1155; 6 T. R. 527: *R.* v. *M'Cafferty*, 10 Cox, 603; Ir. Rep. 1 C. L. 363: *and see* Kel. (J.) 19, 20 (*and see ante*, p. 354). In such a case, the first thing to be proved is the conspiracy; secondly, evidence must be given to connect the defendant with it; and lastly, if it is intended to give in evidence against the defendant the acts of any other person, you must show that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. *See R.* v. *Sidney*, 9 St. Tr. 817, etc.: *R.* v. *Lord Lovat*, 18 St. Tr. 529; *and ante*, p. 354.

Time.]—The time at which the overt acts are alleged to have been committed need not be proved as laid; it is sufficient if they are proved to have been committed at any time within three years before the finding of the indictment. *R.* v. *Charnock*, 1 Salk. 288; 12 St. Tr. 1377: *Sir H. Vane's case*, 6 St. Tr. 123,

Kel. (J.) 16 : *R.* v. *Lord Balmerino*, 18 St. Tr. 441 : *R.* v. *Townley*, 18 St. Tr. 1329; Fost. 7, 8.

Place.]—7 G. 4, c. 64, ss. 12, 13 (*ante*, p. 37), *do not apply to treason*. An overt act must be proved to have been committed in the proper county. *See R.* v. *Lord Preston*, 12 St. Tr. 377 : *R.* v. *Hensey*, 19 St. Tr. 1341, 1345 : *Sir H. Vane's case*, 6 St. Tr. 123, 129 n. : *R.* v. *Hardie*, 1 St. Tr. (N. S.), 609, *and ante*, p. 37. But if any one overt act is proved against the defendant in the proper county, acts of treason tending to prove such overt act laid, though done in a foreign country, may be given in evidence; and this was done in nearly all the trials of the rebels in the year 1746. *R.* v. *Deacon*, Fost. 9, 10 : *R.* v. *Wedderburne*, *Id.* 22.

Place in foreign treasons.]—As to laying and proving place in cases of treason where all the overt acts are proved to have taken place out of the realm, *see post*, pp. 1071, 1072.

Where several overt acts are laid, proof of any one of them will maintain the count, provided the overt act so proved is a sufficient overt act of the species of treason charged in the indictment. 1 Hale, 122; Fost. 194.

The prisoner is not bound to show what was the object or meaning of the acts done by him; it is for the Crown to make out that they amount to the treason charged in the indictment. *R.* v. *Frost*, 4 St. Tr. (N. S.) 85; 9 C. & P. 129.

Corroboration.]—There must be two witnesses to prove the treason, both of them to the same overt act, or one of them to one, and the other of them to another overt act of *the same* treason; unless the defendant shall willingly, without violence, confess the same; 7 & 8 W. 3, c. 3, ss. 2, 4 (*ante*, p. 1057), *and see* 5 St. Tr. 977 n. But this rule does not apply in cases of high treason in compassing or imagining the death or destruction, maiming or wounding of the King, and of misprision of such treason, where the overt acts alleged in the indictment shall be any attempt upon his person; in which cases the prisoner is triable in the same manner and upon the like evidence as if charged with *murder* : 39 & 40 G. 3, c. 93 (*ante*, p. 1060); 57 G. 3, c. 6, s. 4 (*ante*, p. 1061); 5 & 6 Vict. c. 51, s. 1 (*ante*, p. 1062). If the jury do not give credit to both the witnesses, the defendant shall be acquitted. *R.* v. *Palmer*, 7 St. Tr. 1067, 1112. But where the overt act is composite, made up of several circumstances and passing through several stages, it is not necessary that there should be two witnesses to each circumstance and at each stage. It is enough if the joint testimony of two or more witnesses prove the act as a whole. *R.* v. *M'Cafferty*, Ir. Rep. 1 C. L. 363; 10 Cox, 603. And one witness is sufficient to prove a collateral fact; Fost. 242; as, that the defendant is a natural-born subject; *R.* v. *Vaughan*, 13 St. Tr. 485; or a matter of inducement, or the like, 13 St. Tr. 535. As to proof of confessions by the accused, *R.* v. *Deacon*, 18 St. Tr. 369 : *Tonge's case*, 6 St. Tr. 227, 228 : *R.* v. *Crossfield*, 26 St. Tr. 57, *and ante*, p. 379. As to evidence of accomplices, *see ante*, pp. 455, 456.

Copy of indictment and list of witnesses.]—On all prosecutions for treason or misprision of treason, except those triable as if the charge were murder.

39 & 40 G. 3, c. 93; 57 G. 3, c. 6, s. 1; 5 & 6 Vict. c. 51, s. 1 (*ante*, pp. 1060, 1061, 1062); a copy of the indictment and a list of the witnesses for the prosecution must be delivered to the accused ten days before the trial. 7 Anne, c. 21, s. 14 (*ante*, p. 1058). At one time it was deemed safer to deliver a copy of the caption with that of the indictment; Bacon, Abr. Treason (C. c.); *but see R.* v. *O'Connell*, 5 St. Tr. (N. S.) 28: *R.* v. *Burke*, 10 Cox, 519. A copy of the caption was given in *R.* v. *Casement* [1917] 1 K. B. 98. A bill of indictment for treason was found on the 11th December, on the 12th copies of the indictment and of the jury panel were delivered to the prisoner; and on the 17th a copy of the list of witnesses was delivered to him. The prisoner was arraigned on the 31st December, and pleaded: and upon the first witness being called for the Crown, it was objected that the list of witnesses had not been delivered according to the statute. Upon a case reserved, it was held, by nine judges to six, that the delivery of the list was not a good delivery in point of law: but it was also held, by a like majority, that the objection was too late after plea pleaded. And it was agreed by all the judges, that if the objection had been taken in due time, the only effect of it would have been a postponement of the trial, to give time for a proper delivery of the list. *R.* v. *Frost*, 4 St. Tr. (N. S.) 35; 2 Mood. 140; 9 C. & P. 129 And so the fact that a true copy of the indictment has not been furnished to the prisoner is not matter for a plea, but is only a ground for postponing the trial. *R.* v. *Burke*, 10 Cox, 519.

List of jury.]—7 Anne, c. 21, s. 14 (s. 11 in Ruffhead), also contained provisions as to a list of the petty jurors which were *repealed* as to England by 6 G. 4, c. 50, s. 62, and replaced by s. 21 of that Act, under which the list of the petty jurors, with names, professions, and places of abode, must be delivered in the presence of two credible witnesses ten days before the day of trial, if the trial is in the King's Bench Division, and ten days before the day of arraignment if the trial is in any other court. This obligation does not apply where the particular treason is triable in the same way as murder. *See* 39 & 40 G. 3, c 93 (*ante*, p. 1060); 6 G. 4, c. 50, s. 21 (*ante*, p. 1061); 5 & 6 Vict. c. 51, s. 1 (*ante*, p. 1062).

Form of a Count for levying War. (25 *Edw.* 3, *st.* 5, *c.* 2, *ante*, pp. 1053, 1054.)

Commencement as post, p. 1071, *or at Assizes.*

STATEMENT OF OFFENCE.

High Treason by levying war, contrary to the Treason Act, 1351.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, being on the said days a British subject, levied war against our Lord the King in his realm.

Overt acts of the said Treason.

[State them in ordinary language—*see post*, p. 1071.]

Evidence.

In order to maintain this count, it is necessary to prove that which in law amounts to a levying of war, directly or constructively, against the King in his realm; and to prove that the defendant was either actually engaged in it, or present aiding and abetting. Levying war in *Ireland* is treason, by force of *Poyning's Act* (10 H. 7, c. 22, Ir.). *Smith O'Brien* v. *R.*, 7 St. Tr. (N. S.) 1; 2 H. L. C. 465. As to the meaning of "realm," *see ante*, p. 1054.

In order to constitute a levying of war, the number of persons assembled is not material; three or four will constitute it as fully as a thousand. 3 Co. Inst. 9. Nor is it necessary that they should be *more guerrino arraiati*, armed with military weapons, with colours flying, etc., although it is usually so stated in the indictment. Fost. 208: *and see R.* v. *Dammaree and Purchase*, Fost. 208; 15 St. Tr. 521, 606, 645. Nor is actual fighting necessary to constitute a levying of war: Fost. 218; 1 Hale, 144; for, as the Court held in *R.* v. *Vaughan* (13 St. Tr. 485; 2 Salk. 634), enlisting and marching are sufficient, without coming to battle. But there must be force accompanying that insurrection, and it must be for an object of a general nature, *R.* v. *Frost*, 4 St. Tr. (N. S.) 85; 9 C. & P. 129. As to levying war by use of dangerous explosives, *see R.* v. *Gallagher*, 16 Cox, 291 (Ir.): *R.* v. *Deasy*, 15 Cox, 334. After an action has taken place, it is termed *bellum percussum;* before it, *bellum levatum*. *See* 15 St. Tr. 525 n.

War levied against the King is of two kinds—direct and constructive. It is said to be *direct*, when the war is levied directly against the King or his forces, with intent to do some injury to his person, to imprison him, or the like: 1 Hale, 131, 132; such, for instance, as open rebellion, for the purpose of deposing or imprisoning the King, or of getting him into the power of the rebels, or of forcing him to put away his ministers, or the like; 1 Hale, 152; Fost. 210; *and see R.* v. *Earls of Essex and Southampton*, Moore, 621; 1 St. Tr. 1333; holding or defending any of the King's castles, forts, or ships against the King or his forces, or delivering them up to rebels, through treachery; 2 Co. Inst. 10; Fost. 219; 1 Hale, 525, 526. To constitute levying war it is not necessary that great numbers should assemble or military arms or array should be displayed or actual force be used. *R.* v. *Hardie*, 1 St. Tr. (N. S.) 609: *R.* v. *Gallagher*, 16 Cox, 291 (Ir.). Levying war is said to be *indirect* or *constructive* when levied for the purpose of effecting innovations of a public and general nature by an armed force; Fost. 211; as, for the purposes of attempting by force to obtain the repeal of a statute, to alter the religion established by law, or to obtain the redress of any other public grievance, real or pretended; 1 Hawk. c. 17, s. 26; 1 Hale, 153; Fost. 211; 3 Co. Inst. 9, 10: *R.* v. *Lord G. Gordon*, 21 St. Tr. 485; 2 Dougl. 590; *and see* 13 St. Tr. 61; 15 St. Tr. 527 n., 606 n.; 21 St. Tr. 644: *R.* v. *Thistlewood*, 33 St. Tr. 681, 955; or an insurrection for the purpose of throwing down all inclosures, pulling down all bawdy houses, opening all prisons, etc., expelling all strangers, enhancing the price

of wages generally, or the like. *R.* v. *Dammaree and Purchase*, Fost. 213; 1 Hale, 132: *R.* v. *Bradshaw*, Poph. 122: *R.* v. *Messenger*, Kel. (J.) 70-79; 6 St. Tr. 879. Therefore, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting-houses, and actually pulled down two, it was held to be treason. *R.* v. *Dammaree*, 15 St. Tr. 521, 605: *R.* v. *Purchase*, *Id.* 645. A mere rising or tumult is not treasonable, unless for a purpose of a public or general nature. *R.* v. *Hardie*, 1 St. Tr. (N. S.) 609: *R.* v. *Munroe*, *Id.* 1356. Thus an insurrection for the purpose of throwing down the inclosures of a particular manor, park, common, etc., or upon a mere quarrel between private persons, Fost. 210; 1 Hale, 131, 133, 149, or to deliver one or more particular persons out of a prison (they not being imprisoned for treason), 1 Hale, 134, or holding a house by force against a sheriff and *posse comitatus*, 1 Hale, 146, is not treason. So, if an armed body of men enter a town, their object being not to take it, or to attack the military force there, but merely to make a demonstration of their strength to the magistracy, in order to procure the liberation or mitigate the punishment of prisoners convicted of some political offence, this, though an aggravated misdemeanor, is not high treason. *R.* v. *Frost*, 4 St. Tr. (N. S.) 85; 9 C. & P. 129.

It is said also, in order to maintain this count, proof must be given of a war actually levied, and not merely of a conspiracy to levy it. 1 Hale, 141-148; 1 Hawk. c. 17, s. 27. But, according to Foster, the conspiracy may be dealt with as an overt act in compassing the King's death. Fost. 195.

In the case of war levied directly against the King, all persons assembled and marching with the rebels are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence, or not; *R.* v. *Earls of Essex and Southampton*, 1 St. Tr. 1333; Moore (K. B.) 621; unless compelled to join and continue with them *pro timore mortis*; Fost. 216, 217; 3 Co. Inst. 10; 1 Hale, 49, 51, 139; and actual compulsion is an excuse for adhering to rebels, but mere apprehension of loss of property or injury not endangering the person is not an excuse. *R.* v. *M'Growther*, 18 St. Tr. 391; Fost. 13, 217; 1 East, P. C. 71: *R.* v. *Gordon*, 1 East, P. C. 71; *and see ante*, p. 20. (*a*) But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason, are traitors; the rest are merely rioters. *See R.* v. *Messenger*, Kel. (J.) 70-79; 1 Sid. 358; 6 St. Tr. 879.

(*a*) As to plea that the act done was under military orders of the enemy, *see R.* v. *Louw* [1904] 21 Cape S. C. 36.

Form of Indictment framed against Sir Roger Casement for adhering to the King's Enemies abroad (when tried in the King's Bench Division of the High Court of Justice). (23 *Edw.* 3, *st.* 5, *c.* 2, ante, p. 1053; 35 *H.* 8, *c.* 2, *s.* 1, ante, p. 1055.)

REX *v.* SIR ROGER DAVID CASEMENT.

Court of Trial.—The High Court of Justice, King's Bench Division, sitting at the Royal Courts of Justice, Strand, in the County of the County of London and the County of Middlesex.

PRESENTMENT OF THE GRAND JURY.

Sir Roger David Casement is charged with the following offence :—

STATEMENT OF OFFENCE.

High Treason by adhering to the King's enemies elsewhere than in the King's realm—to wit, in the Empire of Germany—contrary to the Treason Act, 1351 (25 Edw. 3, st. 5, c. 2).

PARTICULARS OF OFFENCE.

Sir Roger David Casement, otherwise known as Sir Roger Casement, knight, on the 1st day of December, 1914, and on divers other days thereafter, and between that day and the 21st April, 1916, being then—to wit, on the said several days—a British subject, and whilst on the said several days an open and public war was being prosecuted and carried on by the German Emperor and his subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects, did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without this realm of England—to wit, in the Empire of Germany.

OVERT ACTS OF THE SAID TREASON.

1. On or about the 31st December 1914, soliciting and inciting and endeavouring to persuade certain persons, being British subjects and members of the military forces of our Lord the King, and being prisoners of war then imprisoned at Limburg Lahn Camp in the Empire of Germany—to wit, Michael O'Connor and others whose names are unknown—to forsake their duty and allegiance to our Lord the King and to join the armed forces of his said enemies and to fight against our Lord the King and his subjects in the said war.

2. On or about the 6th day of January 1915, soliciting and inciting and endeavouring to persuade certain persons, being British subjects and members of the military forces of our Lord the King, and being prisoners of war then imprisoned at Limburg Lahn Camp in the Empire of Germany—to wit, John Robinson and John Cronin, and others whose names are unknown—to forsake their duty and allegiance to our Lord the King and to join the armed forces

of his said enemies and to fight against our Lord the King and his subjects in the said war.

3. On or about the 19th February 1915, soliciting and inciting and endeavouring to persuade certain persons, being British subjects and members of the military forces of our Lord the King, and being prisoners of war then imprisoned at Limburg Lahn Camp in the Empire of Germany—to wit, John Robinson, William Egan, Daniel O'Brien, and James Wilson, and others whose names are unknown—to forsake their duty and allegiance to our Lord the King, and to join the armed forces of his said enemies and to fight against our Lord the King and his subjects in the said war.

4. In or about the months of January and February 1915, at Limburg Lahn in the Empire of Germany, circulating and distributing and causing and procuring to be circulated and distributed to and amongst certain persons being British subjects and members of the military forces of our Lord the King, and being prisoners of war imprisoned at Limburg Lahn Camp aforesaid—to wit, Michael O'Connor, John Robinson, John Cronin, William Egan, Daniel O'Brien, James Wilson, and divers others, whose names are unknown—a certain leaflet to the tenor and effect following, that is to say, "Irishmen, here is a chance for you to fight for *Ireland*! You have fought for England, your country's hereditary enemy. You have fought for Belgium in England's interest, though it was no more to you than the Fiji Islands! Are you willing to fight *for your own country* with a view to securing the national freedom of Ireland? With the moral and material assistance of the German Government an *Irish Brigade* is being formed. The object of the Irish Brigade shall be to fight solely *the cause of Ireland*, and under *no circumstances* shall it be directed to any *German* end. The Irish Brigade shall be formed, and shall fight under the Irish flag alone; the men shall wear a special distinctively Irish uniform and have Irish officers. The Irish Brigade shall be clothed, fed, and efficiently equipped with arms and ammunition by the German Government. It will be stationed near Berlin and be treated as guests of the German Government. At the end of the war the German Government undertakes to send each member of the brigade who may so desire it to the United States of America with necessary means to land. The Irishmen in America are collecting money for the brigade. Those men who do not join the Irish Brigade will be removed from Limburg and distributed among other camps. If interested, see your company commanders. Join the Irish Brigade and win Ireland's independence! Remember Bachelor's Walk! God save Ireland!" with intent to solicit, incite, and persuade the said last mentioned British subjects, being Irishmen, to forsake their duty and allegiance to our Lord the King, and to aid and assist his enemies in the prosecution of the said war against our Lord the King and his subjects.

5. On or about the 31st December 1914, and on divers days thereafter in the months of January and February 1915, persuading and procuring certain persons being members of the Military Forces of our Lord the King—to wit, Daniel Julian Bailey, one Quinlisk, one O'Callaghan, one Keogh, one Cavanagh, one Greer, and one Scanlon, and divers others, whose names are unknown, to the number of about 50; the said persons being Prisoners of War then

imprisoned in Limburg Lahn Camp in the Empire of Germany, to forsake their allegiance to our Lord the King, and to join the armed forces of his said enemies, with a view to fight against our Lord the King and his subjects in the said War.

6. On or about the 12th day of April 1916, setting forth from the Empire of Germany as a member of a warlike and hostile expedition undertaken and equipped by the said enemies of our Lord the King, having for its object the introduction into and landing on the Coast of Ireland of arms and ammunition intended for use in the prosecution of the said War by the said Enemies against our Lord the King and his subjects.

The special acts of adherence must be set forth in the indictment as overt acts; but it is not necessary in this or in any other case of treason, that in laying the overt acts the details of the evidence intended to be given at the trial should be stated; it is sufficient if the charge be reduced to a reasonable certainty, so that the defendant may be apprised of the nature of the offence with which he is charged. Fost. 194, 220.

Venue: Where the King's Bench "shall sit and be kept" (35 H. 8, c. 2, s. 1, ante, p. 1055). *This is now "the county of the county of London and the county of Middlesex." By* 51 & 52 Vict. c. 41, s. 89, sub-s. 3, "*the county of London and the county of Middlesex shall be deemed to be one county for the purpose of all legal proceedings civil or criminal*" . . . *in any court except the Court of Quarter Sessions, and power was given for the making of rules of the Supreme Court for the purpose of carrying this section into effect.* See *the rule*, ante, p. 185. *This offence may also be tried by special commission.* See 35 H. 8, c. 2, s. 1 (ante, p. 1055). *Punishment*, see ante, p. 1064.

Evidence.

The count is proved in the same manner as the count for compassing the King's death (*see ante*, pp. 1066 *et seq.*), namely, by proving one or more of the overt acts laid. The fact of the persons adhered to being enemies may be proved by the production of the Gazette containing the proclamation, if war were formally proclaimed, or public notoriety is sufficient evidence of it. Y. B. 19 E. 4, f. 5; Fost. 219; 1 Hale, 164. And whether they are enemies or not is a matter of fact to be determined by the jury. *Id.*

An actual adherence must be proved. A mere conspiracy or intention to adhere is not treason within this branch of the statute, although probably such a conspiracy might be laid as an overt act of compassing the King's death. But if you can prove such a conspiracy, and connect the defendant with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design, you may give it in evidence against the defendant, if it tends to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all. *R.* v. *Stone*, 25 St. Tr. 1155; 6 T. R. 527 (*see ante*, p. 1066).

Overt acts.]—The words in the *Treason Act*, 1351 (ante, p. 1053), are "or be adherent to the enemies of our Lord the King in his realm, giving to them aid

or comfort in the realm or elsewhere." As to the words in the Parliament Roll and Statute Roll, *see R.* v. *Casement* [1917] 1 K. B. 98, 134. The offence defined by these words is "adhering to the King's enemies within the land or without, and declaring the same by some overt act;" 3 Co. Inst. 10, 11, 63; Co. Litt. 261 b; the offences being complete though both the adherence and the enemies adhered to are without the realm. *See* Fitzh. Abr. Trial, 54. As to the common law before the statute and as to the statute, *see* 1 Hale, 91. 159, 165, 166, 169; 1 Hawk. c. 17, s. 28; 1 East, P. C. 60, 78; Alexander Luders on High Treason, pp. 12, 13; Holbourne's Readings, 12, 13; Bacon, Law Tracts, 164; 18 G. 2, c. 30 (preamble): *R.* v. *Maclane*, 26 St. Tr. 722. 725, Osgoode, C.J. (Quebec): *Mulcahy* v. *R.*, L. R. 3 H. L. 306, 317, Willes, J.: *R.* v. *Lynch* [1903] 1 K. B. 444; 72 L. J. (K. B.) 107. The words "giving aid and comfort to the King's enemies" are words in apposition; they are words to explain what is meant by being adherent to, so that a man may be adherent to the King's enemies in his realm by giving to them aid and comfort in his realm or he may be adherent to the King's enemies elsewhere by giving them aid and comfort elsewhere. In either case he is equally adherent to the King's enemies, and so commits this treason. *R.* v. *Casement* [1917] 1 K. B. 98, 136. Records are preserved in the Record Office of the following cases, all of which contain indictments under 35 H. 8, c. 2, for adhering to, aiding, and assisting the King's enemies abroad, viz.: *R.* v. *Lord Wentworth* (referred to 4 St. Tr. 314): *R.* v. *Grymston: R.* v. *Chamberlayn* (1559: for the surrender of Calais, Baga de Secretis, pouches 38, 39; but as to this case, *see R.* v. *Casement* [1917] 1 K. B. 98, 128): *R.* v. *Lord Middleton and John Stafford* (K. B. Rolls, 1713: for assisting the King of France in fighting against the British in France): *R.* v. *Duke of Wharton* (1728: for assisting the King of Spain in the siege of Gibraltar, Baga de Secretis, pouch 67): *R.* v. *Cundell* (1812: for assisting "the French Government and the men of France under the said Government" in fighting against the British in the Isle of France, Baga de Secretis, pouch 89; 4 Newgate Calendar, 62; followed in *R.* v. *Casement*, [1917] 1 K. B. 98). Every assistance given by the King's subjects to his enemies, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. 1 Hale, 159. Any act done by a British subject which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, or which weakens or tends to weaken the power of the King and of the country to resist or attack the enemies of the King and country, constitutes giving aid and comfort to the King's enemies within the meaning of this part of the Act of Edward III. *R.* v. *Casement*, *supra*. Therefore, if a British subject joins the King's enemies in acts of hostility against this country; Fost. 216; 1 Hawk. c. 17, s. 28; or even against the King's allies; Fost. 220: *R.* v. *Vaughan*, 2 Salk. 634; 13 St. Tr. 485; or raises troops for the enemy; *R.* v. *Harding*, 2 Vent. 315 (where, after a special verdict, it was held that the indictment did not sufficiently charge an adherence to the King's enemies, as it did not state who those enemies were; but the prisoner was convicted of compassing the King's death); or while a state of war exists endeavours in an enemy country to persuade British prisoners of war in that

enemy country to join the armed forces of the enemy; *R.* v. *Casement*, *supra*, or takes part in an attempt to land arms and ammunition in any part of the United Kingdom for the use of the enemy; *R.* v. *Casement*, *supra*; or delivers up the King's castles, forts, or ships of war to the King's enemies through treachery or in combination with them; Fost. 219; 3 Co. Inst. 10; 1 Hale, 168; or even detains the King's castles, etc., from him, if it is done in confederacy with the enemy; Fost. 219; 1 Hale, 326; or sends money, arms, intelligence, or the like to the King's enemies; Fost. 217; although such money, intelligence, etc., be intercepted and never reach them; *R.* v. *Gregg*, 14 St. Tr. 1371, 1376 n.; Fost. 217, 218: *R.* v. *Hensey*, 19 St. Tr. 1341; 1 Burr. 642: *R.* v. *De la Motte*, 21 St. Tr. 808: *R.* v. *Lord Preston*, 12 St. Tr. 645: *R.* v. *Tyrie*, 21 St. Tr. 815: he is guilty of treason. *See also* the following Irish cases: *R.* v. *Jackson*, 25 St. Tr. 783: *R.* v. *Sheares*, 27 St. Tr. 255: *R.* v. *McCann*, *Id.* 399: *R.* v. *Byrne*, *Id.* 455: *R.* v. *Bond*, *Id.* 523. Where the accused, who was a British subject acting as German Consul at Sunderland, continued to assist German subjects of military age to return from England to Germany after a state of war existed between this country and Germany, and was convicted of high treason on an indictment charging him with adhering to, aiding, and comforting the King's enemies, it was held on appeal that the conviction must be quashed, because the judge had directed the jury that it was no defence for the accused to say that he believed he was lawfully entitled to act as he did, whereas they should have been told that they must consider whether the acts of the appellant were done by him with the intention of assisting the King's enemies or whether he acted without any evil intention and in the belief that it was his duty to assist German subjects to return to Germany, in which case he would not be guilty. *R.* v. *Ahlers* [1915] 1 K. B. 616; 24 Cox, 623; 79 J. P. 255; 31 T. L. R. 141; 11 Cr. App. R. 63. Where letters, etc., have been thus intercepted, it is much better to charge them to have been sent from the place where the venue was laid, to be delivered in parts beyond the seas, to the enemy, according to the fact, than to state them to have been sent *in partes transmarinas*, to be delivered to the enemy. Fost. 218. In *R.* v. *Stone*, 25 St. Tr. 1155; 6 T. R. 527, it was objected that the intelligence transmitted by the defendant to the enemy was calculated to dissuade them from invading this country, and was sent with that intent; but Lord Kenyon, C.J., said that whether the intelligence were calculated to dissuade or invite the enemy was immaterial; if it were such as was likely to prove useful to them, in enabling them to annoy us, defend themselves, or shape their attacks, sending such intelligence with a view of its reaching the enemy was undoubtedly high treason. If a British subject incites foreigners to invade this country, it is treason, whether the foreigners be enemies or not; if enemies, it is treason within this branch of the statute; if not enemies, still it is an overt act of compassing the King's death. Fost. 196, 197; 1 Hale, 167. But if a British subject is in a foreign country when war breaks out between that country and this, and continues to reside there, or if during a truce he goes to a foreign country, and returns before the truce expires, this is no treason, unless he actually conspire with the enemy, or aid him in forwarding his measures for hostility. 1 Hale, 165, 166. Serving in war the

King *de facto* is not treason. 11 H. 7, c. 1 (*ante*, p. 1055). This statute appears not to apply to South Africa. *R.* v. *Botha*, 1 Searle, Cape Supreme Ct. 149.

Swearing fealty to a hostile power.]—If an Englishman during war between the King of England and France is taken by the French, and there swears fealty to France, if it is done voluntarily, it is an adhering to the King's enemies; but if it is done for fear of his life, and he returns, as soon as he might, to the allegiance of the crown of England, this is not an adherence to the King's enemies within the Act. 1 Hale, 167. In *R.* v. *Lynch* [1903] 1 K. B. 444; 20 Cox, 468, the prisoner, a British subject, during the war between Great Britain and the South African Republic, subscribed a declaration of willingness to take up arms on behalf of and took an oath of allegiance to the South African Republic. He then obtained letters of naturalization from the South African Republic, and afterwards engaged in various acts of warfare against the British forces. He was indicted in the King's Bench Division of the High Court for high treason, viz., for adhering to the enemies of the late Queen, and the making of the aforesaid declaration and the taking of the aforesaid oath of allegiance were charged as overt acts, as were his various acts of warfare against the British forces in which he subsequently engaged. It was contended for the defence that the prisoner had by reason of the provisions of the *Naturalization Act*, 1870 (33 & 34 Vict. c. 14), ss. 4, 6, been guilty of no offence; but the Court (Alverstone, C.J., Wills and Channell, JJ.) held that the last-mentioned statute does not empower a British subject to become naturalized as a subject of a hostile state in time of war, and that the act of becoming naturalized under such circumstances is itself an act of treason.

Enemies.]—As to the King's enemies within the meaning of this statute;—the subjects of all states against which his Majesty may have proclaimed or declared war are his enemies; so are the subjects of states in actual hostility with us, whether war have been solemnly proclaimed or not. Fost. 219; 1 Hale, 162. But merely issuing letters of marque does not create a state of hostility between two states, although nearly equal to a state of war in its consequences. 1 Hale, 162. Nor is inciting the subjects of a state in amity with us to invade this country treason within this branch of the statute, although it certainly would be an overt act of compassing the King's death. 1 Hale, 167. But if the subjects of a state in amity with us were to invade the country in a hostile manner, or otherwise commit hostilities against us, they would be enemies within the meaning of this statute, and adhering to them would be treason. Fost. 219; 1 Hale, 164; 3 Co. Inst. 11; 4 Co. Inst. 162: *R.* v. *Vaughan*, 2 Salk. 634; 13 St. Tr. 485. British subjects, however, can never be deemed the King's enemies within the meaning of this Act, and therefore to give relief or assistance to a rebel would not be treason within this branch of the statute. 3 Co. Inst. 11; 1 Hale, 159; 1 Hawk. c. 17, s. 28.

It must appear upon the face of the indictment that the persons adhered to were enemies.

SECT. 2.

TREASON FELONY.

Statutes

11 & 12 *Vict. c.* 12 (*Treason Felony Act*, 1848), *s.* 3.]—If any person whatsoever after the passing of this Act (April 22, 1848) shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lord the King, *his heirs or successors*, from the style, honour, or royal name, of the imperial crown of the United Kingdom, or of any other of his Majesty's dominions and countries, or to levy war against his Majesty, *his heirs or successors*, within any part of the United Kingdom, in order by force or constraint to compel him *or them* to change his *or their* measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other his Majesty's dominions or countries under the obeisance of his Majesty, *his heirs or successors*, and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, *or by open and advised speaking*, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable . . . to be transported beyond the seas for the term of his or her natural life. . . .

[*As to the history of this section, and its relation to the previous law*, see *R.* v. *Mitchel*, 6 St. Tr. (N. S.) 599 n. *The words in italics were* rep. 54 & 55 Vict. c. 67 (S. L. R.); *the other words omitted were* rep. 55 & 56 Vict. c. 19 (S. L. R.). *By s.* 30 *of the* Interpretation Act, 1889 (52 & 53 Vict. c. 63), "*unless a contrary intention appears*" *references in a statute whenever passed to the sovereign reigning when the Act was passed are to be read as references to the sovereign for the time being.*]

Sect. 6.—*Not to affect* 25 *Edw.* 3, *st.* 5, *c.* 2.]—Provided always that nothing herein contained shall lessen the force of or in any manner affect anything enacted by the *Treason Act*, 1351 (25 Edw. 3, st. 5, c. 2), *ante*, p. 1053.

Sect. 7.—*Indictment, etc., valid, though facts amount to treason.*]—Provided also that if the facts or matters alleged in an indictment for any felony under this Act shall amount in law to treason, such indictment shall not by reason thereof be deemed void, erroneous, or defective: and if the facts or matters proved on the trial of any person indicted for any felony under this Act shall amount in law to treason, such person shall not by reason thereof be entitled to be acquitted of such felony; but no person tried for such felony shall be afterwards prosecuted for treason upon the same facts.

Sect. 8.—*Punishment of accessories.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable: and every accessory after the fact to any

such felony shall on conviction be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

Sect. 10.—*Costs.*]—Rep. *as to England by* 8 Edw. 7, c. 15, s. 10, *and replaced by other provisions of that Act*, ante. pp. 267 et seq.

Indictment. (11 *&* 12 *Vict. c.* 12, *s.* 3, ante, p. 1077).

STATEMENT OF OFFENCE.

Treason felony, contrary to section 3 of the Treason Felony Act, 1848.

PARTICULARS OF OFFENCE.

A. B., between the —— day of ——, and —— day of ——, in the county of ——, compassed or intended to levy war against our Lord the King in Ireland in order to put force or constraint upon the Houses of Parliament, and expressed or uttered or declared such compassing or intention in a public speech delivered by him at ——, on the —— day of —— [*or as the case may be*].

Overt Acts of the Offence.

[State them in ordinary language—*see ante*, p. 1071.]

In R. *v.* Meany, 10 Cox, 506; Ir. Rep. 1 C. L. 500 C. C. R. Ir., *tried at Dublin, where the indictment was under* 11 *&* 12 *Vict. c.* 12, *and some of the overt acts charged in each count were conspiracies to effect the treasonable intent charged, it was held that overt acts done by some of the conspirators within the venue in furtherance of the conspiracies were acts for which the defendant, a fellow-conspirator, was responsible, though at the time the acts were done he was in America, and that therefore his offence was committed within the venue. The following seem to be all the other reported cases on this statute:*— R. *v.* Mitchel, 6 St. Tr. (N. S.) 599; 3 Cox, 1: R. *v.* O'Doherty, 6 St. Tr. (N. S.) 831: R. *v.* Dowling, 7 St. Tr. (N. S.) 381; 3 Cox, 509: R. *v.* Cuffey, 7 St. Tr. (N. S.) 467; 3 Cox, 517: R. *v.* Cumming, 7 St. Tr. (N. S.) 485. R. *v.* Duffy, 7 St. Tr. (N. S.) 795: R. *v.* Mullins, 7 St. Tr. (N. S.) 1110; 3 Cox, 526: R. *v.* Constantine, 7 St. Tr. (N. S.) 1127: R. *v.* Gallagher, 15 Cox, 291: R. *v.* Deasy, 15 Cox, 334; and see *the charge to a grand jury on the Act by* Alderson, B., 6 St. Tr. (N. S.) 1129.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 11 & 12 Vict. c. 12, s. 3; 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to the evidence*, see ante, pp. 1066 et seq. *It is no objection that the facts proved amount in law to high treason.* 11 & 12 Vict. c. 12, s. 7 (ante, p. 1077).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p 106).

As to costs, see ante, pp. 267 et seq.

SECT. 3.

ATTEMPTS TO INJURE OR ALARM THE SOVEREIGN.

Statute.

5 & 6 *Vict. c.* 51 (*Treason Act*, 1842), *s.* 2.]—If any person shall wilfully discharge or attempt to discharge, or point, aim, or present at or near to the person of the King, any gun, pistol, or any other description of firearms, or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material, or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the King, or if any person shall wilfully strike or strike at, or attempt to strike or to strike at, the person of the King, with any offensive weapon or in any other manner whatsoever, or if any person shall wilfully throw or attempt to throw any substance, matter or thing whatsoever, at or upon the person of the King, with intent in any of the cases aforesaid to injure the person of the King, or with intent in any of the cases aforesaid to break the public peace, or whereby the public peace may be endangered, or with intent in any of the cases aforesaid to alarm his Majesty; or if any person shall, near to the person of the King, wilfully produce or have any gun, pistol, or any other description of firearms, or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the King, or to alarm his Majesty, every such person so offending shall be guilty of a high misdemeanor, and being convicted thereof in due course of law shall be liable, at the discretion of the Court before which the said person shall be so convicted, to be transported beyond the seas for the term of seven years, or to be imprisoned, . . . and during the period of such imprisonment to be publicly or privately whipped, in such manner and form as the said Court shall order and direct. (*As to whipping*, see ante, pp. 244-246). [*It is submitted that the references in this Act to "the Queen" should be read as references to the sovereign for the time being.* Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 30, ante, p. 1077).]

For indictments and trials under this Act, see R. *v.* Bean, 4 St. Tr. (N. S.) 1382 : R. *v.* Hamilton, 7 St. Tr. (N. S.) 1130 : R. *v.* Pate, 8 St. Tr. (N. S.) 1 : R. *v.* O'Connor [1872] 7 St. Tr. (N. S.) 3 n.

Sect. 3.]—Provided, that nothing herein contained shall be deemed to alter in any respect the punishment which by law may now be inflicted, upon persons guilty of high treason or misprision of treason. (*See ante*, pp. 1063, 1065; *post*, *tit.* "*Misprision of Treason.*"

Indictment for presenting a Pistol at the King. (5 & 6 *Vict. c.* 51, *s.* 2.)

STATEMENT OF OFFENCE.

Aiming pistol at the King, contrary to section 2 of the Treason Act, 1842.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, wilfully pointed or aimed at our Lord the King a pistol, with intent to injure or alarm him.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour, with whipping during such imprisonment, as often and in such manner as the Court shall order, not exceeding thrice. 5 & 6 Vict. c. 51, s. 2: 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant presented the pistol at or near to the person of the King, as the case may be; and the intent as directed *ante*, pp. 352, 357, 396. It is immaterial whether the weapon was loaded or not.

SECT. 4.

OFFENCES AGAINST THE FOREIGN ENLISTMENT ACT, 1870.

Statute.

33 & 34 *Vict. c.* 90, *s.* 1.]—This Act may be cited for all purposes as the "*Foreign Enlistment Act*, 1870." [*The Act took the place of* 59 G. 3, c. 69 (rep.). *As to its history*, see 1 Steph. Hist. Cr. L. 257; 7 St. Tr. (N. S.) 979 n. *In* Ex parte Crawshay, 8 Cox, 356, *the Court of Queen's Bench refused leave to a private prosecutor to file an information under* 59 G. 3, c. 69. *But an indictment was preferred in* R. *v.* Granatelli, 7 St. Tr. (N. S.) 979, *at the instance of a foreign ambassador. Corporations were held not subject to indictment under that Act.* King of Two Sicilies *v.* Wilcox, 7 St. Tr. (N. S.) 1049; 1 Sim (N. S.) 334; 19 L. J. (Ch.) 481. But see 52 & 53 Vict. c. 63, s. 2, sub-s. 1, ante, p. 9.]

Sect. 2.—*Application of Act.*]—This Act shall extend to all the dominions of his Majesty, including the adjacent territorial waters.

Sect. 3.—*Commencement of Act.*]—This Act shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives

notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, referred to as the commencement of this Act. (*See R.* v. *Jameson* [1896] 2 Q. B. 425, *and as to proof of proclamation*, ante, pp. 407, 411).

Sect. 4.—*Penalty on enlistment in service of foreign state.*]—If any person, without the licence of his Majesty, being a British subject, within or without his Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with his Majesty, and in this Act referred to as a friendly state, or whether a British subject or not, within his Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour. [*See R.* v. *Granatelli*, 7 St. Tr. (N. S.) 979: *Burton* v. *Pinkerton*, L. R. 2 Ex. 340.]

Sect. 5.—*Penalty on leaving his Majesty's dominions with intent to serve a foreign state.*]—If any person, without the licence of his Majesty, being a British subject, quits or goes on board any ship with a view of quitting his Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within his Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting his Majesty's dominions with the like intent, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Sect. 6.—*Penalty on embarking persons under false representations as to service.*]—If any person induces any other person to quit his Majesty's dominions or to embark on any ship within his Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Sect. 7.—*Penalty on taking illegally enlisted persons on board ship.*]—If the master or owner of any ship, without the licence of his Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within his Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

(1) Any person who, being a British subject within or without the dominions of his Majesty, has, without the licence of his Majesty, accepted or agreed

to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state;

(2) Any person, being a British subject, who, without the licence of his Majesty, is about to quit his Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state;

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state;

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour; and

(2) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace; and

(3) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Sect. 8.—*Penalty on illegal ship-building and illegal expeditions.*]—If any person within his Majesty's dominions, without the licence of his Majesty, does any of the following acts; that is to say,

(1) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(2) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state;

Such person shall be deemed to have committed an offence against this Act and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments at the discretion of the Court before which the offender

is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to his Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following: (that is to say):

(1) If forthwith upon a proclamation of neutrality being issued by his Majesty he gives notice to the secretary of state that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the secretary of state;

(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the secretary of state may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the licence of his Majesty until the termination of such war as aforesaid. (*See The Gauntlet*, L. R. 4 P. C. 184: *The International*, L. R. 3 A. & E. 321.)

Sect. 9.—*Presumption as to evidence in case of illegal ship.*]—Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state, or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

Sect. 10.—*Penalty on aiding the warlike equipment of foreign ships.*]—If any person within the dominions of his Majesty, and without the licence of his Majesty—by adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of his Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Sect. 11.—*Penalty on fitting out naval or military expeditions without licence.*]—If any person within the limits of his Majesty's dominions, and without the licence of his Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to his Majesty.

[*It is not necessary to constitute an offence under this section that the expedition should be completely fitted out in this country. Any act of preparation of the expedition in this country is within the section.* R. *v.* Sandoval, 16 Cox, 206; 3 T. L. R. 411, 436, 498; 56 L. T. 526; 51 J. P. 709. *Therefore where the defendant had purchased guns and ammunition in this country, and had shipped them on a general ship here for the purpose of being put on board another ship in a foreign port, with the knowledge that they were to be used in a hostile demonstration against a friendly state, it was held that he was guilty of having prepared a naval expedition within the meaning of this section.* Id.

If an expedition is unlawfully prepared within the King's dominions, a British subject who assists therein, even without such dominions, is liable under this section. R. *v.* Jameson [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218; and see The Salvador, L. R. 3 P. C. 218: Att.-Gen. *v.* Sillem, 2 H. & C. 431; 32 L. J. (Ex.) 92, *decided on* 59 G. 3, c. 69, s. 7 (rep.).]

Sect. 12.—*Punishment of accessories.*]—Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

Sect. 13.—*Limitation of term of imprisonment.*]—The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Sect. 14 *relates to the restoration of prize brought into British waters in breach of the neutrality of the realm, or by vessels equipped in breach of the Act.*

Sect. 15.—*Licence by his Majesty, how granted.*]—For the purposes of this Act, a licence by his Majesty shall be under the sign manual of his Majesty, or be signified by order in council or by proclamation of his Majesty.

Sect. 16.—*Jurisdiction in respect of offences by persons against Act.*]—Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within his Majesty's dominions in which the person who committed such offence may be.

Sect. 17.—*Venue in respect of offences.*]—Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within his Majesty's dominions, and the venue or local description in the margin may be that of the county,

city, or place in which the trial is held. (*As to the necessary statements in the indictment*, see R. *v.* Jameson [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218; 18 Cox, 392.)

Sect. 18.—*Power to remove offenders for trial.*]—The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the Court having the highest criminal jurisdiction in that place, may, by warrant, or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in his Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place. Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant. Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Sect. 19. *Jurisdiction in respect of forfeiture of ships for offences against Act.*]—All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the secretary of state or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the Court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Sect. 20.—*Regulations as to proceedings against the offender and against the ship.*]—Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Sects. 21-26 *relate to seizure of ships and search of ships and dockyards; s.* 27, *to appeals from decisions of Admiralty Court; ss.* 28, 29, *to protection*

of officers and secretary of state. The secretary of state for foreign affairs at present exercises the power of issuing warrants given by s. 23.

Sect. 30.—*Interpretation of terms.*]—In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

"*Foreign state*" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

"*Military service*" shall include military telegraphy (*see The International* L. R. 3 A. & E. 321) and any other employment whatever, in or in connection with any military operation:

"*Naval service*" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

"*United Kingdom*" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"*British possession*" means any territory, colony, or place being part of his Majesty's dominions, and not part of the United Kingdom, as defined by this Act:

"*The secretary of state*" shall mean any one of his Majesty's principal secretaries of state:

"*The governor*" shall as respects India mean the governor-general or the governor of any presidency, and where a British possession consists of several constituent colonies, mean the governor-general of the whole possession or the governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor shall be included under the term "governor:"

"*Court of Admiralty*" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any vice-admiralty court within his Majesty's dominions:

"*Ship*" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

"*Building*" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:

"*Equipping*" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting

her for the sea or for naval service, and all words relating to equipping shall be construed accordingly :

" *Ship and equipment* " shall include a ship and everything in or belonging to a ship :

" *Master* " shall include any person having the charge or command of a ship.

[*These definitions are not restrictive, but inclusive. The Gauntlet*, L. R. 4 P. C. 184.]

Sect. 31.—*Repeals* Foreign Enlistment Act, 1819 (59 G 3, c. 69).

Sect. 32.]—*Saving as to commissioned ships of foreign states.*

Sect. 33.—*Penalties not to extend to persons entering into military service in Asia.*]—Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or licence as is for the time being required by law in the case of subjects of his Majesty entering into the military service of princes, states, or potentates in Asia.

Indictments and Evidence.

For precedents, see R. *v.* Jameson [1896] 2 Q. B. 425; 65 L. J. (M. C.) 218; 18 Cox, 392 : R. *v.* Sandoval, 16 Cox, 206.

SECT. 5.

COINAGE OFFENCES.

General Provisions.

Statute.

Until 1832 (2 *&* 3 W. 4, *c.* 34), *counterfeiting the King's gold or silver money was high treason under* 25 Edw. 3, st. 5, c. 2 (ante, p. 1053). 1 Hale, 211; 1 East, P. C. 159; 1 Hawk. c. 17, s. 57; 2 Chit. Cr. L. 103 n. *The only relics of the old law are the unrepealed provisions of* 6 G. 3, c. 53, s. 3, *and* 6 G. 4, c. 50, s. 21, *which enact that the procedure on the trial of high treason is not to apply to treason by counterfeiting coin.*

24 *&* 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 1.—*Interpretation of terms.*]—In the interpretation of and for the purposes of this Act,

Current gold and silver coin]—the expression " the King's current gold or silver coin " shall include any gold or silver coin coined in any of his Majesty's mints or lawfully current, *by virtue of any proclamation or otherwise*, in any part of his Majesty's dominions, whether within the United Kingdom or otherwise;

Current copper coin]—and the expression "the King's copper coin" shall include any copper coin and any coin of bronze or mixed metal coined in any of his Majesty's mints, *or* lawfully current, *by virtue of any proclamation or otherwise*, in any part of his Majesty's said dominions;

False or counterfeit coin]—and the expression "false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin" shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for, any of the King's current coin of a higher denomination;

Current coin]—*and the expression "the King's current coin" shall include any coin coined in any of his Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of his Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal.* [*This definition of "current coin" was new in* 1861. *It includes colonial coin. It does not include token coinage* (see 33 & 34 Vict. c. 10, s. 5), *but does include foreign coin lawfully current.* See Chalmers, Colonial Currency; *and for the proclamations at present in force, making certain coin current in different parts of the King's dominions, see* Statutory Rules and Orders Revised (ed. 1904), vol. 2, tits. Coin, and Coin, Colonies, *and subsequent annual volumes of the* Statutory Rules and Orders. *Those since issued are to be found in the subsequent annual volumes of the* Statutory Rules and Orders. *These works being published "by authority" can be put in evidence in the manner provided* ante, p. 406. *As to offences in colonies*, see 16 & 17 Vict. c. 48.]

Criminal possession]—and where the having any matter in the custody or possession of any person is *mentioned* in this Act, *it shall include* not only the having of it by himself in his personal custody or possession, but also *the knowingly and wilful having it in the actual custody or possession of any other person*, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person. [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 21, *and* 22 & 23 Vict. c. 30, *with the additions italicized. The definition of "possession" was altered to get rid of doubts expressed in* R. *v.* Rogers, 2 Mood. 85: R. *v.* Gerrish, 2 M. & Rob. 219: and R. *v.* Williams, C. & Mar. 259.]

Sect. 27.]—*Provision for discovery and seizure of counterfeit coin and coining tools.*

Sect. 28.—*Venue for uttering.*]—*Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or* where two or more persons, acting in concert in different counties or jurisdictions, shall

commit any offence against this Act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction. (*See ante*, pp. 37, 41.) [*The latter part of this section re-enacts* 2 & 3 W. 4, c. 34, s. 15. *The italicized part was new in* 1861.]

Sect. 29. *Proof of coin being counterfeit.*]—Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of his Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 17.]

Sect. 30.—*When the counterfeiting, etc., shall be complete.*]—Every offence of falsely making or counterfeiting any coin, *or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin*, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, *or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off*, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected. [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 3, *with the additions in italics, inserted to overrule* R. *v.* Bradford, 2 Cr. & Dix. (Ir. Circ. Rep.) 41.]

Sect. 31.—*Apprehension of offenders.*]—It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law. [*This was new law in* 1861.]

Sect. 35.—*Accessories, etc.*]—In the case of every felony punishable under the Act, every principal in the second degree and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 18: and see post, "Accessories."]

Sect. 36.—*Admiralty Offences.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place; and in any indictment for any such offence, or for being accessory to any such offence, the venue

in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" *and where any of the crimes and offences, or high crimes and offences, mentioned in this Act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law in Scotland may inquire, try, and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland;* provided that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces. [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 20; *and* 7 & 8 Vict. c. 2, *with the addition of the provisions as to Scotland.*]

Sect. 37, as amended by the *Indictments Act*, 1915 (5 & 6 G. 5, c. 90), Sched. II.—*Proof of former convictions.*]—Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the Court or other officer having or purporting to have the custody of the records of the Court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the Court; and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment, as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the Court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry; Provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. [*This*

section was new law in 1861. *As to alternative modes of proving previous convictions*, see ante, p. 421. *For a peculiar case of breach of the statute*, see R. *v.* Russell, 6 Cr. App. R. 78.]

Sect. 38.—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorised, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the Court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. [*This clause was new law in* 1861.]

Sect. 42.—*Costs of prosecutions in England.*]—Rep. 8 Edw. 7, c. 15, s. 10. See ante, pp. 267 et seq.

COUNTERFEITING BRITISH OR FOREIGN COIN.

Statute.

24 *& 25 Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 2.—*The King's gold or silver coin.*]—Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 3.]

Sect. 14.—*The King's copper coin.*]—Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the King's current copper coin . . . shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This provision re-enacts* 2 & 3 W. 4, c. 34, s. 12. *For the rest of the section*, see post, p. 1098.]

Sect. 18.—*Foreign gold and silver coin.*]—Whosoever shall make or counterfeit any kind of coin not being the King's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 37 G. 3, c. 126, s. 2.]

Sect. 22.—*Other foreign coin.*]—Whosoever shall falsely make or counterfeit any kind of coin not being the King's current coin, but resembling or apparently

intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin, of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable . . . for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 43 G 3, c. 139, s. 3.]

(*As to coining tools*, see post, p. 1109. *As to sale of counterfeit coin, etc.*, see post, p. 1097.)

Indictment. (24 & 25 *Vict. c.* 69, *s.* 2, ante, p. 1091.)

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Making counterfeit coin, contrary to section 2 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, falsely made or counterfeited ten sovereigns and twenty florins, resembling or apparently intended to resemble or pass for the King's current coin.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, s. 2; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, see 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

An indictment for counterfeiting foreign coin, or the King's copper coin, can be framed from the above form, with the necessary changes.

Felonies: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, ss. 14, 18; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to recognizances and sureties*, see 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

These offences are not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and abetting in counterfeiting the coin in question. Under the present statutes only the party who actually counterfeits would be the principal felon, and the others accessories before the fact, although triable as principals; *see ante*, p. 1089, *post*, tit. Accessories. Before the modern statutes which reduced the offence of coining from treason to felony, if several conspired to counterfeit the King's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might have all been indicted for counterfeiting the King's coin generally. 1 Hale, 214.

By 24 & 25 Vict. c. 99, s. 30 (*ante*, p. 1089), the offence of counterfeiting is to be deemed complete, although the coin made or counterfeited is not in a fit state to be uttered, or the counterfeiting thereof is not finished or perfected. *See R. v. Hermann*, 4 Q. B. D. 284; 48 L. J. (M. C.) 106; 14 Cox, 279 (*post*, p. 1103), from which it would appear that the addition of a new milling to a genuine sovereign, which has been fraudulently filed at the edges so as to reduce its weight and destroy the original milling, is the counterfeiting of a sovereign, and within s. 2 (*ante*, p. 1091).

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the Mint. 24 & 25 Vict. c. 99, s. 29 (*ante*, p. 1089).

If it becomes a question whether the coin which the counterfeit money was intended to imitate is the King's coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact to be left to the jury upon evidence of usage, reputation, etc. 1 Hale, 196, 212, 213. As to the proclamations and their proof, *see ante*, pp. 407, 411.

It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. 1 Hale, 215, 229; 3 Co. Inst. 16; 1 East. P. C. 165.

But on a charge of counterfeiting coin evidence of uttering counterfeit coin is admissible to prove the *scienter*. *R. v. Rowlands*, 3 Cr. App. R. 224.

COLOURING, ETC., COIN TO RESEMBLE, ETC., BRITISH COIN.

Statute.

24 & 25 *Vict. c.* 99. (*Coinage Offences Act*, 1861), *s.* 3.]—Whosoever shall gild or silver, or shall with any wash or materials capable of producing the colour or appearance of gold or of silver, *or by any means whatsoever* wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or

pass for any of the King's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, *or by any means whatsoever* wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, *or by any means whatsoever* wash, case over, or colour any of the King's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, *or by any means whatsoever* wash, case over, or colour any of the King's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the King's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

[*This section re-enacts* 2 & 3 W. 4, c. 34, s. 4, *with the additions italicized. The introduction of the words* " capable of producing " *and* " by any means whatsoever " *appears to remove the doubts expressed on* 8 & 9 W. 3, c. 26, s. 4 (rep.), *and* 12 G. 2, c. 28 (rep.), *as to whether the word* " colouring " *was confined to superficial application.* See R. *v.* Lavey, 1 Leach, 153; 1 East, P. C. 166.]

Indictment for colouring the King's Coin. (24 & 25 *Vict. c.* 99, *s.* 3.)

Commencement as ante, p. 1092.

STATEMENT OF OFFENCE.

Colouring coin, contrary to section 3 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, gilded [or washed, cased over or coloured] ten coins resembling or apparently intended to resemble or pass for the King's current half-sovereigns.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, s. 3; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091). *As to venue*, see ante, pp. 37, 41.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the gilding, etc., or colouring, as stated in the indictment. In *R.* v. *Case*, 1 Leach, 154 n.; 1 East. P. C. 165, the defendant was apprehended in the act of making counterfeit shillings, by steeping round blanks, composed of brass and silver, in *aqua fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing they readily acquired the appearance of silver, and would pass current; a conviction under 12 G. 2, c. 28 (*rep.*), was held to be right. Under 2 & 3 W. 4, c. 34 (*rep.*), it was held that where a wash or material was alleged to have been used by the defendant, it must be shown either from the application by the defendant, or from an examination of its properties, that it was capable of producing the colour of gold or silver. But an indictment, charging the use of such material, will be supported by proof of a colouring with gold itself. *R.* v. *Turner*, 2 Mood. 42.

IMPAIRING, ETC., BRITISH GOLD AND SILVER COIN.

Statute.

24 *& 25 Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 4.]—Whosoever shall impair, diminish, or lighten any of the King's current gold or silver coin, with intent *that* the coin so impaired, diminished, or lightened, *may* pass for the King's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 5, *with the alterations italicized.*]

Sect. 5.—*Unlawful possession of filings and clippings of gold or silver coin.*]—Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the King's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section was new law in* 1861.]

Indictment. (24 & 25 *Vict. c.* 99, *s.* 4.)

STATEMENT OF OFFENCE.

Impairing coin, contrary to section 4 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, impaired, diminished, or lightened ten pieces of the King's current sovereigns with intent that the coins so impaired, diminished, or lightened should pass for the King's current sovereigns.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, s. 4; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

Evidence.

Prove the impairing, etc., by direct or presumptive evidence, as that the defendant was in possession of filings of impaired coin, or of the instruments for filing. Prove, also, the intent, by evidence from which it may be inferred by the jury; as, for instance, that the defendant attempted to pass the coin, or had passed other coin so impaired, or that he carried it about with him mixed with other money, particularly if it was not so impaired as apparently to affect its currency.

DEFACING BRITISH COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), s. 16.]—Whosoever shall deface any of the King's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour. [*This section re-enacts* 16 & 17 Vict. c. 102, s. 1, *with certain omissions.*]

Sect. 17.—*Defaced coin not legal tender.—Prosecution.*]—No tender of payment in money made in any gold, silver, or copper coin so defaced by stamping, as in the last preceding section mentioned, shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced, shall, on conviction thereof, before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: provided that it shall not be lawful for any person to

proceed for any such last-mentioned penalty, without the consent, in England or Ireland, of his Majesty's attorney-general for England or Ireland respectively, or in Scotland of the lord advocate. [*This section re-enacts* 16 & 17 Vict. c. 102, s. 2.]

Indictment for defacing British Coin. (24 & 25 *Vict. c.* 99. *s.* 16.)

STATEMENT OF OFFENCE.

Defacing coin, contrary to section 16 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, defaced ten pieces of the King's current sovereigns by stamping thereon the words ——.

Misdemeanor: imprisonment for not more than one year, with or without hard labour. 24 & 25 Vict. c. 99, s. 16. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 38 (ante, p. 1091).

Evidence.

Prove that the defendant defaced the coin in question, by stamping on it any names or words, or both. Although the word "wilfully" is not in the present statute, it is submitted that the defacing to be punishable must be not merely accidental. It is not necessary to prove that the coin was thereby diminished or lightened. The defaced coin is no longer a legal tender, and any person uttering it is liable to a penalty not exceeding forty shillings, which, however, cannot be proceeded for without the consent of the attorney-general or lord advocate. 24 & 25 Vict. c. 99, s. 17 (*supra*).

BUYING OR SELLING, ETC., COUNTERFEIT BRITISH COIN AT A LOWER VALUE.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act.* 1861). *s.* 6.—*King's gold or silver coin.*]—Whosoever, *without lawful authority or excuse (the proof whereof shall lie on the party accused)*, shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, at or for a lower rate or value than the same imports *or was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life: . . . *and in any indictment*

for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off, the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off.

[*The first part of this section re-enacts* 2 & 3 W. 4, c. 34, s. 6, *with the addition of the words in italics to protect officers engaged in detecting offences against the coin. The latter part of the section was new in* 1861, *and was framed to get rid of the decisions in* R. *v.* Joyce, Car. Supp. 184; 3 C. & P. 411 n.; R. *v.* Hedges, 3 C. & P. 410; *and* R. *v.* Wooldridge, 1 Leach, 307; 1 East, P. C. 179.

Sect. 14.—*Copper coin.*]—Whosoever . . . shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current copper coin, at or for a lower rate of value than the same imports *or was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . .

For other offences created by the section, see ante, p. 1092, *post*, p. 1109. [*The section re-enacts* 2 & 3 W. 4, c. 34, s. 12, *with the additions italicized.*]

Indictment for buying or selling Counterfeit Gold or Silver British Coin at a Lower Rate than by its Denomination it imports. (24 *&* 25 *Vict. c.* 99, *s.* 6.)

Statement of Offence.

Buying counterfeit coin, contrary to section 6 of the Coinage Offences Act, 1861.

Particulars of Offence.

A. B., on the —— day of ——, in the county of ——, without lawful authority or excuse, bought [or received or offered to buy or receive] ten counterfeit coins resembling, or apparently intended to resemble or pass for, the King's current florins, for a lower value than at the rate of two shillings for each coin.

As to the venue, see ante, pp. 37, 41, 1089. *The indictment need not state at what rate the coin was bought, sold, etc.*

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, s. 6; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

The indictment for an offence against 24 & 25 Vict. c. 99, s. 14, *may be framed from the above form, with the substitution of copper for gold or silver, and change of the denomination. It seems also necessary to state the rate at which copper coin was sold.* See R. *v.* Joyce, Car. Supp. 184.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, s. 15; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to recognizances and sureties,* see 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

Evidence.

Prove that the defendant bought, etc., the counterfeit coin, as mentioned in the indictment. The proof of lawful authority or excuse for the act lies on the defendant.

It must also be proved that the coin was sold at a lower rate than it imports, but the precise rate at which it was sold need not now be stated in the indictment in the case of gold or silver coin. 24 & 25 Vict. c. 99, s. 6 (*supra*).

IMPORTING OR EXPORTING COUNTERFEIT COIN.

Statute.

24 *& 25 Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 7.—*Importing counterfeit of British gold or silver coin.*]—Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 *& 3 W.* 4, c. 34, s. 6, *with additions italicized.*

Sect. 8.—*Exporting counterfeit British coin.*]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . . [*This section was new law in* 1861. *It appears to apply to counterfeit colonial coin. Greaves, Crim. Law Cons. Acts* (2nd ed.), p. 324.]

Sect. 19.—*Importing foreign counterfeit gold or silver coin.*]—Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall bring or receive into the United Kingdom any such false or counterfeit coin (*i.e., any kind of coin not being the King's current gold or silver coin, s.* 18) resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 37 G. 3, c. 126, s. 3, *with the additions italicized.*]

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876), *s.* 150.—*Importation of base coin into certain colonies prohibited.*]—Base or counterfeit coin is hereby absolutely prohibited to be imported or brought, either by sea or inland carriage or navigation, into the British possessions in America or the Mauritius.

Sect. 151.]—*Act to extend to British possessions abroad.*

Indictment for importing Counterfeit Gold or Silver Coin. (24 & 25 *Vict. c.* 99, *s.* 7, ante, p. 1099.)

STATEMENT OF OFFENCE.

Importing counterfeit coin, contrary to section 7 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, without lawful authority or excuse, imported or received into the United Kingdom from beyond the seas ten counterfeit coins resembling or apparently intended to resemble or pass for ten of the King's current gold coins called sovereigns, knowing the said coins to be counterfeit.

Felony 24 & 25 Vict. c. 99, s. 7. See *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant imported the counterfeit coin. The terms of s. 7 appear to include importation from any place beyond the seas, whether within or without the King's dominions; *but see* 1 Hawk. c. 17, s. 87; 1 East, P. C. 175. Prove also the defendant's guilty knowledge: for unless that be averred in the indictment, and proved, it is no offence. 1 Hale, 228; 1 East, P. C. 175. The proof of lawful authority or excuse (if any) lies on the defendant. 24 & 25 Vict. c. 99, s. 7 (*ante*, p. 1099).

UTTERING COUNTERFEIT COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 9.—*Uttering counterfeit British gold or silver coin.*]—Whosoever shall tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 7.]

Sect. 10.—*Uttering counterfeit British gold or silver coin accompanied by possession of other counterfeit coin, or followed by a second uttering.*]—Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 7, *with minor alterations.*] Sect. 11.]—*See post*, p. 1107.

Sect. 12.—*Uttering after former conviction.*]—Whosoever having been convicted, *either before or after the passing of this Act*, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, *or of any felony or high crime and offence against this or any former Act relating to the coin*, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, ss. 7, 8, *with the alterations italicized.*]

Sect. 13.—*Uttering spurious coin, medals, etc., as current coin.*]—Whosoever shall, with intent to defraud, tender, utter or put off as or for any of the King's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure and colour the current coin as for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered,

uttered, or put off being of less value than the current coin as for which the same shall be so tendered, uttered or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour. . . . [*This section was new law in* 1861. *The defendant knowingly passed as and for a half-sovereign a medal of about the same size and colour as a half-sovereign. On the obverse side was Queen Victoria's head, as on a half-sovereign, but with a different inscription. The coin itself was not produced to the jury, and there was no evidence as to the appearance of the reverse side. It was held that there was some evidence that the medal was one, in size, figure and colour, resembling a half-sovereign.* R. *v.* Robinson, L. & C. 604; 34 L. J. (M. C.) 176.]

Sect. 14.]—*See ante*, pp. 1091, 1098, *post*, p. 1109.

Sect. 15.—*Uttering counterfeit British copper coin.*]—Whosoever shall tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current copper coin, knowing the same to be false or counterfeit, . . . (*as to possession*, see post, p. 1107), shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 12.]

Sect. 20.—*Uttering foreign counterfeit gold or silver coin.*]—Whosoever shall tender, utter or put off any such false or counterfeit coin (*as mentioned in s.* 19, *ante*, p. 1100) resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding six months, with or without hard labour. [*This section re-enacts* 37 G. 3, c. 126, s. 4.]

Sect. 21.—*Uttering foreign counterfeit gold or silver coin after former conviction.*]—Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (*see ante*, p. 243); and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 37 G. 3, c. 126, s. 4.]

Indictment for uttering Counterfeit British Gold or Silver Coin.
(24 & 25 *Vict. c.* 99, *s.* 9, ante, p. 1101.)

STATEMENT OF OFFENCE.

Uttering counterfeit coin, contrary to section 9 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, at a public-house called the Red Lion, in the county of ——, uttered a counterfeit sovereign, knowing the same to be counterfeit.

Misdemeanor: imprisonment for not more than one year, with or without hard labour. 24 & 25 Vict. c. 99, s. 9. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 38 (ante, p. 1091).

Evidence.

1. Prove the tendering, uttering or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. *R.* v. *Wooldridge*, 1 Leach, 307. Where a good shilling was given to a boy for fruit, and he put it into his mouth, under pretence of trying whether it was good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor, saying it was not good; this (which is called ringing the changes) was held to be an uttering within the meaning of 16 G. 2, c. 28 (*rep.*). *R.* v. *Franks*, 2 Leach, 644.

It is submitted that to be within the statute the uttering must at least amount to a holding forth of the thing uttered as current coin for the purpose of currency, and that it would not include use of a false coin as a means of cheating at play. *See R.* v. *McMahon* [1894] 13 N. S. W. Rep. Law, at p. 137, Foster, J.; *and cf. R.* v. *Shukard*, R. & R. 200.

The giving of a piece of counterfeit coin in charity was held not to be an uttering within 2 W. 4. c. 34, s. 7 (*rep.*), although the party knew it to be counterfeit; for that there must be some intention to defraud. *R.* v. *Page*, 8 C. & P. 122; 1 Russ. Cr. (7th ed.) 362 n. But this case was doubted by Mr. Greaves; *see* 1 Russ. Cr. (7th ed.) 363 n; and appears to have been treated as erroneous. *See R.* v. *Ion*, 2 Den. 475, 484, Alderson, B., *and Anon.*, 1 Cox, 250, where the giving of a counterfeit coin to a woman, as the price of connection with her, was held to be "uttering."

It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin is offered in payment, though it is refused by the person to whom it is offered. *R.* v. *Welch*, 2 Den. 78; 20 L. J. (M. C.) 101: *see R.* v. *Radford*, 1 Den. 59: *R.* v. *Ion*, 2 Den. 475; 21 L. J. (M. C.) 166.

As there are no accessories in misdemeanors, all persons who are engaged in the common purpose of uttering counterfeit coin, although the uttering in pursuance of that common purpose be by one only of such persons in the absence of the others, may be jointly convicted, or any of such persons may be separately

convicted, of that offence of uttering. 24 & 25 Vict. c. 94, s. 8 (*post*, tit. "Accessories"): *R.* v. *Greenwood*, 2 Den. 453; 21 L. J. (M. C.) 127: *see R.* v. *Hurse*, 2 M. & Rob. 360. These decisions overrule a series of cases in which it had been held that persons not present at the actual uttering could not be convicted of it, unless they were within such a distance as to be able to render assistance to the actual utterer, and which appear to have been decided without consideration of the distinction between felonies and misdemeanors as to principals and accessories, *see post*, tit. "Accessories."

A genuine sovereign, which has been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and to which a new milling has been added in order to restore the appearance of the coin, is a false and counterfeit coin within 24 & 25 Vict. c. 99, s. 9. *R.* v. *Hermann*, 4 Q. B. D. 284; 48 L. J. (M. C.) 106.

A coin made by splitting two genuine coins, and joining the heads together so as to make a double-headed coin, has been held counterfeit. *R.* v. *McMahon* [1894] 15 N. S. W. Rep. Law, 131, 136.

2. Prove that the defendant knew it to be a counterfeit sovereign at the time he uttered it. This, of course, must be done by circumstantial evidence. (*See ante*, pp. 360, 396). If, for instance, it is proved that he uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or a different denomination, to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question: this will be evidence from which the jury may presume a guilty knowledge. *R.* v. *Whiley*, 2 Leach, 983: *R.* v. *Foster*, Dears. 456; 24 L. J. (M. C.) 134. (*See ante*, p. 360.)

The mere fact that the defendant ran away when followed by a constable after the uttering is not enough *per se* to warrant a conviction. *R.* v. *Lee*, 72 J. P. 253; 1 Cr. App. R. 5. Nor is the admission of a previous conviction. *Id.*

Indictment for uttering Counterfeit British Coin, having at the same time Counterfeit Coin in Possession. (24 & 25 *Vict. c.* 99, *s.* 10, ante, p. 1101.)

As in the last precedent, adding "and having in his custody or possession at the time of such uttering, ten other counterfeit half-crowns."

Misdemeanor: imprisonment for not more than two years, with or without hard labour, 24 & 25 Vict. c. 99, s. 10. *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, Id. s. 38 (ante, p. 1091).

Evidence.

Prove the offence of uttering as directed *ante*, p. 1103, and prove that the defendant at the same time had about him one or more pieces of the counterfeit money specified in the indictment. The guilty knowledge may reasonably be implied from the possession of the other counterfeit coin. 24 & 25 Vict. c. 99,

s. 1 (*ante*, p. 1088), enacts that "where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person." Even prior to this enactment it had been held that where two persons went to a shop, and one of them went in and uttered a bad piece of money, having no more in her possession, and the other stayed outside the shop, having other bad money, both might be convicted, the uttering and the possession being joint; *R.* v. *Skerrit*, 2 C. & P. 427; and that where one of two persons in company (or, as it seems, apart from each other) utters counterfeit coin, and other counterfeit coin is found on the other, both are guilty of the aggravated offence of acting in concert, and both knowing of the possession. *R.* v. *Gerrish*, 2 M. & Rob. 219. *See R.* v. *Rogers*, 2 Mood. 85: *R.* v. *Williams*, C. & Mar. 259 (*post*, p. 1108): *R.* v. *Greenwood*, *R.* v. *Hurse* (*ante*, p. 1104).

Indictment for uttering twice within Ten days. (24 & 25 Vict. c. 99, *s.* 10, ante, p. 1101.)

As in the last example but one, adding "and having on the said day [*or on the —— day of —— (within ten days of the first uttering charged)*] at a public-house called the Nag's Head, in the county of ——, uttered a counterfeit florin."

The double uttering must be charged in one count of the indictment. R. *v.* Tandy, 2 Leach, 833: see R. *v.* Martin, 2 Leach, 923.

Misdemeanor: 24 & 25 Vict. c. 99, s. 10. See *the last precedent.*

On a conviction for two separate offences of uttering, in two counts, one judgment for two years imprisonment, under s. 10, *would be bad.* R. *v.* Robinson, 1 Mood. 413. *But a sentence of one year's imprisonment, under s.* 9, *may in such a case be passed for each offence, and the commencement of the second year's imprisonment may be postponed until the termination of the first.* Id.

Evidence.

Prove the two offences as directed *ante*, p. 1103, and prove them to have been committed on the same day, or within the space of ten days according as it is alleged in the indictment.

Indictment for a Subsequent Uttering, after a Previous Conviction, under 24 & 25 *Vict. c.* 99, *ss.* 9, 10, 11, *for Uttering.* (24 & 25 *Vict. c.* 99, *s.* 12, ante, p. 1101.)

As in the precedent on p. 1103, *then adding* "A. B. has been previously convicted of a misdemeanor under section 9 of the Coinage Offences Act, 1861, on the —— day of ——, at ——."

A similar provision is made by s. 21 (ante, p. 1102) *as to uttering foreign gold or silver coin. An indictment for the latter offence can be framed from the above precedent.*

To commit any of the misdemeanors mentioned in ss. 9, 10 (ante, p. 1101), *or s.* 11 (post, p. 1107), *after a conviction for any one of those offences respectively, is felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years with or without hard labour.* 24 & 25 Vict. c. 99, s. 12; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace,* 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106.)

Evidence.

Prove the subsequent offence, as directed under the last three precedents. Before the prisoner has pleaded guilty or is found guilty of the subsequent offence, the previous conviction cannot be given in evidence, except under the provisions of s. 1 (*f*) of the *Criminal Evidence Act,* 1898 (*ante,* pp. 458, 466), or under 24 & 25 Vict. c. 99, s. 37 (*ante,* p. 1090). *R.* v. *Martin,* L. R. 1 C. C. R. 214; 39 L. J. (M. C.) 31 (overruling on this point *R.* v. *Goodwin,* 10 Cox, 534). It is not necessary that any judgment should have been pronounced against the prisoner on the first conviction. *R.* v. *Blaby* [1894] 2 Q. B. 170; 18 Cox, 5. If the prisoner pleads guilty, or is found guilty of the subsequent offence, prove the former conviction in manner directed by 24 & 25 Vict. c. 99, s. 37 (*ante,* p. 1090), and the identity of the prisoner with the person described in the former conviction. The course of proceedings at the trial as to arraignment, etc., is also regulated by that section. *R.* v. *Martin, supra.*

If the prisoner is found guilty of the subsequent offence, and then upon being asked whether he has been previously convicted, denies that he has, and the jury after inquiry find that he has not been so previously convicted, he is entitled to be acquitted of the whole charge laid against him in the indictment and cannot be convicted, under s. 9, of the *misdemeanor* of uttering counterfeit coin. R. v. *Thomas,* L. R. 2 C. C. R. 141; 44 L. J. (M. C.) 42. He may, however, after such acquittal be indicted for the misdemeanor alone, and cannot to such indictment plead *autrefois acquit. Id.,* Mellor, J.

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POSSESSING COUNTERFEIT COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 11.—*Having in possession three or more pieces of counterfeit British gold or silver coin.*]—Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 8, *with the additions italicized.*]

Sect. 15.—*Having in possession three or more pieces of counterfeit British copper coin.*]—Whosoever . . . shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the King's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime or offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for a term not exceeding one year, with or without hard labour. . . . [*For rest of section*, see ante, p. 1102. *The above provision re-enacts* 2 & 3 W. 4, c. 34, s. 12, *with the additions italicized.*]

Sect. 23.—*Having in possession more than five pieces of counterfeit foreign coin.*]—Whosoever, without lawful *authority or* excuse (*the proof whereas shall lie on the party accused*), shall have in his custody or possession any greater number of pieces than five pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section (s. 22, *ante*, p. 1091) mentioned, shall, on conviction thereof before any justice of the peace, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding forty shillings nor less than ten shillings for every such piece of false and counterfeit coin which shall be found in the custody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid, it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months, or until such penalty shall be paid.

[*This section was framed from* 37 G. 3, c. 126, s. 6, *and* 43 G. 3, c. 139, s. 6, *with the alterations italicized.*]

Indictment for Possession of Counterfeit British Gold or Silver Coin.
(24 & 25 *Vict. c.* 99, *s.* 11, ante, p. 1107.)

STATEMENT OF OFFENCE.

Possessing counterfeit coin, contrary to section 11 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, had in his custody or possession three [" *three or* more "] pieces of counterfeit coin resembling or apparently intended to resemble or pass for the King's current half-crowns, knowing them to be counterfeit and with intent to utter them or any of them.

Misdemeanor: penal servitude for not more than five nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 99, s. 11; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *As to fine, recognizances and sureties for keeping the peace and being of good behaviour*, 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091). *This offence, after a previous conviction for the like offence, or for any of the misdemeanors mentioned in ss.* 9 *and* 10, *or for any felony against* 24 & 25 Vict. c. 99, *or any former Act relating to the coin, is felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.* 24 & 25 Vict. c. 99, s. 12; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239). *An indictment for that offence may be easily framed from this and the last precedent* (ante, p. 1106).

An indictment for possessing counterfeit British copper coin may be in the same form, with substitution of the word " copper," and the denomination, for the words " gold " or " silver."

Misdemeanor: imprisonment for not more than one year, with or without hard labour. 24 & 25 Vict. c. 99, s. 15 (ante, p. 1107). *As to fine and recognizances*, see 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

Evidence.

Prove that the defendant had in his custody or possession three or more pieces of counterfeit gold or silver coin. They will be deemed to be in his custody or possession if he has them in his personal custody or possession, or knowingly and wilfully has them in the actual custody or possession of any other person, or knowingly and wilfully has them in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether they be had for his own use or benefit, or for that of another. 24 & 25 Vict. c. 99, s. 1 (ante, p. 1088). So, also, when pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty under this section. *R.* v. *Rogers*, 2 Mood. 85; *R.* v. *Williams*, C. & Mar. 259 (*see ante*, p. 1105). Prove also the defendant's knowledge that the coin was counterfeit, and his intent to utter it. These, of course, can

only be proved by circumstances; as, for instance, by evidence of former utterings, or by the fact of the defendant's having in his possession a large quantity of counterfeit coin of like date, and made in the same mould, wrapped up in separate papers, and distributed in different pockets of his dress. *R.* v. *Jarvis*, Dears. 552; 25 L. J. (M. C.) 30. *See R.* v. *Fuller*, R. & R. 308.

At common law, it was no offence to have possession of counterfeit coin with intent to utter it; *R.* v. *Stewart*, R. & R. 288: *R.* v. *Heath*, *Id.* 184; but to *procure* it with that intent was a misdemeanor. *R.* v. *Fuller*, R. & R. 308: *see R.* v. *Roberts*, Dears. 539; 25 L. J. (M. C.) 17 (*post*, p. 1111): *cf. Dugdale* v. *Reg.*, Dears. 64. And proof that the defendant was the coiner was an answer to an indictment for the common law misdemeanor of procuring (*see* 1 Russ. Cr. (7th ed.) 358); but this would not be so under the present statute.

MAKING, ETC., COINING TOOLS.

Statute.

24 & 25 *Vict. c.* 99. (*Coinage Offences Act*, 1861), *s.* 14.—*Tools for counterfeiting British copper coin.*]—. . . Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the King's current copper coin . . . shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*For other offences created by this section*, see ante, pp. 1093, 1098. *The section re-enacts* 2 & 3 W. 4, c. 34, s. 12.]

Sect. 24.—*Tools for counterfeiting British gold or silver coin, or any foreign coin.*]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or shall be *adapted and* intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the King's current gold or silver coin, *or of any coin of any foreign prince, state or country* (see post, p. 1112), or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging *or other* tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or

proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal or *mixture of metals, or any other machine*, knowing such press to be a press for coinage or knowing such engine or machine to have been used, or to be intended to be used, for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 & 3 W. 4, c. 34, s. 10, *with the additions italicized. A galvanic battery is a machine within this section.* R. *v.* Gover, 9 Cox, 282.]

Indictment for making, etc., a Puncheon, etc., for coining Gold and Silver Coin. (24 & 25 *Vict. c.* 99, *s.* 24.)

STATEMENT OF OFFENCE.

Making a puncheon, contrary to section 24 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, without lawful authority or excuse, knowingly made or began to make, or had in his custody or possession, a puncheon, in and upon which there was then impressed the apparent resemblance of one of the sides, or a part of one of the sides, of the King's current half-sovereigns.

As to the words "without lawful authority or excuse" *in the precedent*, see R. *v.* Harvey, (post, p. 1112).

Felony: penal servitude for life or for not less than three years, if the offence relates to British current gold or silver coin or any foreign coin, and penal servitude for not more than seven nor less than three years, if it relates to British current copper coin; 24 & 25 Vict. c. 99, ss. 14, 24; 54 & 55 Vict. c. 69, s. 1 (ante, p. 238); *or in either case, imprisonment for not more than two years, with or without hard labour.* 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, p. 238). *As to recognizances and sureties for keeping the peace,* 24 & 25 Vict. c. 99, s. 38 (ante, p. 1091).

These offences are not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant made, etc., a puncheon, etc., as stated in the indictment; and prove that the instrument in question is a puncheon or other instrument described in the indictment, and included in the statute. The words in the statute "upon which there shall be made or impressed," etc.,

apply to the puncheon, which, being convex, bears upon it the figure of the coin; and the words "which will make and impress," etc., apply to the counter-puncheon, etc., which, being concave, will make and impress. Although it is more accurate to describe the instruments according to their actual use, even under earlier statutes they might be described either way. *R.* v. *Lennard*, 1 Leach, 85, 90; 1 East, P. C. 170; 2 W. Bl. 807. It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words "or any part or parts," etc., are introduced into this statute, and consequently the difficulty in *R.* v. *Sutton*, 2 Str. 1074, where the instrument was capable of making the sceptre only, cannot now occur. And on an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not completed the entire impression. *R.* v. *Foster*, 7 C. & P. 495. It is not necessary to prove, under this branch of the statute, the *intent* of the defendant; the mere similitude is treated by the legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question. *R.* v. *Ridgeley*, 1 East, P. C. 171, 172. The proof of lawful authority or excuse (if any) for the act lies on the defendant. 24 & 25 Vict. c. 99, s. 24. *See Dickins* v. *Gill* [1896] 2 Q. B. 310; 65 L. J. (M. C.) 187.

Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings: and the die-sinker, suspecting fraud, informed the authorities at the Mint, and under their directions made the die for the purpose of detecting the prisoner; it was held that the die-sinker was an innocent agent, and the defendant was rightly convicted as a principal under 2 W. 4, c. 34, s. 10 (*rep.*). *R.* v. *Bannen*, 2 Mood. 309; 1 C. & K. 295.

The *making* and *procuring* dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them here, but by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanor at common law. *R.* v. *Roberts*, Dears. 539; 25 L. J. (M. C.) 17 (*see ante*, p. 1109). As to the liability of a wife for implements found in a room occupied by her husband, *see R.* v. *Boober*, 4 Cox, 272.

Indictment for having a Puncheon, etc., in Possession. (24 & 25 Vict. c. 99, *s.* 24, ante, p. 1109.)

The charge of having the tool in his custody or possession may be included in an indictment for making, as in the last example. In that example the prisoner's possession is averred to have been "without lawful authority or excuse"; it is sufficient, however, if the possession is averred to have been "without lawful excuse," on the ground that there can be no authority which

would not also be an excuse, and therefore to negative excuse is to negative authority. R. *v.* Harvey, L. R. 1 C. C. R. 284; 40 L. J. (M. C.) 63. *As to the venue*, see ante, pp. 37, 41, 1091.

Felony: 24 & 25 Vict. c. 99, s. 24. See *the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106.

Possessing coining tools with intent to use them seems not to be an offence at common law. R. v. Heath, R. & R. 184.

Evidence.

Prove the custody or possession, that is, that the defendant had the instrument either in his personal custody or possession, or in the actual custody or possession of any other person, or in some dwelling-house or building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether the instrument was had for his own use or benefit, or for that of another. 24 & 25 Vict. c. 99, s. 1 (*ante*, p. 1088); *see R.* v. *Rogers*, 2 Mood. 85 (*ante*, p. 1108). To prove the guilty knowledge, evidence may be given of the defendant's having previously uttered counterfeit money. *R.* v. *Weeks*, L. & C. 18; 30 L. J. (M. C.) 141. The guilty knowledge required is the being knowingly in possession of the instrument contrary to the provisions of the statute, *i.e.*, without lawful authority or excuse. A guilty intention in reference to the use or possession of the instrument is not necessary under the statute. *R.* v. *Harvey*, L. R. 1 C. C. R. 284; 40 L. J. (M. C.) 63; 11 Cox, 662. Where the prisoner ordered of a die-sinker two dies having an apparent resemblance to the sides of a sovereign, whereupon the die-sinker communicated with the police, who in consequence of orders from the Mint told him to furnish the dies to the prisoner, which he accordingly did; it was held that these facts constituted no lawful authority or excuse for the prisoner's possession of the dies. *Id.* The police, entering prisoner's house in his absence, took from some persons inside a plaster-of-Paris mould of a half-crown, part of which was still wet, after resistance on their part, and an attempt by them to destroy the mould. Materials suitable for melting lead and making plaster-of-Paris moulds were found in various parts of the house. Shortly afterwards the prisoner came in. He had passed a bad half-crown thirteen days before, but there was no evidence to show that it was made in the mould seized. It was held, that this evidence warranted the conviction of the prisoner for knowingly and without lawful excuse feloniously having in his custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown. *R.* v. *Weeks* (*supra*).

CONVEYING COINING TOOLS OR COINS OUT OF THE MINT.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 25.]—Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly convey out of any of his Majesty's Mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging *or other* tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section is taken from* 2 & 3 W. 4, c. 34, s. 11, *with alterations italicized.*]

54 & 55 *Vict. c.* 69, *s.* 1.—*Minimum term of penal servitude and term of imprisonment.*]—See ante, pp. 238, 239.

MAKING, ETC., MEDALS RESEMBLING CURRENT COIN.

Statute.

46 & 47 *Vict. c.* 45 (*Counterfeit Medal Act*, 1883), *s.* 2.—*Punishment for making, etc., medals resembling current gold or silver coin.*]—If any person without due authority or excuse (*see R. v. Harvey, ante*, p. 1112) (the proof whereof shall lie on the person accused), makes or has in his possession for sale, or offers for sale, or sells, any medal, cast, coin, or any other like thing made wholly or partially of metal or any metallic combination and resembling in size, figure, and colour any of the King's current gold or silver coin, or having thereon a device resembling any device on any of the King's current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process, be so dealt with as to resemble any of the King's current gold or silver coin, he shall be guilty, in England and Ireland, of a misdemeanor, and in Scotland of a crime and offence, and on being convicted thereof shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour. (*See also* 24 & 25 Vict. c. 99, s. 13 (*ante*, p. 1101).)

Sect. 3.—*Interpretation.*]—"The King's current gold or silver coin" includes any gold or silver coin in or for any of His Majesty's Mints, or lawfully current by virtue of any proclamation or otherwise in any part of his Majesty's dominions, whether within the United Kingdom or otherwise. (See *ante*, p. 1088.)

SECT. 6.

SEDITION (INCLUDING SEDITIOUS LIBEL).

Statutes.

13 *Car.* 2, *st.* 1, *c.* 1, *s.* 3.]—*Maliciously and advisedly, by writing, printing, preaching, or express words, declaring or affirming that parliament has legislative authority without the King: punishable by penalties of præmunire under* 16 Ric. 2, c. 5.

Sect. 4.]—*Limitation of prosecution six months: no prosecution without special order of King or council.*

6 *Anne, c.* 41, *s.* 2.]—*Maliciously and advisedly, by preaching, teaching, or advisedly speaking, declaring, maintaining or affirming that any person has right or title to the crown otherwise than in accordance with the Acts of Settlement and Union: punishable by penalties of præmunire. Limitation of prosecution three days: two credible witnesses necessary for conviction.*

32 *G.* 3, *c.* 60.—*Functions of juries on trial of indictment for libel.*]—See post, p. 1238.

37 *G.* 3, *c.* 123; 52 *G.* 3, *c.* 104.]—*Taking or administering oaths for seditious purposes.*]—See post, pp. 1127, 1132.

39 *G.* 3, *c.* 79; 57 *G.* 3, *c.* 19, *s.* 25.—*Unlawful Societies.*]—See post, p. 1128.

60 *G.* 3 & 1 *G.* 4, *c.* 8 (*Criminal Libel Act*, 1819), *s.* 1.—*Search for and seizure after verdict of blasphemous and certain kinds of seditious libel.*]—In every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred or contempt the person of his Majesty or the government and constitution of the United Kingdom as by law established, or either house of parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means, it shall be lawful for the judge or the Court before whom or in which such verdict shall have been given, or the Court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace, or for any constable or other peace officer, acting under any

such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

Sect. 2.—*Disposal of copies seized.*]—If in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the Court in which such judgment shall be given shall order and direct.

Sect. 4.—*Punishment.*]—If any person shall be legally convicted of having composed, printed, or published any blasphemous libel or any such seditious libel as aforesaid, and shall after being so convicted offend a second time, and be thereof legally convicted before any commissioner of oyer and terminer or gaol delivery, or in his Majesty's Court of King's Bench, such person may, on such second conviction, be adjudged, at the discretion of the Court, to suffer such punishment as may now by law be inflicted in cases of high misdemeanors. . . . [*So much of this section as inflicted banishment on a second conviction was repealed by* 11 G. 4 & 1 W. 4, c. 73, s. 1.]

Sect. 7.—*Certificate of conviction.*]—The clerk of assize, clerk of the peace, or other clerk or officer of the Court having the custody of the records where any offender shall have been convicted of having composed, printed, or published any blasphemous or seditious libel, shall, upon request of the prosecutor on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, to the justices of assize, oyer and terminer, great sessions, or gaol delivery, where such offender or offenders shall be indicted for any second offence of composing, printing, or publishing any blasphemous or seditious libel; for which certificate six shillings and eightpence and no more shall be paid, and which certificate shall be sufficient proof of the conviction of such offender.

6 & 7 *Vict. c.* 96 (*Libel Act.* 1843), *s.* 7.—*Rebutting* primâ facie *case of publication by agent.*]—Whensoever, upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall

have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from any want of due care or caution on his part. (*See R.* v. *Holbrook*, 3 Q. B. D. 60; 4 Q. B. D. 42; 47 L. J. (Q. B.) 35; 48 L. J. (Q. B) 113.)

44 & 45 *Vict. c.* 60, *s.* 6.—*All libels to be within Vexatious Indictments Act.*] —Ante, pp. 67 et seq.

51 & 52 *Vict. c.* 64, *s.* 8.—*No prosecutions for libel in newspaper without a judge's order.*]—Post, p. 1242.

40 & 41 *Vict. c.* 21 (*Prison Act*, 1877), *s.* 40.—*Treatment of prisoners convicted of sedition or seditious libel.*]—The prison commissioners shall see that any prisoner under sentence inflicted on conviction for sedition or seditious libel shall be treated as a misdemeanant of the first division within the meaning of s. 67 of the *Prison Act*, 1865 (28 & 29 Vict. c. 126), notwithstanding any statute, provision, or rule to the contrary. (*See ante*, p. 241.)

61 & 62 *Vict. c.* 41 (*Prison Act*, 1898), *s.* 6 (5).]—References in ss. 40 and 41 of the *Prison Act*, 1877, to a misdemeanant of the first division within the meaning of s. 67 of the *Prison Act*, 1865, shall be construed as references to an offender of the first division within the meaning of this section. *See ante*, p. 241, [*Sect.* 67 *was repealed on May* 1*st*, 1899, *on the coming into force of the* Local Prison Rules, 1899.]

Indictment for a Seditious Libel (Common Law).

STATEMENT OF OFFENCE.

Seditious Libel.

Commencement as ante, p. 1092.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, seditiously wrote and published or caused or procured to be written and published a seditious libel concerning his Majesty's Government, containing the following seditious matters:

[*Set out the matter alleged to be seditious.*]

It has been held in R. *v.* McHugh [1901] 2 Ir. Rep. 369, *that the words "seditious" and "seditiously" are not essential.*

Misdemeanor: fine and imprisonment. 60 G. 3 & 1 G. 4, c. 8, s. 4 (ante, p. 1114). *As to the treatment of persons sentenced to imprisonment for seditious libel*, see 40 & 41 Vict. c. 21, s. 40; 61 & 62 Vict. c. 41, s. 6 (ante, p. 1116). *The* Vexatious Indictments Act (ante, p. 67) *seems to apply to seditious libel.*

It seems that no prosecution of persons concerned in the publication of a seditious libel ("*any libel*") *appearing in a newspaper, as defined by* 44 & 45 Vict. c. 60, s. 1 (post, p. 1240) *and* 51 & 52 Vict. c. 64, s. 1 (post, p. 1241), *may be instituted without the order of a judge of the High Court in chambers.* See 51 & 52 Vict. c. 64, s. 8 (post, p. 1242).

The offence of composing, printing, or publishing blasphemous, or seditious, or defamatory libels, is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Sedition defined.]—Sedition, whether by words spoken or written, or by conduct, is a misdemeanor indictable at common law, punishable by fine and imprisonment. *See Stroud's case*, 3 St. Tr. 235; *and cf.* 22 St. Tr. 477 n. It embraces all those practices, whether by word, deed, or writing, which fall short of high treason (1 Hale, 77), but directly tend or have for their object to excite discontent or dissatisfaction: to excite ill-will between different classes of the King's subjects; to create public disturbance, or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder; *R.* v. *Fussell*, 6 St. Tr. (N. S.) 723; 3 Cox, 291: *R.* v. *Lovett*, 3 St. Tr. (N. S.) 1177, Littledale, J.: *R.* v. *O'Brien*, 6 St. Tr. (N. S.) 571, 591 n., Crampton, J.: *R.* v. *Sullivan*, *R.* v. *Pigott*, 11 Cox, 44, 45, 51, 60, Fitzgerald, J.: *and see* 33 St. Tr. 342, 394; 1 St. Tr. (N. S.) 751; Steph. Dig. Cr. L. (6th ed.) p. 70; or to incite people to unlawful associations, or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law, or to use any form of physical force in any public matter connected with the state. *R.* v. *Jones*, 6 St. Tr. (N. S.) 783, Wilde, C.J.: *R.* v. *O'Donnell*, 7 St. Tr. (N. S.) 637, Erle, J.: *R.* v. *Feargus O'Connor*, 4 St. Tr. (N. S.) 1352, 1364: *R.* v. *Bronterre O'Brien*, *Id.* 1341, 1343, Coleridge, J.: *R.* v. *Aldred*, 22 Cox, 1; 74 J. P. 55, Coleridge, J. But it would seem that a document published in this country, which is calculated to disturb the government of some foreign country, is not a seditious libel, nor punishable as a libel at all. *R.* v. *Antonelli*, 70 J. P. 4. And the definition does not prevent candid, full, and free discussion of any public matter, which is the right of every citizen, unless the discussion takes place under circumstances calculated or intended to incite tumult; *R.* v. *Collins*, 3 St. Tr. (N. S.) 1149; 9 C. & P. 456; or the statements made are an appeal to the passions of the hearers and an incitement to violence or outrage. *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1; 3 B. & Ald. 717. Thus a publication to Indian students in England, advocating the principle that political assassination is no murder and glorifying as a martyr in the cause of Indian independence an Indian student who murdered Sir Curzon Wyllie at a conversazione, was held a seditious libel, *R.* v. *Aldred*, *supra*. But a writer may criticize or censure the conduct of the servants of the Crown or the acts of the government,—he can do it freely

and liberally, but it must be without malignity, and not imputing corrupt or malicious motives, and avoiding defamation, obscenity or blasphemy; he may also freely criticize the proceedings of courts of justice and of individual judges. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion. *R.* v. *Sullivan*, *R.* v. *Pigott*, *supra*. These cases were followed and approved in *R.* v. *Burns*, 16 Cox, 355, Cave, J. Exciting ill-will between different classes of his Majesty's subjects may amount to sedition; whether it does so or not in any particular case is a question for the jury after taking into consideration all the circumstances of the case. *R.* v. *Burns*, *supra: and see R.* v. *Aldred*, *supra*. Political writings and words may be classed under three heads: those which are overt acts of treason; those which are seditious; and those which are allowable and justifiable. We have seen what political writings and words constitute overt acts of high treason (*ante*, p. 1065). On the other hand, a man may lawfully discuss and criticize the measures adopted by the King and his ministers for the government of the country, provided he does it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. *See R.* v. *Lambert & Perry*, 2 Camp. 398: *R.* v. *Aldred*, *supra*. All political writings and words between these extremes may be deemed seditious. As, for instance, if a man curses the King, wishes him ill, gives out scandalous stories concerning him (*see R.* v. *Harvey* (*a*), 2 L. J. (K. B.) 4; 2 St. Tr. (N. S.) 1; 2 B. & C. 257), or does anything that may lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people; or if he denies the King's right to the throne, in common and unadvised discourse (for if it is by advisedly speaking, it amounts to *præmunire*, 6 Anne, c. 41, s. 2, *ante*, p. 1114); all these are sedition. 4 Bl. Com. 423. In *R.* v. *Tutchin* (14 St. Tr. 1095; Holt, 424), Lord Holt said, that "if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished." And Lord Ellenborough, in *R.* v. *Cobbett*, 29 St. Tr. 1, 49; Holt on Libel (2nd ed.), 114; Starkie on Libel (6th ed.) 653, said that if a publication is calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, etc., are punishable. And whether the defendant really intended by his publication to alienate the affections of the people from the government, or not, is not material; if the publication is calculated to have that effect, it is a seditious libel. *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1; 4 B. & Ald. 95: *R.* v. *Aldred*, 22 Cox, 1; 74 J. P. 55. It is also a seditious libel if published with an intention (or if calculated, *cf. R.* v. *Grant*, 7 St. Tr. (N. S.) 507: *R.* v. *Hicklin*, L. R. 3 Q. B. 360) to inflame the minds of the labourers and working people, and to incite them to acts of violence, riot, and disorder, and to the burning and destruction of corn, machines, and other

(*a*) This was an indictment for defamatory, not for seditious, libel.

property. *R.* v. *Cobbett*, 2 St. Tr. (N. S.) 789, 899, Tenterden, C.J. Liability depends not on the truth of the words used nor on the motive of the publisher, but on the question whether the words used, having regard to the audience addressed, were calculated to promote public disorder, physical force or violence in a matter of state. R. v. *Aldred*, *supra*. Coleridge, J. To impute corruption to judges has been said to be seditious. *R.* v. *Lord George Gordon*, 22 St. Tr. 177. But it would seem to be properly punishable as contempt of court or defamatory libel. (*See post*, pp. 1215, 1238). So also as to a libel on the clergy of a diocese. *See R.* v. *Williams*, 1 St. Tr. (N. S.) 1291; 5 B. & Ald. 595: *R.* v. *Harvey*, 2 L. J. (K. B.) 4; 2 St. Tr. (N. S.) 1; 2 B. & C. 257, where the indictment is framed without the word "seditious." But statements about the King which if published of subjects would be defamatory appear to be regarded as seditious and incapable of justification. *Ex parte William O'Brien*. 12 L. R. Ir. 29; 15 Cox, 180: *R.* v. *Duffy* [1846] 6 St. Tr. (N. S.) 303; 19 Ir. L. R. 329.

Form of indictment.]—1. The indictment should charge a publication; but there are indications of judicial opinion that merely composing or writing a seditious libel is an offence, even if the libel is not afterwards published. *See R.* v. *Burdett*, 1 St. Tr. (N. S.) 1, 122, 138; 4 B. & Ald. 95. But the publisher is equally liable with the writer of the libel. *R.* v. *Aldred*, *supra*. As to venue, *see post*, p. 1120.

2. The seditious parts of the publication relied on should be set out correctly. If the libel is in a foreign language, it should be set out in such language verbatim, together with a correct translation. *Zenobio* v. *Axtell*, 6 T. R. 162: *R.* v. *Peltier*, 28 St. Tr. 529. *See*, *however*, 5 & 6 G. 5, c. 90, s. 3 (*ante*, p. 43).

3. Besides setting out the seditious passages of the publication, the indictment should also contain such averments and innuendoes as may be necessary to render it intelligible, and its application to the King or his government, etc., evident. *See R.* v. *Yates*, 12 Cox, 233. When the statement of an intrinsic fact is necessary in order to render the libel intelligible, or to show its seditious quality, such intrinsic fact should be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, this is done by an innuendo. And an innuendo can explain only in cases where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. *R.* v. *Horne*, 20, St. Tr. 651; 2 Cowp. 652: *R.* v. *Burdett*. 1 St. Tr. (N. S.) 1. *See further* on this subject, "Defamatory Libel" (*post*, pp. 1238 *et seq.*). In *R.* v. *Tutchin*, 14 St. Tr. 1095, one part of the libel ran thus: "The mismanagements of the *navy* have been a greater tax upon the merchants than the duties raised by parliament." In order to explain what was meant by the navy, the introductory part of the information charged the libel to have been written "of and concerning the royal navy of this kingdom, and the government of the said navy;" and when, in stating the libel, it came to the word "navy," it explained it by an innuendo, thus: meaning "the royal navy of this kingdom:" which, being coupled with the averment in the introductory

part of it, made the sense and the charge complete. In *R.* v. *Matthews*, 15 St. Tr. 1323, the words of the libel were: "From the solemnity of the Chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." It was there objected—What Chevalier? who is he? what recommendation? and to what? But in the introductory part of the information the libel was charged to have been written "of and concerning the Pretender, and of and concerning his right to the crown of Great Britain:" and it was held that the innuendoes in the middle of the libel, explaining the words, "Chevalier, etc.," to mean the Pretender, and his hereditary right to the crown of Great Britain, when connected with the averment in the introductory part, of its being written "of and concerning the Pretender, and his right to the crown of Great Britain," were a sufficient explanation to make good the charge.

Evidence for the Prosecution.

Date.]—The day on which the libel is alleged to have been written and published is not material, and need not be proved as laid; but a variance between the indictment and evidence, in any dates alleged and mentioned in the libel, would be fatal unless amended. (*See ante*, pp. 51, 54, 349.)

Venue.]—Subject to the provisions of 7 G. 4, c. 64, s. 12 (*ante*. p. 37), the offence must be proved to have been committed in the county named, and in which the trial is had. If a letter containing the libel reaches the party to whom it is directed in the proper county, *see R.* v. *Johnson*, 7 East, 65; 29 St. Tr. 81: even though addressed to him at a place out of the county, *R.* v. *Watson*, 1 Camp. 215, or even if a sealed letter, containing the libel, is put into the post office in the proper county, *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1; 4 B. & Ald. 95, *by three judges*, Bayley, J., *dub.*, it is a sufficient publication of the libel in that county: and in the last case the three judges held, that if a man writes and composes a libel in L., with intent to publish it, and afterwards publishes it in M., he may be indicted for a misdemeanor in either county; and *see R.* v. *Williams*, 2 Camp. 506. As to these decisions, *see R.* v. *Ellis* [1899] 1 Q. B. 230 (*ante*, p. 38; 1 Russ. Cr. (7th ed.) 54). In *R.* v. *Watson*, 1 Camp 215, Lord Ellenborough held that the post-mark of a particular place within the county, upon a letter containing the libel, was no evidence of a publication in that county; for the post-mark might be forged. But this case is not now followed (*see Stocken* v. *Collin*, 7 M. & W. 529; 10 L. J. (Ex.) 227), and it would seem that post-marks are evidence that the letters on which they are were in the office to which the post-mark belongs, at the date thereby specified. *See R.* v. *Plumer*, R. & R. 264: *R.* v. *Johnson*, 7 East, 65; 29 St. Tr. 103, 458: *R.* v. *Canning*, 19 St. Tr. 370: *Warren* v. *Warren*, 1 Cr. M. & R. 250; 4 Tyrw. 850.

Seditiously.]—The seditious intent may be inferred from the libel itself, without any extrinsic evidence of it. *R.* v. *Creevey*, 1 M. & Sel. 273, 282: *R.* v. *Lord Abingdon*, 1 Esp. 226: *Stockdale* v. *Hansard*, 3 St. Tr. (N. S.) 723, 882. 896: *Bromage* v. *Prosser*, 3 L. J. (K. B.) 203; 4 B. & C. 247, 255

(*ante*, p. 400). And so, in order to prove it, evidence is admissible of the defendant's having published other copies of the same libel, *Plunkett* v. *Cobbett*, 5 Esp. 136, or other libels, *R.* v. *Pearce*, Peake, (3rd. ed.), 106, provided that they expressly refer to the subject of the libel set out in the indictment. *Finnerty* v. *Tipper*, 2 Camp. 72 : *see Chubb* v. *Westley*, 6 C. & P. 436.

Wrote and published.]—A publication must be proved. Upon a count charging the defendant with having composed, printed, and published a libel, proof that he composed and published it, *R.* v. *Williams*, 2 Camp. 646, or even that he only published it, *R.* v. *Hunt*, 2 Camp. 583; 31 St. Tr. 367, 408, will be sufficient to maintain the count.

The publication may be by selling the libel, distributing it gratis, reading it to others (if he knew the tendency of it before), or by sending it and having it delivered to another person, or even to the party libelled by it. *See* Bac. Abr. Libel (B. 2); 1 Hawk. c. 73, s. 11. So, evidence of the defendant's procuring another person to publish the libel, is sufficient to maintain a count charging the defendant with having published it : and therefore evidence of the libel's being purchased in a bookseller's shop, or at a newspaper office, or the office of a newsvendor, from a servant there, in the course of business, will support a count charging the master with having published it (4 Bac. Abr. Libel (B. 2) : *R.* v. *Almon*, 20 St. Tr. 803, 839; 5 Burr. 2686), even although it be proved that the master was not privy to it. *R.* v. *Walter*, 3 Esp. 21 : *R.* v. *Gutch*, M. & M. 433 : *Att.-Gen.* v. *Siddon*, 1 Cr. & J. 220. But the presumption created by such evidence can now be rebutted by evidence under 6 & 7 Vict. c. 96, s. 7 (*ante*, p. 1115). As to publication through an innocent agent, *see post*, p. 1249). As to what may amount to evidence against the editor of a newspaper of conspiring to pervert the course of justice with the author of certain articles appearing therein, *see R.* v. *Tibbits & Windust* [1902] 1 K. B. 77; 71 L. J. (K. B.) 4; 20 Cox, 60.

The delivery of a newspaper to the officer of a stamp office was held to be sufficient publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself. *R.* v. *Amphlit*, 4 B. & C. 35; 6 D. & R. 125. And if the manuscript of a libel is proved to be in the handwriting of the defendant, and it is also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, though there is no express evidence that he authorized the printing or publishing. *R.* v. *Beare*, 1 Ld. Raym. 414; *Lamb's case*, 9 Co. Rep. 59 : *R.* v. *Lovett*, 3 St. Tr. (N. S.) 1117; 9 C. & P. 462.

Where the libel is contained in a newspaper, and the defendant is indicted for having published it, the fact that the defendant is the *proprietor* of the newspaper may now be proved in the manner provided by s. 15 (*post*, p. 1241) of the *Newspaper Libel and Registration Act*, 1881 (44 & 45 Vict. c. 60). The provisions of 6 & 7 W. 4, c. 76, ss. 8, 13, as to proving the defendant to have *printed and published* the paper, were repealed by 33 & 34 Vict. c. 99. Under 39 G. 3, c. 79, s. 28 (now incorporated in the second schedule to the

Newspaper, etc., Repeal Act, 1869 (32 & 33 Vict. c. 24)), the printer of a newspaper is liable to penalties for printing and publishing without the name of the printer, and required to keep copies with the name and address of the person for whom he printed.

A certain seditious libel.]—The libel itself must be produced in evidence, and must correspond in substance with the indictment. (*See ante*, pp. 351, 1119.) If the libel is in a foreign language, and is set out in that language, together with a translation (*see ante*, p. 1119), the translation must be proved to be correct. *R.* v. *Peltier*, 28 St. Tr. 529; 2 Sel. (N. P.) 1048. A seditious libel does not necessarily consist of written or printed matter, but it may be evidenced by a woodcut or engraving. *R.* v. *Sullivan*, *R.* v. *Pigott*, 11 Cox, 44, 51.

It is not necessary to prove the libel to be false. *See post*, p. 1126.

Innuendo.]—In strictness all the innuendoes must be proved by some persons acquainted with the nature of the libel, and who can swear that they understood such and such words to mean so and so, or to have reference to such and such persons, things, or facts, as described by the innuendo. In many cases, however, the truth of the innuendo appears so evident from the context of the libel itself, that further proof is deemed unnecessary, and it is left to the jury upon a consideration of the libel alone. In an action for libel it is the judge's duty to determine, upon the evidence adduced at the trial, whether the words complained of are reasonably capable of the meaning ascribed to them by the innuendoes, and if they are not, he is bound to withdraw the case from the jury and to direct either a non-suit or a verdict for the defendant. *Hunt* v. *Goodlake*, 43 L. J. (C. P.) 54: *Mulligan* v. *Cole*, L. R. 10 Q. B. 549; 44 L. J. (Q. B.) 153.

Evidence for the Defence.

The defendant may prove that he did not write or publish the libel at all; or he may contend that the publication is not seditious, or that he was privileged in publishing it.

1. He may prove that he was not concerned in the writing or publishing of the libel in question; and in the case of a newspaper, he may prove that he is neither printer, publisher, nor proprietor of it, nor otherwise interested or concerned in it. He may also prove that he was a mere innocent agent in the publication; as, for instance, that he carried and delivered the letter containing the libel, without knowing its contents, or delivered one paper by mistake for another (*R.* v. *Topham*, 4 T. R. 126, 128), or the like. He may also, where a presumptive case of publication, by the act of any other person by his authority, has been established, prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part; 6 & 7 Vict. c. 96, s. 7 (*ante*, p. 1115); but the Act does not say expressly whether such evidence shall be a complete defence or go in mitigation of punishment only. On the trial of a criminal information against the defendants for a libel published in their newspaper, it appeared

that the duty of editing the paper was left entirely by them to an editor, whom they had appointed. The libel was inserted in the paper by the editor without the actual authority, consent, or knowledge of the defendants. The judge on these facts having directed a verdict of guilty against the defendants, it was held by Cockburn, C.J., and Lush, J., (Mellor, J., *diss.*), that there must be a new trial, on the ground that upon the true construction of the *Libel Act*, 1843 (6 & 7 Vict. c. 96), s. 7 (*ante*, p. 1115), the libel was published without the defendants' authority, consent, or knowledge, and it was a question for the jury whether the publication arose from any want of due care or caution on their part. *R.* v. *Holbrook*, 3 Q. B. D. 60; 47 L. J. (Q. B.) 85. Upon the second trial, the same facts having been proved as on the first trial, the judge summed up in terms which might have led the jury to suppose that the general authority given to the editor to manage the editorial department of the paper, was *per se* evidence that the defendants had authorised the publication of the libel within the meaning of 6 & 7 Vict. c. 96, s. 7, and the jury having returned a verdict of guilty, a new trial was granted on the ground of misdirection, Cockburn, C.J. and Lush, J. (Mellor, J., *diss.*), being of opinion that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law, and therefore not to authorize the publication of a libel. *R.* v. *Holbrook*, 4 Q. B. D. 42; 48 L. J. (Q. B.) 113. It is not competent to the defendant to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons who have never been prosecuted for it. *R.* v. *Holt*, 5 T. R. 436: *R.* v. *Newman*, 1 E. & B. 268; 22 L. J. (N. S.) Q. B. 156.

2. He may prove that the words alleged to be seditious, whether spoken or written, are not seditious; and for that purpose a defendant has been allowed to give in evidence other passages in the same speech, newspaper or publication, plainly referring to the subject of the libel in question, or fairly connected with it, though disjoined from it by other matter, and in a different type, in order to prove that his intention was not such as was imputed to him by the prosecution, or that the passage in question would not fairly bear the construction attempted to be given to it. *R.* v. *Lambert & Perry*, 2 Camp. 398, 400; 31 St. Tr. 335.

3. He may show that he was privileged in publishing the matter alleged to be seditious. As, for instance, that it formed part of a speech delivered by him as a member of parliament (1 W. & M. sess. 2, c. 2); but this privilege extends only to his speaking in the house; for if he afterwards publishes his speech, he is amenable for it in the same manner as any other person. *R.* v. *Creevey*, 1 M. & Sel. 273, 282: *R.* v. *Lord Abingdon*, 1 Esp. 226: *Stockdale* v. *Hansard*, 3 St. Tr. (N. S.) 723, 882, 896; 9 A. & E. 1; 2 P. & D. 1. The publication in a public newspaper of a faithful report of a debate in either house of parliament is privileged, so that the publisher is not responsible for statements made in the course of the debate so reported and published (*Wason* v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34); and the publication of articles fairly commenting upon debates so reported and published is equally privileged. *Id.* 3 & 4 Vict. c. 9, passed in consequence of *Stockdale* v. *Hansard*, *supra*,

provided for staying proceedings in respect of documents laid before either house and published by their authority. This enactment mainly affects defamatory libels, but appears to extend not only to defamatory, but to seditious, obscene, or blasphemous matter contained in such documents.

So, he may prove that the matter alleged to be seditious was contained in a petition to parliament, and published to its members only, or contained in articles of the peace, or in some other regular proceeding in a court of justice (1 Hawk. c. 73, s. 8), or the like. *See Fairman* v. *Ives*, 5 B. & Ald. 642: *M'Gregor* v. *Thwaites*, 2 L. J. (K. B.) 217; 3 B. & C. 24; 5 Dowl. & Ry. 447.

With regard to reports of judicial proceedings in newspapers, it is enacted by s. 3 (*post*, p. 1241) of the *Law of Libel Amendment Act*, 1888 (51 & 52 Vict. c. 64), that a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority, shall, if published *contemporaneously* with such proceedings, be privileged. As to what is a newspaper, *see* 44 & 45 Vict. c. 60, s. 1, *and* 51 & 52 Vict. c. 64, s. 1 (*post*, pp. 1240, 1241).

At common law, and irrespective of 51 & 52 Vict. c. 64, s. 3 (*post*, p. 1241), he may prove that it is a fair report of proceedings in a court of justice. *See R.* v. *Wright*, 8 T. R. 293: *Lewis* v. *Walter*, 4 B. & Ald. 605: *Chalmers* v. *Payne*, 2 Cr. M. & R. 156: *Lewis* v. *Levy*, 27 L. J. (N. S.) Q. B. 282; E. B. & E. 537: *Ryalls* v. *Leader*, L. R. 1 Ex. 296; 35 L. J. (Ex.) 185: *Milissich* v. *Lloyds*, 13 Cox, 575; 46 L. J. (C. P.) 404. 51 & 52 Vict. c. 64, s. 3, excepts from protection blasphemous and obscene libel, but does not name seditious libel. The privilege at common law and by statute appears to attach whether the report published contains seditious or defamatory or even treasonable matter, if the publication is a fair and *bonâ fide* report. *R.* v. *Gray*, 10 Cox, 184 (Ir.). The publication of the history of a trial, consisting of the facts of the case, and of the law of the case as applied to those facts, is lawful. But the privilege is qualified only, and not absolute, and the fact that the publication incriminated is a fair report of proceedings in a court of justice must not be considered a justification or excuse in all cases. For instance, in the course of a trial it may become necessary for the purposes of justice to hear or read matter of a scandalous, blasphemous, or indecent nature; yet it is not lawful, under the pretence of publishing that trial, to circulate such matter. 51 & 52 Vict. c. 64, s. 3: *R.* v. *Mary Carlile*, 3 B. & Ald. 167: *R.* v. *Creevey*, 1 M. & Sel. 273, 281; *per* Bayley, J.: *Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. (M. C.) 85: *Macdougall* v. *Knight*, 14 App. Cas. 194; 58 L. J. (Q. B.) 537. And a fair and an accurate report of the proceedings in a court of justice sent to a newspaper by a person who is not a reporter on the staff of the newspaper, is not privileged absolutely; and if it is sent from a malicious motive, an action will lie against the sender. *Stevens* v. *Sampson*, 5 Ex. D. 53; 49 L. J. Ex. 120. Until the passing of the *Law of Libel Amendment Act*, 1888, the publication of reports of *ex parte* proceedings was discouraged if not held illegal, and the publication of proceedings before justices prior to committal was at least of doubtful legality. See *R.* v. *Parke* [1903] 2 K. B. 432, 438; 72 L. J. (K. B.) 839, Wills, J. But a fair and accurate report of an *ex parte* application made to a magistrate in open court is now privileged (*Kimber* v. *Press Association* [1893] 1 Q. B. 65; 62 L. J.

(Q. B.) 152 : *R.* v. *Gray*, 10 Cox, 184), and this rule appears to apply in all cases where the magistrate has jurisdiction in point of law, although there is what may be called want of jurisdiction, because the facts do not make out the charge. *Usill* v. *Hales*, 3 C. P. D. 319; 47 L. J. (C. P.) 323; 14 Cox, 61 : *Usill* v. *Brearley*, 3 C. P. D. 206; 47 L. J. (C. P.) 380 : *Lewis* v. *Levy*, E. B. & E. 537; 27 L. J. (Q. B.) 282 : and *Wason* v. *Walter*, L. R. 4 Q. B. 73, 94; 38 L. J. (Q. B.) 34, 44; where Cockburn, C.J., said, "Even in quite recent days judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on application for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

These decisions appear to overrule the opinions at one time expressed that the reports of proceedings (particularly *ex parte* proceedings) before magistrates were not privileged. *See R.* v. *Fisher*, 2 Camp. 563 : *R.* v. *Lee*, 5 Esp. 123 : *R.* v. *Fleet*, 1 B. & Ald. 379 : *Duncan* v. *Thwaites*, 3 L. J. (K. B.) 3; 3 B. & C. 556, 583 : *R.* v. *Parke* [1903] 2 K. B. 432, 438; 72 L. J. (K. B.) 839.

As to the publication of matters prejudicial to accused persons whose trial is pending, *see R.* v. *Tibbits & Windust* [1902] 1 K. B. 77; 71 L. J. (K. B.) 4; 20 Cox, 70, *and post*, p. 1217.

A fair and accurate report published in any newspaper of the proceedings of a public meeting and of certain bodies and persons specifically mentioned, and the publication of certain notices or reports issued by certain public officers, have a modified and limited protection afforded by 51 & 52 Vict. c. 64, s. 4 (*post*, p. 1242). It was formerly no defence to an action or indictment for publishing a libel in a newspaper, that it was a true report of proceedings at a public meeting held under a local improvement Act, or the like. *Davison* v. *Duncan*, 7 E. & B. 229; 26 L. J. (Q. B.) 104 : *Popham* v. *Pickburn*, 7 H. & N. 891; 31 L. J. (Ex.) 133.

The defendant is in no case allowed to prove the truth of a seditious libel, in justification of his having published it. 6 & 7 Vict. c. 96, s. 6 (*post*, p. 1239), permitting a plea that a libel is true, and its publication in the public interest, applies only to defamatory libels, and not to seditious or blasphemous libels. *R.* v. *Duffy*, 6 St. Tr. (N. S.) 303; 2 Cox, 45; 9 Ir. L. R. 329 : *Ex parte O'Brien*, 12 L. R. Ir. 29; 15 Cox, 180 : *R.* v. *McHugh* [1901] 2 Ir. Rep. 569 : *R.* v. *Aldred*, 74 J. P. 55. In *R.* v. *Burdett*, 1 St. Tr. (N. S.) 1; 4 B. & Ald. 95, it was held that on an indictment for a seditious libel containing statements involving criminal charges, the defendant could not at the trial or in mitigation prove their truth; but that he could after verdict in mitigation prove that he had read them in newspapers. But the publication

in a newspaper of matter which is in itself a seditious libel will not be excused merely on the ground that it is copied from a foreign newspaper as an item of news, although this is a matter for the jury in considering the intention of the defendant; but they must also consider the circumstances under which the matter was copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, and the general tone of the other writings in the newspaper. *R.* v. *Sullivan*, 11 Cox, 44 (Ir.). It was held in *R.* v. *McHugh*, *supra*, that the defence of fair comment and absence of malice under 51 & 52 Vict. c. 64, s. 4 (*post*, p. 1242), is not open on a trial for seditious libel.

The jury may give a general verdict on the whole matter put in issue, and shall not be required by the Court to find the defendant guilty merely on proof of the publication, and of the sense ascribed to it in the indictment or information. 32 G. 3, c. 60, s. 1 (*post*, p. 1238). This is without prejudice to their power to return a special verdict (s. 3), and does not affect the right of the judge to give his opinion and direction to the jury (s. 2), nor the right of the defendant on conviction to move in arrest of judgment (s. 4), as in other criminal cases.

Indictment for Seditious Words (Common Law).

Commencement as ante, p. 1092.

STATEMENT OF OFFENCE.

Sedition.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, in the hearing of liege subjects of our lord the King, uttered a seditious speech, the purport of which was [*state in ordinary language*].

Fine or imprisonment without hard labour, as a misdemeanant of the first division, or both. 40 & 41 Vict. c. 21, s. 40; 61 & 62 Vict. c. 41, s. 6 (ante, p. 1116).

Offences against the King's title, prerogative, person, or government, are not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Where seditious words are spoken at a meeting, those who do anything, as by expressions of approval, to help the speaker to produce upon the hearers the natural effect of the words spoken, are guilty of uttering seditious words, just as if they spoke them themselves. *R.* v. *Burns*, 16 Cox, 355, 366, Cave, J., but the merely standing by and saying nothing when the seditious words are spoken does not make the stander-by guilty of uttering seditious words. *Id.*

SECT. 7.

UNLAWFUL OATHS.

Statutes.

37 *G.* 3, *c.* 123 (*Unlawful Oaths Act*, 1797), *s.* 1.]—Whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in his Majesty's forces by sea and land, and others of his Majesty's subjects, from their duty and allegiance to his Majesty, and to incite them to acts of mutiny and sedition (*see* 37 G. 3, c. 70, *post*, p. 1132), and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered; be it enacted, etc., that any person or persons who shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled (*see s.* 2, *infra*) thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years. [*Penal servitude was substituted for transportation by* 20 & 21 Vict. c. 3, ante, p. 237.]

Sect. 2.]—*Persons compelled to take such oath not justified or excused unless within four days they declare the same.*

Sect. 3.—*Aiders and abettors.*]—Persons aiding and assisting at, or present at, and consenting to, the administering or taking of any such oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and shall be tried as such, although the persons or person (*sic*) who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. (*See post*, tit. "Accessories."

Sect. 4.—*Form of indictment.*]—It shall not be necessary in any indictment against any person or persons administering or causing to be administered

or taken, or taking, any such oath or engagement as aforesaid, or aiding or assisting at, or present at and consenting to, the administering or taking thereof, to set forth the words of such oath or engagement; and it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

Sect. 5.—*Form of oath.*]—Provided always . . . that any engagement or obligation whatsoever, in the nature of an oath, shall be deemed an oath within the intent and meaning of this Act, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

Sect. 6.—*Venue.*]—Provided also . . . that any offence committed against this Act on the high seas or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried, and determined, before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and, if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried, and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom. [*This Act applies only to Great Britain.* 50 G. 3 c. 102, *makes similar provisions as to Ireland.*]

Sect. 7.]—*Persons tried under the Act not to be tried again for treason on the same facts.* (Cf. 52 & 53 Vict. c. 63, s. 33 (ante, p. 160).)

By the *Unlawful Societies Act*, 1799 (39 G. 3, c. 79), certain societies were prohibited as unlawful confederacies, and societies which require or use an oath or engagement unlawful within 37 G. 3, c. 123, are guilty of unlawful combination or confederacy. By the *Seditious Meetings Act*, 1817 (57 G. 3, c. 19, s. 25, partially repealed by 53 & 54 Vict. c. 33), all societies the members whereof are required to take any oath or engagement which is unlawful within 37 G. 3, c. 123 (*ante*, p. 1127), or 52 G. 3, c. 104 (*post*, p. 1130), or to take any oath not required or authorized by law, etc., are to be deemed guilty of an unlawful combination within 39 G. 3, c. 79, s. 2. On these Acts *see R.* v. *Dixon*, 6 C. & P. 601; 3 St. Tr. (N. S.) 1281; Steph. Dig. Cr. Law. (6th ed.), p. 66; 1 Russ. Cr. (7th ed.) 332. Exceptions are made in favour of declarations in a form approved and registered at petty sessions, and confirmed at quarter sessions (39 G. 3, c. 79, s. 3); of regular lodges of Freemasons, subject to conditions (ss. 4, 5); and of registered friendly societies, subject to conditions. 59 & 60 Vict. c. 25, s. 32.

Proceedings in England under 39 G. 3, c. 79, and 57 G. 3, c. 19, can only be taken in the name of a law officer of the Crown. 9 & 10 Vict. c. 33, s. 1.

Indictment for administering an Unlawful Oath. (37 G. 3, c. 123, s. 1, ante, p. 1127.)

STATEMENT OF OFFENCE.

Administering unlawful oath, contrary to section 1 of the Unlawful Oaths Act, 1797.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, administered or caused to be administered to C. D., or aided the administration to C. D., of an oath or engagement purporting or intended to bind the said C. D. to engage in a mutinous or seditious purpose or to disturb the public peace.

If the offence has been committed on the high seas, or out of the realm, or in England, the venue may be laid in any county in England. 37 G. 3, c. 123, s. 6.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 37 G. 3, c. 123, s. 1; 20 & 21 Vict. c. 3 (ante, pp. 1127, 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

The offence of administering or taking unlawful oaths is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

It is not necessary to set out the words of the oath; stating the purport, or some material part of it, is all that is required. 37 G. 3, c. 123, s. 4. The oath described by the statute must purport or be intended to bind the party taking it to one or other of the following things:—viz. 1. To engage in some mutinous or seditious purpose; 2. To disturb the public peace; 3. To be of some association, society or confederacy formed for any such purpose; 4. To obey the orders or commands of a committee or body of men not lawfully constituted, or of a leader or commander or other person not having authority by law for that purpose; 5. Not to inform or give evidence against any associate, confederate, or other person; 6. Not to reveal or discover any unlawful combination or confederacy; 7. Not to reveal or discover any illegal act done, or to be done; 8. Not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement. If the purport of the oath is doubtful, it can be set out in different ways in several counts, taking care to bring it within some of the descriptions above mentioned. *See R.* v. *Moors*, 6 East, 419 n. (*b*).

Evidence.

Prove that A. B. administered to C. D. an oath or engagement (it is no matter in what form, 37 G. 3, c. 123, s. 5: *see R.* v. *Lovelass*, 6 C. & P. 596; 1 M. & Rob. 349; 3 St. Tr. (N. S.) 1280) of the purport stated in some one count in the indictment. If read from a paper at the time it was administered, still it is not necessary to produce such paper, or give the defendant notice to

produce it; but parol evidence of its purport, without such notice, will be sufficient. *R.* v. *Moors*, 6 East, 419 n. (*b*). So, parol evidence of any declarations made by the defendant at the time he administered the oath will be received in proof of the nature of the oath, if that does not sufficiently appear from the words of the oath itself. *Id.* And where it appeared that an oath was unlawfuly administered by an associated body of men, purporting to bind the party not to reveal such unlawful combination or conspiracy, or any illegal act done by them, the judges seemed to have no doubt of its being a felony within this Act, although it appeared that the object of the association was a conspiracy to raise wages and make regulations in a particular trade, and not to stir up mutiny or sedition. *R.* v. *Marks*, 3 East, 157; *see R.* v. *Ball*, 6 C. & P. 563: *R.* v. *Brodribb*, *Id.* 571.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some statute to be legal), for whatever purpose or object it may be formed: and the administering an oath not to reveal anything done in such association is an offence within the statute 37 G. 3, c. 123, s. 1. *R.* v. *Lovelass*, 6 C. & P. 596; 1 M. & Rob. 349; 3 St. Tr. (N. S.) 1280. As to the common law with reference to unlawful oaths, *see R.* v. *Edgar*, 33 St. Tr. 145, 151 n.; *R.* v. *Eadon*, 31 St. Tr. 1064.

In an indictment for taking an unlawful oath it is not necessary to prove that any person administered the oath. 37 G. 3, c. 123, s. 5. Nor is it necessary for the prosecutor to prove that the defendant was not compelled to take the oath; compulsion is matter of excuse, to be established by evidence for the defence. And in order to make it a legal excuse, the defendant must prove that he disclosed the whole affair upon oath to a magistrate (or, if a soldier or seaman, to his commanding officer) within four days after taking the oath unless prevented by actual force or sickness, and then within four days after such force or sickness ceased. *Id.* s. 2.

OATHS TO COMMIT TREASON OR FELONY.

Statutes.

52 *G.* 3, *c.* 104 (*Unlawful Oaths Act*, 1812), *s.* 1.]—[*After reciting the passing of the* Unlawful Oaths Act, 1797 (37 G. 3, c. 123), ante, p. 1127]: Whereas it is expedient that more effectual provisions should be made as to certain oaths: be it therefore enacted . . . that every person who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at the administering of any oath, or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony, . . . (*see* 7 W. 4 & 1 Vict. c. 91, s. 1, *infra*) and every person who shall take any such oath or engagement,

not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and shall be *transported as a felon* for the term of his natural life, or for such term of years as the Court before whom the said offender or offenders shall be tried shall adjudge.

Sect. 2.]—*Compulsion to take oath no justification or excuse unless declared within fourteen days.*

Sect. 4.—*Aiders and abettors.*]—*In the same terms as* 37 G. 3, c. 123, s. 3, ante, p. 1127.

Sect. 5.—*Form of indictment.*]—*In the same terms as* 37 G. 3, c. 123, s. 4, ante, p. 1127.

Sect. 6.—*Oaths within the Act.*]—Provided always . . . that any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of this Act, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person to any other person or persons : or taken by any other person or persons without any administration thereof by any other person or persons.

Sect. 7.—*Venue.*]—Provided also . . . that any offence committed against this Act on the high seas, or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried and determined before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom. (*And see ante*, pp. 30-35, 42.)

Sect. 8.]—*Persons tried under the Act not to be tried again for the same offence as high treason or misprision.* Provisions of Act *alternative to law of treason, etc.* (See 52 & 53 Vict. c. 63, s. 33, ante, p. 160.)

57 *G.* 3, *c.* 19, *s.* 25.]—See ante, p. 1128.

7 *W.* 4 *& 1 Vict. c.* 91, *s.* 1.—*Commutation of punishment.*]—*Recites* (inter alia) 52 G. 3, c. 104, s. 1, *so far as it relates to administering the oaths therein mentioned*, and enacts that if any person shall, after the commencement of this Act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . . [*Rest rep.* 55 & 56 Vict. c. 19 (S. L. R.). *Penal servitude was substituted for transportation by* 20 & 21 Vict. c. 3, ante, p. 237.]

54 *& 55 Vict. c.* 69, *s.* 1.—*Minimum term of penal servitude and term of imprisonment.*]—Ante, pp. 238, 239.

Indictment for administering an Oath to commit Treason, etc.
(52 *G.* 3, *c.* 104, *s.* 1, ante, p. 1130.)

As in last precedent, except altering the statute in the statement of the offence, and in the particulars of the offence stating the oath or engagement as "purporting or intending to bind C. D. to commit treason" [*or to murder* E. F., *as the case may be* (*any felony punishable by law with death*)].

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 7 W. 4 & 1 Vict. c. 91, s. 1; 20 & 21 Vict. c. 3 (ante, pp. 1131, 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *Taking such an oath felony: penal servitude for life or for not less than three years;* 52 G. 3, c. 104, s. 1; 54 & 55 Vict. c. 69, s. 1; *or imprisonment for not more than two years, with or without hard labour.* 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *If the offence is committed on the high seas, or out of the realm, the venue may be laid in any county.* 52 G. 3, c. 104, s. 7, ante, p. 1131.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

As to the evidence, *see ante*, p. 1129. As to the effect of the Act, *see R.* v. *Edgar*, 33 St. Tr. 145.

SECT. 8.

INCITING TO MUTINY, ETC.

Statutes.

37 *G.* 3, *c.* 70 (*Incitement to Mutiny Act*, 1797), *s.* 1.]—Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience; be it enacted, that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony. . . . (*As to punishment*, see 7 W. 4 & 1 Vict. c. 91, s. 1, infra.)

Sect. 2.—*Venue.*]—Provided always . . . that any offence committed against this Act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if the said offence had been therein committed. (*See ante*, pp. 30-35, 42.)

Sect. 3.—*Persons tried for offences against the Act not to be tried again on the same facts for high treason or misprision of treason.*]—See ante, p. 160.

7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1.—*Punishment.*]— . . . *Recites* (inter alia) 37 G. 3, c. 70, s. 1; *and enacts, that* if any person shall, after the commencement of this Act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . [*Remainder rep.* 55 & 56 Vict. c. 19 (S. L. R.). *As to present punishment*, vide infra.]

9 & 10 *Geo.* 5, *c.* 46 (*Police Act*, 1919), *s.* 3.—*Causing disaffection amongst members of police force.*]—If any person causes, or attempts to cause, or does any act calculated to cause disaffection amongst the members of any police force, or induces, or attempts to induce, or does any act calculated to induce, any member of a police force to withhold his services or to commit breaches of discipline, he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding fifty pounds, or to both such imprisonment and fine, and in either case, if a member of a police force, shall forfeit all pension rights, and be disqualified for being a member of any police force: Provided that, where the person convicted of any such offence was a member of a police force, and was not sentenced to imprisonment without the option of a fine, the police authority may, if they think fit, pay to him the whole or any part of the rateable deductions which may have been made from his pay.

9 & 10 *Geo.* 5, *c.* 92 (*Aliens Restriction* (*Amendment*) *Act*, 1919) *s.* 3.—*Incitement to sedition, &c.*]—(1) If any alien attempts or does any act calculated or likely to cause sedition or disaffection amongst any of His Majesty's Forces or the forces of His Majesty's allies, or amongst the civilian population, he shall be liable on conviction on indictment to penal servitude for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding three months. (2) If any alien promotes or attempts to promote industrial unrest in any industry in which he has not been bonâ fide engaged for at least two years immediately preceding in the United Kingdom, he shall be liable on summary conviction to imprisonment for a term not exceeding three months.

Indictment for endeavouring to seduce a Soldier from his Allegiance.

STATEMENT OF OFFENCE.

Attempting to seduce soldiers, contrary to section 1 of the Incitement to Mutiny Act, 1797.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously endeavoured to seduce soldiers serving in His Majesty's Army from their duty and allegiance to His Majesty.

The venue may be laid in any county. 37 G. 3, c. 70, s. 2.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 7 W. 4 & 1 Vict. c. 91, s. 1, supra; 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *The offence described in the statute is an endeavour to seduce any person serving in his Majesty's forces by sea or land, from his duty or allegiance to his Majesty: or to incite or stir him up to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever. It is not necessary to allege the means by which the defendant endeavoured to seduce him.* R. *v.* Fuller, 2 Leach, 790; 1 East, P. C. 92; 1 B. & P. 180. *Where the incitement is in the form of a publication addressed to British soldiers in general, it is not necessary to specify in the indictment any particular person or persons who have been incited.* R. *v.* Bowman, 22 Cox, 729; 76 J. P. 271, Horridge, J. *As to the punishment of persons subject to military law who persuade or assist soldiers, etc., to desert*, see Army Act (44 & 45 Vict. c. 58), ss. 12, 14; 45 & 46 Vict. c. 48, s. 15. *Civilians guilty of these acts may be punished by a court of summary jurisdiction under* 44 & 45 Vict. c. 58, s. 153. And see 45 & 46 Vict. c. 48, s. 17 (Army Reserve); 7 Edw. 7, c. 9, s. 20 (Territorial Forces).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Although in the indictment it is not necessary to state the means by which the defendant endeavoured to seduce a soldier or sailor from his duty and allegiance, they must be detailed in evidence. Where an endeavour to seduce a particular person (J. N.) is alleged in the indictment, it must be proved, also, that J. N. was at the time serving in his Majesty's land forces; and that A. B. was aware of that fact. Where the incitement is published in a newspaper, the jury must consider whether the publication was addressed to persons serving in His Majesty's forces, and, if so, whether it amounted to an endeavour to seduce such persons from their allegiance. *R.* v. *Bowman*, 22 Cox, 729; 76 J. P. 271, Horridge, J. A sailor who has been in the sick hospital for thirty days, and therefore is not entitled to pay, nor liable to answer before a court-martial for what he does, is nevertheless a person serving in his Majesty's navy, within this Act. *R.* v. *Tierney*, R. & R. 74.

SECT. 9.

ILLEGAL TRAINING AND DRILLING.

Statutes.

60 G. 3 & 1 G. 4, c. 1 (*Unlawful Drilling Act*, 1819), s. 1.]—*Recites, that in some parts of the United Kingdom, men clandestinely and unlawfully assembled have practised military training and exercise, to the great terror and alarm of his Majesty's peaceable and loyal subjects, and the imminent danger of the public peace; and enacts that* all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled, to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his Majesty, or *a Secretary of State, or any officer deputed by him for the purpose*, by commission or otherwise, for so doing, shall be and the same are, hereby prohibited, as dangerous to the peace and security of his Majesty's liege subjects and of his government; and every person who shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the Court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment not exceeding two years, at the discretion of the Court in which such conviction shall be had. [*The words italicised represent the amendment effected* by 10 & 11 *Geo.* 5 *c.* 43. *s.* 16. As *to present punishment*, see post, p. 1136).]

Sect. 2.—*Dispersion of meetings, etc.*]—It shall be lawful for any justice of the peace, or for any constable or peace officer, or for any other person acting in their aid or assistance, to disperse any such unlawful meeting or assembly as aforesaid, and to arrest and detain any person present at, or aiding, assisting, or abetting any such assembly or meeting as aforesaid; and it shall be lawful for the justice of the peace who shall arrest any such person, or before whom any person so arrested shall be brought, to commit such person for trial for such offence, under the provisions of this Act, unless such person can and shall give sufficient bail for his appearance at the next assizes or general or quarter sessions of the peace, to answer to any indictment which may be preferred against him for any such offence against this Act, in England and Ireland; and in Scotland every such person shall be arrested and dealt with according to the law and practice of that part of the United Kingdom in the case of a bailable offence.

Sect. 4.—*Provisions of Act alternative to those of former law: provision against double prosecution.* (Cf. 52 & 53 Vict. c. 63, s. 33, ante, p. 160).

Sect. 7.—*Limitation of prosecutions.*]—Provided always that no person shall be prosecuted by virtue of this Act for anything done or committed contrary to the provisions hereinbefore contained, unless such prosecution shall be commenced within six calendar months after the offence committed. (*See ante*, pp. 63, 64.)

Indictment for Unlawful Drilling. (60 *G.* 3 *& 1 G.* 4, *c.* 1, *s.* 1, ante, p. 1135.)

STATEMENT OF OFFENCE.

Unlawful drilling, contrary to section 1 of the Unlawful Drilling Act, 1819.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, was present at an unlawful meeting of persons assembled together for the purpose of being trained or drilled to the use of arms, and drilled some of the persons so assembled in the use of arms.

It may be charged generally that the defendant trained and drilled to the use of arms, etc., without stating any meeting or assembly. An indictment for being present at such meeting for the purpose of being trained or drilled, or for being there trained or drilled, may easily be framed from the above. The indictment must show that the meeting was held for the purpose of training or drilling, etc., as described in the statute: it is not sufficient to allege that it was a meeting dangerous to the public peace, and that the defendant attended it for the purpose of training and drilling, etc. Gogarty *v.* R., 3 Cox, 306 (Ir.); 1 Ir. Jur. (O. S.) 203.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 60 G. 3 & 1 G. 4, c. 1, s. 1; 20 & 21 Vict. c. 3 (ante, p. 237).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the meeting was held as stated in the indictment, under circumstances tending to show that it was unauthorized and unlawful; that it was held for the purpose of training and drilling to the use of arms, etc.; and that the defendant attended it for the purpose of training and drilling others, or of being himself trained and drilled, or drilled some members of the assembly, as the case may be. The jury will, of course, have to infer the intent from the circumstances (*see ante*, p. 396).

Drilling for the purpose of going to a lawful meeting in good order is lawful: if for the purpose of securing attention to seditious speeches, and to give confidence to seditious persons, it is a misdemeanor: if for overawing the

government, it is certainly unlawful, and seems to be treason. *R.* v. *Hunt*, 1 St. Tr. (N. S.) 171 : *Redford* v. *Birley*, *Id.* 1071. *See post*, "*Unlawful Assembly*," p. 1218. As to unlawful making and selling of arms, *see R.* v. *Knowles*, 1 St. Tr. (N. S.) 497 : *R.* v. *Morris*, *Id.* 521.

SECT. 10.

OFFENCES RELATING TO PUBLIC STORES.

Statutes.

12 *G.* 3, *c.* 24.—*Setting fire to public stores.*]—Ante, p. 748.

28 *& 29 Vict. c.* 89 (*Greenwich Hospital Act*, 1865), *s.* 45.]—The following mark may be applied in or on stores used or intended to be used for the purposes of Greenwich Hospital, to denote his Majesty's property in stores so marked, namely, an anchor surmounted with a naval crown, with two flags over the crown, and the letter G. on one side, and the letter H. on the other side : and stores intended to be used as aforesaid shall be deemed naval stores within the meaning of the *Public Stores Act*, 1875, and that Act shall apply thereto as if the mark in the present section were described in the schedule to that Act, and that Act shall apply to all stores so marked before the commencement of this Act (1st Sept., 1865) becoming by virtue of this Act the property of his Majesty. [*The words in italics were substituted by* 38 & 39 Vict. c. 25, s. 17 (post, p. 1139), *for the words* "Naval and Victualling Stores Act, 1864," *repealed by the later Act.*]

38 *& 39 Vict. c.* 25 (*Public Stores Act*, 1875), *s.* 2.—*Interpretation of terms.*]—In this Act the term "secretary of state" means one of his Majesty's principal secretaries of state; the term " the admiralty " means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral : the term " stores " includes all goods and chattels, and any single store or article. . . .

Sect. 3.—*Stores to which the Act applies.*]—This Act shall apply to all stores under the care, superintendence, or control of a secretary of state or the admiralty, or any public department or office, or of any person in the service of his Majesty, and such stores are in this Act referred to as his Majesty's stores. The secretary of state, admiralty, public department, office, or person having the care, superintendence, or control of such stores, are hereinafter in this Act included in the expression public department.

Sect. 4.—*Marks in schedule appropriated for public stores.—Misapplication of them a misdemeanor.*]—The marks described in the first schedule to this Act may be applied in or on stores therein described in order to denote his Majesty's property in stores so marked; and it shall be lawful for any public

department, and the contractors, officers, and workmen of such department, to apply those marks, or any of them, in or on any such stores; and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores, he shall be guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 5.—*Obliteration, etc., of marks with intent to conceal the King's property in stores.*]—If any person, with intent to conceal his Majesty's property in any stores, takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, or any mark whatsoever denoting the property of his Majesty in any stores, he shall be guilty of felony, and shall on conviction thereof be liable, in the discretion of the Court before which he is convicted, to be kept in penal servitude for any term not exceeding seven years. . . .

Sect. 7.—*Unlawful possession of his Majesty's stores.*]—If any person is brought before a court of summary jurisdiction charged with conveying or with having in his possession or keeping any of his Majesty's stores reasonably suspected of being stolen or unlawfully obtained, and does not give an account to the satisfaction of the Court how he came by the same, he shall be deemed guilty of a misdemeanor, and shall be liable on summary conviction to a penalty not exceeding 5*l.*, or in the discretion of the Court to be imprisoned for any term not exceeding two months, with or without hard labour.

Sect. 9.—*Penalty on dealer, etc., found in possession of his Majesty's stores and not accounting for them.*]—If stores are found in the possession or keeping of a person being in his Majesty's service, or in the service of a public department, or being a dealer in marine stores or in old metals, or being a pawnbroker (within the meaning of the enactments for the time being in force relating to such dealers or pawnbrokers), and he is taken or summoned before a court of summary jurisdiction, and the Court sees reasonable ground for believing the stores found to be or to have been his Majesty's property, then, if such person does not satisfy the Court that he came lawfully by the stores so found, he shall be liable on summary conviction to a penalty not exceeding 5*l.* (*As to dealers in old metals*, see 24 & 25 Vict. c. 110, s. 4; 34 & 35 Vict. c. 112, s. 13 (ante, p. 723); 8 Edw. 7, c. 67, s. 116. *As to marine store dealers*, see 57 & 58 Vict. c. 60, ss. 538-542; 2 & 3 Vict. c. 47, s. 26; 8 Edw. 7, c. 67, s. 116. *As to pawnbrokers*, see 35 & 36 Vict. c. 93, s. 38 (ante, p. 723).)

Sect. 10.—*Criminal possession explained.*]—For the purposes of this Act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person or in any house, building, lodging, apartment, field, or place, open or inclosed, whether occupied by himself or not, and whether the same are so had (*sic*) for his own use or benefit or for the use or benefit of another.

Sect. 12.—*Parts of* 24 *&* 25 *Vict. c.* 96, *incorporated.*]—The following sections of the *Larceny Act*, 1861, are hereby incorporated with this Act, and shall for the purposes of this Act be read as if they were here re-enacted, namely, sections 98 to 100, 103, 107 to 113, and 115 to 121, all inclusive, and for this purpose the expression "this Act," where used in those sections, shall be

taken to include the present Act. [*Section* 100 *of the* Larceny Act, 1861, *has now been replaced by s.* 45 *of the* Larceny Act, 1916.]

Sect. 13.—*Provision for regimental necessaries, etc.*]—The provisions of this Act relative to the taking out, destroying, or obliterating of marks, or to the having in possession or keeping his Majesty's stores, shall not apply to stores issued as regimental necessaries or otherwise for any soldier, militiaman, or volunteer; but nothing herein shall relieve any person from any obligation or liability to which he may be subject under any other Act in respect of any such stores. (*See* 44 & 45 Vict. c. 58, s. 156 (1), (7), *post*, p. 1140).

Sect. 16.—*Penalties of Act alternative to those of other Acts and common law.*]—Nothing in this Act shall prevent any person from being indicted under this Act or otherwise for any indictable offence made punishable by summary conviction under this Act or prevent any person from being liable under any other Act or otherwise to any higher or other penalty or punishment than is provided for any offence under this Act, so that no person be punished twice for the same offence. (*Cf.* 52 & 53 Vict. c. 63, s. 33, ante, p. 160).

Sect. 17.]—Sect. 45 of the *Greenwich Hospital Act*, 1865 (*ante*, p. 1137), shall be read and have effect as if this Act, instead of the *Naval and Victualling Stores Act*, 1864, were referred to in that section.

Sect. 18.]—*Act to apply to stores marked before its passing* (*June* 29, 1875).

FIRST SCHEDULE.

Marks appropriated for Use in or on his Majesty's Stores.

Stores.	Marks.
Hempen cordage and wire rope .	White, black or coloured worsted threads laid up with the yarns and the wire respectively.
Canvas, fearnought, hammocks, and seamen's bags.	A blue line in a serpentine form.
Bunting	A double tape in the warp.
Candles	Blue or red cotton threads in each wick or wicks of red cotton.
Timber or metal	The name of his Majesty, his predecessors, his heirs or successors, or of any public department, or any branch thereof, or the broad arrow, or a crown, or his Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name.
Any stores not before enumerated, whether similar to the above or not.	

44 & 45 *Vict. c.* 58 (*Army Act*), *s.* 156.]—(1) *Penalty on purchase from soldiers of regimental necessaries, etc.*

* * * * * * *

(7) Articles which are public stores within the meaning of the *Public Stores Act*, 1875, (*supra*), and are not included in the foregoing description, shall not be deemed to be stores issued as regimental necessaries or otherwise within the meaning of s. 13 of that Act.

Indictment for wrongfully applying Marks on Stores. (38 & 39 *Vict. c.* 25, *s.* 4, ante, p. 1137.)

STATEMENT OF OFFENCE.

Wrongfully applying marks, contrary to section 4 of the Public Stores Act, 1875.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, without lawful authority, applied a certain mark [*see the Schedule, supra*] in and on [*see the Schedule, supra*] being His Majesty's stores.

Misdemeanor: imprisonment for not more than two years, with or without hard labour. 33 & 39 Vict. c. 25, s. 4.

Evidence.

Prove that the defendant applied the mark to the stores mentioned in the indictment. It is not necessary to show that he did so without lawful authority. If the defendant had such authority he must prove it. 38 & 39 Vict. c. 25, s. 4. *See* the following decisions on the former law as to offences relating to public stores:—*R.* v. *Banks*, 1 Esp. 144: *R.* v. *Wilmett*, 3 Cox, 281: *R.* v. *Cohen*, 8 Cox, 41: *R.* v. *Sleep*, *Id.* 472, *and see* 477 n.; L. & C. 44.

Indictment for obliterating Marks on Stores. (38 & 39 *Vict. c.* 25, *s.* 5, ante, p. 1138.)

STATEMENT OF OFFENCE.

Obliterating marks, contrary to section 5 of the Public Stores Act, 1875.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, obliterated wholly or in part from [*state the articles*], being the King's stores, a certain mark

[*stating it*], which denoted the King's property therein, with intent to conceal the King's property therein.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 38 & 39 Vict. c. 25, s. 5; 54 & 55 Vict. c. 69, s. 1, sub-ss. 1, 2 (ante, pp. 238, 239).

Evidence.

Prove that the defendant took out the mark from the stores, and circumstances from which it may be inferred that his intent in so doing was to conceal his Majesty's property therein. As, however, a man is presumed to intend the necessary and reasonable consequences of his own acts (*R.* v. *Dixon*, 3 M. & Sel. 11, 15; 4 Camp. 12: *R.* v. *Farrington*, R. & R. 207, *ante*, p. 400), the mere fact of the defendant's having taken out the mark will be sufficient evidence to go to the jury that in so doing he intended to conceal his Majesty's property in the stores.

SECT. 11.

DISCLOSURE, ETC., OF GOVERNMENT SECRETS.

Statutes (*a*).

1 & 2 *G.* 5, *c.* 28 (*Official Secrets Act*, 1911), *s.* 1.—*Penalties for spying.*]—(1) If any person for any purpose prejudicial to the safety or interests of the State—(*a*) approaches, *inspects*, *passes over*, or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or (*b*) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or (*c*) obtains, *collects*, *records*, *or publishes*, or communicates to any other person *any secret official code word*, *or pass word*, *or* any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; he shall be guilty of felony. . . [*Provisions as to punishment repealed by* 10 & 11 Geo. 5, c. 75, *and replaced by* s. 8 (1) *thereof*, *post*, p. 1150.]

(2) On a prosecution under this section, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place within the meaning

(*a*) The words printed in italics represent amendments effected by the *Official Secrets Act*, 1920 (10 & 11 Geo. 5, c. 75), ss. 9, 10, and First Schedule.

of this Act, or anything in such a place, *or any secret official code word or pass word*, is made, obtained, *collected*, *recorded*, *published*, or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, *collected*, *recorded*, *published*, or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved. [*The word "enemy" in this section does not mean necessarily some one with whom this country is at war, but a potential enemy with whom we might some day be at war.* R. *v.* Parrott, 8 Cr. App. R. 186.]

Sect. 2.—*Wrongful communication, etc., of information.*]—(1) If any person having in his possession or control *any secret official code word, or pass word, or* any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained *or to which he has had access* owing to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract,—(*a*) communicates the *code word, pass word,* sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it; (*aa*) *uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State;* (or) (*b*) retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it, *or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or* (*c*) *fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code, or pass word or information* : that person shall be guilty of a misdemeanor. [*On the construction of* s. 2 (1) (b) *see* R. *v.* Simington [1921] 1 K. B. 451. *Where there is evidence that a person having in his possession information which he has obtained owing to his position as a person who held office under His Majesty has communicated it to a person other than a person to whom he was authorized to communicate it the case is within the words of this section and it is not necessary to show that the information was entrusted specially in confidence to him.* R. *v.* Crisp and Homewood, 83 J. P. 121 (Avory, J.). *The section applies to any document or information of an official character.* Id.]

(1A) *If any person having in his possession or control any sketch, plan, model, article, note, document, or information which relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State, that person shall be guilty of a misdemeanor.*

(2) If any person receives any sketch, *secret official code word, or pass word, or* plan, model, article, note, document, or information knowing, or having reasonable ground to believe, at the time when he receives it, that the sketch, *code word, pass word,* plan, model, article, note, document, or information is com-

municated to him in contravention of this Act, he shall be guilty of a misdemeanor, unless he proves that the communication to him of the sketch, *code word*, *pass word*, plan, model, article, note, document, or information was contrary to his desire.

(3) [*Provisions as to punishment repealed by* 10 & 11 Geo. 5, c. 75, *and replaced by s.* 8 (2) *thereof*, post, p. 1150.]

Sect. 3.—*Definition of prohibited place.*]—For the purposes of this Act, the expression "prohibited place" means—(*a*) *any work of defence, arsenal, naval or air force establishment or station, factory, dockyard, mine, minefield, camp, ship, or aircraft belonging to or occupied by or on behalf of His Majesty, or any telegraph, telephone, wireless or signal station, or office so belonging or occupied, and any place belonging to or occupied by or on behalf of His Majesty and used for the purpose of building, repairing, making, or storing any munitions of war, or any sketches, plans, models, or documents relating thereto, or for the purpose of getting any metals, oil, or minerals of use in time of war*; and (*b*) any place not belonging to His Majesty where any *munitions of war*, or any *sketches, models, plans* or documents relating thereto, are being made, repaired, *gotten* or stored under contract with, or with any person on behalf of, His Majesty, or otherwise on behalf of His Majesty; and (*c*) any place belonging to *or used for the purposes of* His Majesty which is for the time being declared by *order of* a Secretary of State to be a prohibited place for the purposes of this section on the ground that information with respect thereto, or damage thereto, would be useful to an enemy; and (*d*) any railway, road, way, or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith), or any place used for gas, water, or electricity works or other works for purposes of a public character, or any place where any *munitions of war* or any *sketches, models, plans*, or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of His Majesty, which is for the time being declared by *order of* a Secretary of State to be a prohibited place for the purposes of this section, on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy.

Sect. 4.—*Repealed by* 10 & 11 Geo. 5, c. 75, *and replaced by* s. 7 *thereof.*]

Sect. 5.—*Person charged with felony under Act, may be convicted of misdemeanor under Act.*]—Any person charged with an offence which is a felony under this Act may, if the circumstances warrant such a finding, be found guilty of an offence which is a misdemeanor under this Act.

Sect. 6.—*Power to arrest.*]—Any person who is found committing an offence under this Act, whether that offence is a felony or not, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be apprehended and detained in the same manner as a person who is found committing a felony.

Sect. 7—*Penalty for harbouring spies.*]—If any person knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits to meet or assemble in any premises in his occupation

or under his control any such persons, or if any person having harboured any such person, or permitted to meet or assemble in any premises in his occupation or under his control any such persons, wilfully *omits or* refuses to disclose to a superintendent of police any information which it is in his power to give in relation to any such person he shall be guilty of a misdemeanour . . . . [*Provisions as to punishment repealed by* 10 & 11 Geo. 5, c. 75 *and replaced by* s. 8 (2) *thereof, post,* p. 1150.]

Sect. 8.—*Restriction on prosecution.*]—A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General :

Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

Sect. 9.—*Search warrants.*]—(1) If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant authorising any constable named therein to enter at any time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note, or document, or anything of a like nature or anything which is evidence of an offence under this Act having been or being about to be committed, which he may find on the premises or place or on any such person, and with regard to or in connexion with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed.

(2) Where it appears to a superintendent of police that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice under this section.

Sect. 10.—*Extent of Act and place of trial of offence.*]—(1) This Act shall apply to all acts which are offences under this Act when committed in any part of His Majesty's dominions, or when committed by British officers or subjects elsewhere.

(2) An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British court in the place where the offence was committed, or in the High Court in England or the Central Criminal Court, and the Criminal Jurisdiction Act, 1802, shall apply in like manner as if the offence were mentioned in that Act, and the Central Criminal Court as well as the High Court possessed the jurisdiction given by that Act to the Court of King's Bench.

(3) An offence under this Act shall not be tried by any court of general or quarter sessions, nor by the sheriff court in Scotland, nor by any court out

of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law.

(4) The provisions of the Criminal Law and Procedure (Ireland) Act, 1887, shall not apply to any trial under the provisions of this Act.

Sect. 11.—*Saving for laws of British possessions.*]—If by any law made before or after the passing of this Act by the legislature of any British possession provisions are made which appear to His Majesty to be of the like effect as those contained in this Act, His Majesty may, by Order in Council, suspend the operation within that British possession of this Act, or of any part thereof, so long as that law continues in force there, and no longer, and the Order shall have effect as if it were enacted in this Act:

Provided that the suspension of this Act, or of any part thereof, in any British possession shall not extend to the holder of an office under His Majesty who is not appointed to that office by the Government of that possession.

Sect. 12.—*Interpretation.*]—In this Act, unless the context otherwise requires,—

Any reference to a place belonging to His Majesty includes a place belonging to any department of the Government of the United Kingdom or of any British possessions, whether the place is or is not actually vested in His Majesty;

The expression "Attorney-General" means the Attorney or Solicitor-General for England; and as respects Scotland, means the Lord Advocate; and as respects Ireland, means the Attorney or Solicitor-General for Ireland; and, if the prosecution is instituted in any court out of the United Kingdom, means the person who in that court is Attorney-General, or exercises the like functions as the Attorney-General in England;

Expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect, or description thereof only be communicated or received; expressions referring to obtaining or retaining any sketch, plan, model, article, note, or document, include the copying or causing to be copied the whole or any part of any sketch, plan, model, article, note, or document; and expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document;

The expression "document" includes part of a document;

The expression "model" includes design, pattern, and specimen;

The expression "sketch" includes any photograph or other mode of representing any place or thing;

The expression "munitions of war" includes the whole or any part of any ship, submarine, aircraft, tank or similar engine, arms and ammunition, torpedo or mine, intended or adapted for use in war, and any other article, material, or device, whether actual or proposed, intended for such use;

The expression "superintendent of police" includes any police officer of a like or superior rank, *and any person upon whom the powers of a superin-*

tendent of police are for the purpose of this Act conferred by a Secretary of State.

The expression " office under His Majesty " includes any office or employment in or under any department of the Government of the United Kingdom, or of any British possession;

The expression "offence under this Act" includes any act, omission, or other thing which is punishable under this Act.

Sect. 13.—*Short title and repeal.*]—(1) This act may be cited as the *Official Secrets Act*, 1911.

(2) The *Official Secrets Act*, 1889, is hereby repealed.

10 & 11 *G. 5, c. 75* (*Official Secrets Act*, 1920), *s. 1.—Unauthorised use of uniforms; falsification of reports, forgery, personation, and false documents.*]—If any person for the purpose of gaining admission, or of assisting any other person to gain admission, to a prohibited place, within the meaning of the *Official Secrets Act*, 1911 (hereinafter referred to as "the principal Act"), or for any other purpose prejudicial to the safety or interests of the State within the meaning of the said Act—

(*a*) uses or wears, without lawful authority, any naval, military, air-force, police, or other official uniform, or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform; or

(*b*) orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes or connives at the making of any false statement or any omission; or

(*c*) forges, alters, or tampers with any passport or any naval, military, air-force, police, or official pass, permit, certificate, licence, or other document of a similar character (hereinafter in this section referred to as an official document), or uses or has in his possession any such forged, altered, or irregular official document; or

(*d*) personates, or falsely represents himself to be a person holding, or in the employment of a person holding office under His Majesty, or to be or not to be a person to whom an official document or secret official code word or pass word has been duly issued or communicated, or with intent to obtain an official document, secret official code word or pass word, whether for himself or any other person, knowingly makes any false statement; or

(*e*) uses, or has in his possession or under his control, without the authority of the Government Department or the authority concerned, any die, seal, or stamp of or belonging to, or used, made or provided by any Government Department, or by any diplomatic, naval, military, or air force authority appointed by or acting under the authority of His Majesty, or any die, seal or stamp so nearly resembling any such die, seal or stamp as to be calculated to deceive, or counterfeits any such die, seal or stamp, or uses, or has in his possession, or under his control, any such counterfeited die, seal or stamp;

he shall be guilty of a misdemeanour.

(2) If any person—

(*a*) retains for any purpose prejudicial to the safety or interests of the State any official document, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with any directions issued by any Government Department or any person authorised by such department with regard to the return or disposal thereof; or

(*b*) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or pass word issued for the use of some person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable; or

(*c*) without lawful authority or excuse, manufactures or sells, or has in his possession for sale any such die, seal or stamp as aforesaid;

he shall be guilty of a misdemeanour.

(3) In the case of any prosecution under this section involving the proof of a purpose prejudicial to the safety or interests of the State, subsection (2) of section one of the principal Act shall apply in like manner as it applies to prosecutions under that section.

Sect. 2.—*Communications with foreign agents to be evidence of commission of certain offences.*]—(1) In any proceedings against a person for an offence under section one of the principal Act, the fact that he has been in communication with, or attempted to communicate with, a foreign agent, whether within or without the United Kingdom, shall be evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

(2) For the purpose of this section, but without prejudice to the generality of the foregoing provision—

(*a*) A person shall, unless he proves the contrary, be deemed to have been in communication with a foreign agent if—

(i) He has, either within or without the United Kingdom, visited the address of a foreign agent or consorted or associated with a foreign agent; or

(ii) Either, within or without the United Kingdom, the name or address of, or any other information regarding a foreign agent has been found in his possession, or has been supplied by him to any other person, or has been obtained by him from any other person:

(*b*) The expression "foreign agent" includes any person who is or has been or is reasonably suspected of being or having been employed by a foreign power either directly or indirectly for the purpose of committing an act, either within or without the United Kingdom, prejudicial to the safety or interests of the State, or who has or is reasonably suspected of

having, either within or without the United Kingdom, committed, or attempted to commit, such an act in the interests of a foreign power :

(*c*) Any address, whether within or without the United Kingdom, reasonably suspected of being an address used for the receipt of communications intended for a foreign agent, or any address at which a foreign agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, shall be deemed to be the address of a foreign agent, and communications addressed to such an address to be communications with a foreign agent.

Sect. 3.—*Interfering with officers of the police or members of His Majesty's forces.*]—No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede, the chief officer or a superintendent or other officer of police, or any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place, and, if any person acts in contravention of, or fails to comply with, this provision, he shall be guilty of a misdemeanour.

Sect. 4.—*Power to require the production of telegrams.*]—(1) Where it appears to a Secretary of State that such a course is expedient in the public interest, he may, by warrant under his hand, require any person who owns or controls any telegraphic cable or wire, or any apparatus for wireless telegraphy, used for the sending or receipt of telegrams to or from any place out of the United Kingdom, to produce to him, or to any person named in the warrant, the originals and transcripts, either of all telegrams, or of telegrams of any specified class or description, or of telegrams sent from or addressed to any specified person or place, sent or received to or from any place out of the United Kingdom by means of any such cable, wire, or apparatus, and all other papers relating to any such telegram as aforesaid.

(2) Any person who, on being required to produce any such original or transcript or paper as aforesaid, refuses or neglects to do so shall be guilty of an offence under this Act, and shall, for each offence, be liable on conviction under the Summary Jurisdiction Acts to imprisonment with or without hard labour for a term not exceeding three months, or to a fine not exceeding fifty pounds, or to both such imprisonment and fine.

(3) In this section the expression " telegram " shall have the same meaning as in the Telegraph Act, 1869 (32 & 33 Vict. c. 73), and the expression " wireless telegraphy " shall have the same meaning as in the Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24).

Sect. 5.—*Registration and regulation of persons carrying on the business of receiving postal packets.*]—(1) Every person who carries on, whether alone or in conjunction with any other business, the business of receiving for reward letters, telegrams, or other postal packets for delivery or forwarding to the persons for whom they are intended, shall as soon as may be send to the chief officer of police for the district, for registration by him, notice of the fact together with the address or addresses where the business is carried on, and the chief officer of police shall keep a register of the names and addresses of such persons, and shall, if required by any person who sends such a notice, furnish him on payment of a fee of one shilling with a certificate of registration, and every person

so registered shall from time to time furnish to the chief officer of police notice of any change of address or new address at which the business is carried on, and such other information as may be necessary for maintaining the correctness of the particulars entered in the register.

(2) Every person who carries on such a business as aforesaid shall cause to be entered in a book kept for the purpose the following particulars—

(*a*) the name and address of every person for whom any postal packet is received, or who has requested that postal packets received may be delivered or forwarded to him;

(*b*) any instructions that may have been received as to the delivery or forwarding of postal packets;

(*c*) in the case of every postal packet received, the place from which the postal packet comes, and the date of posting (as shown by the post-mark) and the date of receipt, and the name and address of the sender if shown on the outside of the packet, and, in the case of a registered packet, the date and office of registration and the number of the registered packet;

(*d*) in the case of every postal packet delivered, the date of delivery and the name and address of the person to whom it is delivered;

(*e*) in the case of every postal packet forwarded, the name and address to which and the date on which it is forwarded;

and shall not deliver a letter to any person until that person has signed a receipt for the same in such book as aforesaid, nor, if that person is not the person to whom the postal packet is addressed, unless there is left with him instructions signed by the last-mentioned person as to the delivery thereof, and shall not forward any postal packet to another address unless there is left with him written instructions to that effect signed by the addressee.

(3) The books so kept and all postal packets received by a person carrying on any such business, and any instruction as to the delivery or forwarding of postal packets received by any such person, shall be kept at all reasonable times open to inspection by any police constable.

(4) If any person contravenes or fails to comply with any of the provisions of this section, or furnishes any false information or makes any false entry, he shall be guilty of an offence under this Act, and shall, for each offence, be liable on conviction under the Summary Jurisdiction Acts to imprisonment with or without hard labour for a term not exceeding one month or to a fine not exceeding ten pounds, or to both such imprisonment and fine.

(5) Nothing in this section shall apply to postal packets addressed to any office where any newspaper or periodical is published, being postal packets in reply to advertisements appearing in such newspaper or periodical.

(6) Nothing in this section shall be construed as rendering legal anything which would be in contravention of the exclusive privilege of the Postmaster General under the Post Office Acts, 1908 to 1920, or the Telegraph Acts, 1863 to 1920.

Sect. 6.—*Duty of giving information as to commission of offences.*]—It shall be the duty of every person to give on demand to a chief officer of police, or to a superintendent or other officer of police not below the rank of inspector appointed by a chief officer for the purpose, or to any member of His Majesty's

forces engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under the principal Act or this Act, and, if so required, and upon tender of his reasonable expenses, to attend at such reasonable time and place as may be specified for the purpose of furnishing such information, and, if any person fails to give any such information or to attend as aforesaid, he shall be guilty of a misdemeanour.

Sect. 7.—*Attempts, incitements, &c.*]—Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty of a felony or a misdemeanour or a summary offence according as the offence in question is a felony, a misdemeanor or a summary offence, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.

Sect. 8.—*Provisions as to trial and punishment of offences.*]—(1) Any person who is a guilty of a felony under the principal Act or this Act shall be liable to penal servitude for a term of not less than three years and not exceeding fourteen years.

(2) Any person who is guilty of a misdemeanour under the principal Act or this Act shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or, on conviction under the Summary Jurisdiction Acts, to imprisonment, with or without hard labour, for a term not exceeding three months or to a fine not exceeding fifty pounds, or both such imprisonment and fine :

Provided that no misdemeanour under the principal Act or this Act shall be dealt with summarily except with the consent of the Attorney General.

(3) For the purposes of the trial of a person for an offence under the principal Act or this Act, the offence shall be deemed to have been committed either at the place in which the same actually was committed, or at any place in the United Kingdom in which the offender may be found.

(4) In addition and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings if, in the course of proceedings before a court against any person for an offence under the principal Act or this Act or the proceedings on appeal, or in the course of the trial of a person for felony or misdemeanour under the principal Act or this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the national safety, that all or any portion of the public shall be excluded during any part of the hearing, the court may make an order to that effect, but the passing of sentence shall in any case take place in public.

(5) Where the person guilty of an offence under the principal Act or this Act is a company or corporation, every director and officer of the company or corporation shall be guilty of the like offence unless he proves that the act or omission constituting the offence took place without his knowledge or consent.

Sect. 9.—*Amendments of principal Act in relation to munitions of war.*]—The principal Act shall have effect as though—

(1) After paragraph (*a*) of subsection (1) of section two the following paragraph were inserted :

"(*aa*) Uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State;"

and after the said subsection (1) the following subsection were inserted :

(1A) If any person having in his possession or control any sketch, plan, model, article, note, document, or information which relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State, that person shall be guilty of a misdemeanour;" and

(2) In section twelve, after the definition of "sketch," the following definition were inserted :

" The expression ' munitions of war ' includes the whole or any part of any ship, submarine, aircraft, tank or similar engine, arms and ammunition, torpedo, or mine, intended or adapted for use in war, and any other article, material, or device, whether actual or proposed, intended for such use. [*The above amendments have been embodied in the text of the principal Act in italics.*]

Sect. 10.—*Minor amendments of principal Act.*]—The amendments specified in the second column of the First Schedule to this Act (which relate to minor details) shall be made in the provisions of the principal Act specified in the first column of that schedule. [*These amendments have been embodied in the text of the principal Act in italics.*]

Sect. 11.—*Short title, construction, and repeal.*]—(1) This Act may be cited as the Official Secrets Act, 1920, and shall be construed as one with the principal Act, and the principal Act and this Act may be cited together as the Official Secrets Acts, 1911 and 1920.

Provided that—

(*a*) this Act shall not apply to any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia (which for this purpose shall be deemed to include Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, Newfoundland, and India; and

(*b*) nothing in the principal Act shall be construed as preventing an offence under this Act which is to be tried summarily being tried in Scotland by the sheriff.

(2) The provisions of the principal Act mentioned in the Second Schedule to this Act are hereby repealed.

(3) For the purposes of this Act, the expression "chief officer of police,"—

(*a*) with respect to any place in England other than the city of London, has the meaning assigned to it by the Police Act, 1890; (53 & 54 Vict. c. 45).

(*b*) with respect to the city of London, means the Commissioner of the City Police;

(*c*) with respect to Scotland, has the meaning assigned to it by the Police (Scotland) Act, 1890 (53 & 54 Vict. c. 67); and

(*d*) with respect to Ireland, means, in the police district of Dublin metropolis, either of the Commissioners of Police for that district, and elsewhere the district inspector of the Royal Irish Constabulary.

FIRST SCHEDULE.

Minor Amendments of Principal Act.

Enactment.	Nature of Amendment.
s. 1 (1) (*a*) -	After the word " approaches " there shall be inserted the words " inspects, passes over."
s. 1 (1) (*c*) -	After the word " obtains " there shall be inserted the words " collects, records, or publishes," and after the words " any other person " there shall be inserted the words " any secret official code word, or pass word, or."
s. 1 (2) -	After the words " in such a place " there shall be inserted the words " or any secret official code word or pass word."
	After the word " obtained," in both places where it occurs, there shall be inserted the words " collected, recorded, published."
s. 2 (1) -	After the words " possession or control " there shall be inserted the words " any secret official code word, or pass word, or."
	After the words " which he has obtained " there shall be inserted the words " or to which he has had access."
	After the words " communicates the " there shall be inserted the words " code word, pass word."
	After the words " his duty to retain it " there shall be inserted the words " or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof."
	After paragraph (b) there shall be inserted the following paragraph :— " or (c) Fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code or pass word or information."
s. 2 (2) -	Before the word " sketch " where that word first occurs, there shall be inserted the words " secret official code word, or pass word, or."
	Before the word " sketch " in other places where it occurs, there shall be inserted the words " code word, pass word."
s. 3 - -	For paragraph (*a*) the following paragraph shall be substituted :— " Any work of defence, arsenal, naval or air force establishment or station, factory, dockyard, mine, minefield, camp, ship, or aircraft belonging to or occupied by or on behalf of His Majesty, or any telegraph, telephone, wireless or signal station, or office so belonging or occupied, and any place belonging to or occupied by or on

Enactment,	Nature of Amendment.
	behalf of His Majesty and used for the purpose of building, repairing, making, or storing any munitions of war, or any sketches, plans, models, or documents relating thereto, or for the purpose of getting any metals, oil, or minerals of use in time of war." In paragraphs (*b*) and (*d*) for the words " ship, arms, or other materials or instruments of use in time of war," in both places where they occur, there shall be substituted the words " munitions of war," and for the word " plans." in both places where it occurs, there shall be substituted the words " sketches, models, plans." In paragraph (*b*) after the word " repaired " there shall be inserted the word " gotten." In paragraph (*c*) after the words " any place belonging to " there shall be inserted the words " or used for the purposes of." In paragraphs (*c*) and (*d*) for the words " by a Secretary of State " in both places where those words occur, there shall be substituted the words " by order of a Secretary of State."
s. 7 . .	For the words " wilfully refuses " there shall be substituted the words " wilfully omits or refuses."
s. 12 . .	After the words " like or superior rank " there shall be inserted the words " and any person upon whom the powers of a superintendent of police are for the purpose of this Act conferred by a Secretary of State."

Second Schedule.

Provisions of Principal Act Repealed.

In subsection (1) of section one the words " and shall be liable to penal servitude for any term not less than three years and not exceeding seven years."

Subsection (3) of section two.

Section four.

In section seven the words " and liable to imprisonment with or without hard labour for a term not exceeding one year, or to a fine, or to both imprisonment and a fine."

10 & 11 *Geo.* 5, *c.* 41 (*Census Act*, 1920), *s.* 8 (2).—If any person (*a*) being a person employed in taking a census, without lawful authority publishes or communicates to any person otherwise than in the ordinary course of such employment any information acquired by him in the course of his employment; or (*b*) having possession of any information which to his knowledge has been disclosed in contravention of this Act, publishes or communi-

cates that information to any other person; he shall be guilty of a misdemeanor, and shall on conviction be liable to imprisonment with or without hard labour for a term not exceeding two years or to a fine, or to both such imprisonment and fine.

SECT. 12.

MISCONDUCT BY EXECUTIVE AND ADMINISTRATIVE OFFICIALS OF THE CROWN.

It has already been stated (*ante*, pp. 132, 133) that neglect by public officers of duties imposed on them at common law or by statute is indictable. Misconduct and extortion by, and bribery of, judicial officers and ministerial officers of justice are dealt with *post*, pp. 1205, 1206. Misconduct, fraud, and oppression by officers of the Crown are indictable at common law, whether the officer is appointed under the common law or statute. *See* 1 Russ. Cr. (7th ed.) 601.

In *R.* v. *Bembridge*, 22 St. Tr. 1; 6 East, 136, *cit.*, it was held indictable to enable persons in the pay office to pass their accounts in such a way as to defraud the government. *Cf. R.* v. *Baxter*, 5 Cox, 302, and the charge of Russell, C.J., to the grand jury of Middlesex in *R.* v. *Hodgkinson* (Times Newsp., 26th June, 1900), where a British vice-consul (at Bremerhaven) was indicted for misconduct in failing to account for certain moneys received by him by virtue of his office. In *R.* v. *Davison*, 31 St. Tr. 99, the defendant was convicted on criminal information for defrauding the Crown in the purchase of military stores by means of false vouchers. In *R.* v. *Hedges*, 28 St. Tr. 1315, clerks in the Woolwich Dockyard were convicted of fraud in their office; and in *R.* v. *Jones*, 31 St. Tr. 251; 8 East, 31, a commissary-general to the forces in the West Indies was convicted of frauds practised by him in his office.

As to the trial and punishment of Indian officials in England for offences in India, *see* Ilbert, Govt. of India (2nd ed.), 255, 258: *R.* v. *Douglas*, 13 Q. B. 42: *R.* v. *Hollond*, 5 T. R. 607.

As to the trial and punishment of British officials for oppressions, crimes and offences under the degree of felony committed outside Great Britain, *see* 11 W. 3, c. 12; 42 G. 3, c. 85 (*ante*, pp. 31, 440); 49 G. 3, c. 126, s. 14; *and cf. R.* v. *Hodgkinson*, *supra*.

Prior to the passing of the last two of these Acts, in *R.* v. *Munton*, 1 Esp. 62, an information was laid against a principal storekeeper in the West Indies for misdemeanors in colluding with contractors to defraud the government. It was objected that the evidence showed that the alleged frauds were committed in the West Indies outside the jurisdiction of the Court. Lord Kenyon, C.J., said that where the matter arose wholly abroad, the Court could have no jurisdiction except by statute; but held that as some of the

offences consisted in making false returns which had been sent from Antigua to England, there was an offence in London, where the returns were received and the offence made complete.

It is an indictable misdemeanor to buy or sell or pay any money or reward for any public office, within 5 & 6 Edw. 6, c. 16, or 49 G. 3, c. 126: *i.e.*, any office in the gift of the Crown, and any military or naval commission or place under the control of any public department, whether it be in the United Kingdom or in a British possession abroad. 49 G. 3, c. 126, ss. 1, 3. The punishment is fine and imprisonment, forfeiture of the office, and absolute disqualification for holding it again. *See Earl of Macclesfield's case*, 16 St. Tr. 767; Steph. Dig. Cr. Law (6th ed.), 104; 1 Russ. Cr. (7th ed.) 619, 627.

Purchase of the offices of clerk of the peace or under-sheriff is punishable under 1 & 2 W. & M. c. 21, s. 8; 50 & 51 Vict. c. 55, s. 27.

SECT 13.

CONCEALMENT OF TREASURE TROVE.

For the evidence required to establish this rare offence, which is a misdemeanor at common law, punishable by fine and imprisonment, *see* 3 Co. Inst. 133: *R.* v. *Thomas*, L. & C. 313; 33 L. J. (M. C.) 22: *R.* v. *Toole*, Ir. Rep. 2 C. L. 36; 11 Cox, 75; *Att.-Gen.* v. *British Museum (Trustees)* [1903] 2 Ch. 598: 1 Russ. Cr. (7th ed.) 339. As to inquisitions *re* treasure trove. *see Coroners Act*, 1887 (50 & 51 Vict. c. 71), s. 36; and *Att.-Gen.* v. *Moore* [1893] 1 Ch. 676; 62 L. J. (Ch.) 607: Jervis on Coroners (6th ed.), 107.

SECT 14.

SMUGGLING.

MAKING SIGNALS TO SMUGGLING VESSELS.

Statute.

30 *&* 40 *Vict. c.* 36 *(Customs Consolidation Act*, 1876), *s.* 190.—*Making signals.*]—No person shall, after sunset and before sunrise between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time of the year, make, aid, or assist in making any signal in or on board or from any ship

or boat, or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or be not within distance to notice any such signal; and if any person contrary to the *Customs Acts*, shall make or cause to be made, or aid or assist in making, any such signal, he shall be guilty of a misdemeanor, and may be stopped arrested detained and conveyed before any justice, who, if he sees cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender, being duly convicted, shall, by order of the Court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or, at the discretion of such court, be committed to a gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.

Sect. 191.—*Onus of proof.*]—If any person be charged with having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such intent and for such purpose shall be upon the defendant against whom such charge is made.

Sect. 255.—*In whose name indictments to be preferred.*]—Ante, p. 968.

Sect. 257.—*Limitation of prosecution.*]—Ante, p. 968.

Sect. 258.—*Venue.* Ante, p. 968.

Indictment. (39 & 40 *Vict. c.* 36, *s.* 190, ante, p. 1155.)

Statement of Offence.

Signalling, contrary to section 190 of the Customs Consolidation Act, 1876.

Particulars of Offence.

A. B., on the —— day of ——, at 10 o'clock in the evening, in the county of ——, made or assisted in making a signal from the shore for the purpose of giving notice to the master of a smuggling ship called the *Fly-by-night*, then on board the said ship.

Misdemeanor: either forfeiture of penalty of 100*l.*, *or, at discretion of Court, imprisonment with hard labour for any term not exceeding one year.* 39 & 40 Vict. c. 36, s. 190.

This offence is triable at quarter sessions. R. *v.* Cock, 4 M. & Sel. 71.

Evidence.

All the prosecutor has to prove is, that the defendant made a signal by firing a gun or otherwise, or was aiding and assisting in so doing on the sea-shore, etc., as stated in the indictment. It is not necessary for him to prove

that any smuggling vessel was in fact within sight or actually on the coast at the time; 39 & 40 Vict. c. 36, s. 190; and it is for the defendant to prove (if he can) that the fire, etc., was not lighted with the intent charged in the indictment. *Id.* s. 191. The offence must be committed after sunset and before sunrise between 21st September and 1st April, and after eight in the evening and before six in the morning in any other part of the year. *Id.* s. 190. *See* R. v. *Brown*, M. & M. 163.

The indictment for this and all other offences against this statute must be exhibited within three years next after the date of the offence committed. 39 & 40 Vict. c. 36, s. 257 (*ante*, p. 968). *See R.* v. *Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183 (*ante*, p. 64).

BEING ARMED AND ASSEMBLED FOR THE PURPOSE OF ASSISTING IN RUNNING UNCUSTOMED GOODS, ETC.

Statute.

42 & 43 *Vict. c.* 21 (*Customs and Inland Revenue Act*, 1879), *s.* 10.—*Penalty for assembling to run goods.*]—All persons to the number of three or more who shall assemble for the purpose of unshipping landing running carrying concealing or having so assembled shall unship land run carry convey or conceal any spirits tobacco or any prohibited restricted or uncustomed goods shall each forfeit a penalty not exceeding five hundred pounds nor less than one hundred pounds. [*This section is to be read as part of* 39 & 40 Vict. c. 36, *and as if it occupied the place formerly occupied in that statute by s.* 188, *now repealed.* 42 & 43 Vict. c. 21, s. 14.]

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876). *s.* 189.—*Procuring persons to assemble to run goods.—Persons armed or disguised with goods within five miles of coast.*]—Every person who shall by any means procure or hire or shall depute or authorize any other person to procure or hire, any person or persons to assemble for the purpose of being concerned in the landing or unshipping or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months; and if any person engaged in the commission of any of the above offences be armed with firearms or other offensive weapons, or whether so armed or not be disguised in any way, or being so armed or disguised shall be found with any goods liable to forfeiture under the *Customs Acts* within five miles of the sea-coast or of any tidal river, he shall be imprisoned, with or without hard labour, for any term not exceeding three years. (*See note to indictment*, infra.)

Sect. 257.—*Limitation of time for prosecution.*]—See ante, p. 968.

Sect. 258.—*Venue.*]—See ante, p. 968.

Indictment for being assembled armed to the Number of Three or more for the purpose of landing Uncustomed Goods. (39 & 40 *Vict. c.* 36, *s.* 189.)

STATEMENT OF OFFENCE.

Running goods, contrary to section 189 of the Customs Consolidation Act, 1879.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., together with other persons unknown, on the —— day of ——, in the county of ——, unlawfully assembled together, armed with firearms or other offensive weapons, for the purpose of unshipping prohibited, restricted or uncustomed goods.

Misdemeanor: imprisonment for not more than three years, with or without hard labour. 39 & 40 Vict. c. 36, s. 189. *This term of imprisonment appears not to be altered by* 54 & 55 Vict. c. 69, s. 1 (ante, 238, 239).

Evidence.

Prove that the defendants, or some of them, together with other persons unknown, to the number of three at least, were assembled and armed, as stated in the indictment. It is not necessary that all should be armed; if some are armed, and the others are present aiding and assisting, it will be sufficient. *R.* v. *Smith*, R. & R. 368. In *R.* v. *Cosans*, 1 Leach, 342, 343 n. (a), the Court held, that not only guns, pistols, daggers, and other instruments of war, but also bludgeons (properly so called), clubs, and such other things as are not in common use for any other purpose but as weapons, are within the meaning of the Act. *See R.* v. *Hutchinson*, 1 Leach, 339. A common whip has been held not to be an offensive weapon (*R.* v. *Fletcher*, 1 Leach, 23, 342 n.), and bats, which are long poles used by smugglers to carry tubs, were also held not to be offensive weapons within 6 G. 4, c. 108, s. 56 (*rep.*). *R.* v. *Noakes*, 5 C. & P. 326. If, in the heat of an affray, a man catches up a hatchet accidentally, this is not within the meaning of the statute. *R.* v. *Rose*, 1 Leach, 342 n. Also, to bring the case within the statute, it must appear that the parties had deliberately assembled for the purpose charged in the indictment.

The purpose for which the defendants assembled is proved, either expressly, by the evidence of an accomplice, or the like; or impliedly, by evidence of circumstances from which the jury may fairly presume it.

SHOOTING AT VESSELS BELONGING TO THE NAVY, ETC.

Statute.

39 & 40 *Vict. c.* 96, *s.* 193.]—Ante, p. 968.

CHAPTER II.

OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP.

SECT 1.

BLASPHEMY AND BLASPHEMOUS LIBEL.

Common Law.

Blasphemy against God or the Christian religion in indictable at common law. 1 Hawk. c. 5; 1 East, P. C. 3; 2 Chit. Cr. L. 13; and the authorities there cited. For the now accepted definition of this offence, *see post*, 1162.

Statutes.

1 *Edw.* 6, *c.* 1.]—*An Act against such as shall irreverently speak against the sacrament of the body and blood of Christ, commonly called the sacrament of the altar.* (See 1 Hawk. c. 6, s. 31.)

Sect. 1.]—*Punishment by fine and imprisonment.*

Sect. 2.]—*Trial at quarter sessions.* But see 5 & 6 Vict. c. 38, s. 1, ante, p. 106.

Sect. 3.]—*Writ to bishop to attend himself or by chancellor or lawful deputy at trial.*

Sect. 4.]—*Limitation of prosecution three months.*

1 *Mar. sess.* 2, *c.* 3.]—*Punishment for abuse of the said sacrament.*

1 *Eliz. c.* 1, *s.* 1.]—*Revives* 1 *Edw.* 6, *c.* 1, supra.

1 *Eliz. c.* 2, *s.* 3.]—*Punishment of persons declaring or speaking anything in the derogation, depraving, or despising of the book of common prayer, or anything contained therein.* (1 Hawk. c. 7.)

14 *C.* 2, *c.* 4, *s.* 20.]—*Applies* 1 Edw. 6, c. 1, s. 1, *to the present book of common prayer.*

9 *W.* 3, *c.* 35 (9 & 10 *W.* 3, *c.* 32, *in Ruffhead's edition*), *s.* 1.—*Penalties.*]—Whereas many persons have of late years openly avowed and published many blasphemous and impious opinions contrary to the doctrines and principles of the Christian religion greatly tending to the dishonour of Almighty God and may prove destructive to the peace and welfare of this kingdom. Wherefore for the more effectual suppressing of the said detestable crimes be it enacted [*etc.*] that if any person or persons having been educated in or at any time having made profession of the Christian religion within this realm shall by writing printing teaching or advised speaking [*deny any one of the persons in the Holy Trinity to be God* (Rep. 53 G. 3, c. 160, s. 2: see Shore *v.* Wilson, 9 Cl. & F. 355; 4 St. Tr. (N. S.) 1370), *or shall*] assert or maintain there are more gods than one or shall deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority and shall upon indictment or information in any of his Majesty's courts at Westminster or at the assizes be thereof lawfully convicted by the oath of two or more credible witnesses such person or persons for the first offence shall be adjudged incapable and disabled in law to all intents and purposes whatsoever to have or enjoy any office or offices employment or employments ecclesiastical civil or military or any part in them or any profit or advantage appertaining to them or any of them. And if any person or persons so convicted as aforesaid shall at the time of his or their conviction enjoy or possess any office place or employment such office place or employment shall be void and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any of the aforesaid crime or crimes that then he or they shall from henceforth be disabled to sue prosecute plead or use any action or information in any court of law or equity or to be guardian of any child or executor or administrator of any person or capable of any legacy or deed of gift or to bear any office civil or military or benefice ecclesiastical for ever within this realm and shall also suffer imprisonment for the space of three years without bail or mainprize from the time of such conviction. [*This term of imprisonment appears not to be affected by* 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *There seems to be no instance of a prosecution under this enactment. Neither this Act nor* 53 *G.* 3, *c.* 160, *altered the common law offence of blasphemy.* R. *v.* Richard Carlile, 1 St. Tr. (N. S.) 1387, Abbott, C.J.: R. *v.* Waddington, 1 St. Tr. (N. S.) 1339; 1 B. & C. 26: R. *v.* Mary Carlile, 1 St. Tr. (N. S.) 1033: R. *v.* Richard Carlile, 3 B. & Ald. 161; 1 Chit. (K. B.) 451).]

Sect. 2.—*Limitation of prosecutions.*]—Provided always . . . that no person shall be prosecuted by virtue of this Act for any words spoken unless the information of such words shall be given upon oath before one or more justice or justices of the peace within four days after such words spoken and the prosecution of such offence be within three months after such information. (*See ante*, pp. 63, 65.)

Sect. 3.—*Relief from penalties.*]—Provided also . . . that any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid shall for the first offence (upon his her or their acknowledgment and renunciation of such offence or erroneous opinions in the same Court where such person or persons was or were convicted as aforesaid within the space

of four months after his her or their conviction) be discharged from all penalties and disabilities incurred by such conviction; anything in this Act contained to the contrary thereof in anywise notwithstanding.

60 *G.* 3 *& 1 G.* 4, *c.* 8, *ss.* 1, 2.]—*Seizure of blasphemous libels after verdict, and disposal, if judgment not arrested.*]—Ante, p. 1114.

Sect. 4.—*Punishment on second conviction for blasphemous libel.*]—Ante, p. 1115.

Sect. 7.—*Evidence of previous conviction.*]—Ante, p. 1115.

43 *& 44 Vict. c.* 41 (*Burial Laws Amendment Act*, 1880), *s.* 7.]—All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner; and every person . . . who shall in any such churchyard or graveyard as aforesaid (i.e., *in which parishioners have rights of burial* (s. 1)) deliver any address, not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious service or otherwise, in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor. (*For other offences under this section*, see post, p. 1166.)

Indictment for Blasphemous Libel. (*Common Law.*)

STATEMENT OF OFFENCE.

Blasphemous Libel.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully and wickedly composed or printed or published, or caused to be composed or printed or published, a blasphemous libel concerning the Holy Scriptures and the Christian religion, the tenor of which is as follows: [*Set out in ordinary language the substance of the blasphemous parts relied upon.*]

Misdemeanor: fine and (*or*) *imprisonment, with or without hard labour* (ante, p. 246). See 60 G. 3 & 1 G. 4, c. 8, ss. 4, 7, ante, pp. 1114, 1115, *as to second convictions.*

Blasphemy and offences against religion, and composing, printing or publishing blasphemous libels, are not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

The Vexatious Indictments Act (ante, p. 67) *seems to apply to blasphemous libel:* 44 & 45 Vict. c. 60, s. 6 (post, p. 1241). *No criminal prosecution may be commenced against any proprietor, publisher, editor, or any person responsible*

for the publication of a newspaper as defined by 44 & 45 Vict. c. 60, s. 1, *and* 51 & 52 Vict. c. 64, s. 1 (post, pp. 1240, 1241), *for any libel published therein, without the order of a judge at chambers, the application for which must be made on notice to the person accused, who must have an opportunity of being heard against it.* 51 & 52 Vict. c. 64, s. 8 (post, p. 1242). *The judge's decision is final.* Ex parte Pulbrook [1892] 1 Q. B. 86; 61 L. J. (M. C.) 91.

Definition.]—The gist of the offence of blasphemy is the use of language having a tendency to vilify the Christian religion or the Bible. 1 Hawk. c. 5, ss. 1, 2: *R.* v. *Mary Carlile*, 1 St. Tr. (N. S.) 1033, and authorities collected at 1039 n., and in *R.* v. *Hetherington*, 4 St. Tr. (N. S.) 563, 590 n. It is immaterial whether the words used are spoken or written. 2 Starkie on Slander (6th ed.) 622: Odgers on Libel (5th ed.), 477; 1 Russ. Cr. (7th ed.) 393; Steph. Dig. Cr. L. (6th ed.) 125: *and see R.* v. *Richard Carlile*, 4 St. Tr. (N. S.) 1423, Abbott, C.J.; *R.* v. *Richard Carlile*, 1 St. Tr. (N. S.) 1387, Abbott, C.J. It has been held blasphemous to speak of Christ as an impostor and murderer: *R.* v. *Waddington*, 1 L. J. (K. B.) 37; 1 St. Tr. (N. S.) 1339; 1 B. & C. 26: *and see Cowan* v. *Milbourn*, L. R. 2 Ex. 230; 35 L. J. (Ex.) 124; to speak of the Old Testament as the work of a random idiot. *R.* v. *Hetherington*, 4 St. Tr. (N. S.) 563; 5 Jur. 529; *and cf. R.* v. *Moxon*, 4 St. Tr. (N. S.) 693 (the case of Shelley's Queen Mab), and the comments on that case in *R.* v. *Hicklin*, L. R. 3 Q. B. 360, 372; 37 L. J. (M. C.) 89. In *R.* v. *Petcherine*, 8 St. Tr. (N. S.) 1086; 7 Cox, 79 (Ir.), it was held that it was blasphemous to burn any version of the Holy Scriptures.

It is not blasphemy to vilify the Jewish or any non-Christian religion. *R.* v. *Gathercole*, 2 Lew. 237: and the disputes of learned men upon particular controverted points of religion are not punishable as blasphemy. *R.* v. *Woolston*, 2 Str. 834. Publications discussing with decency and gravity questions as to Christian doctrine or statements in the Hebrew Scriptures, and even questioning their truth, are not punishable as blasphemy; but publications which in an indecent and malicious spirit assail and asperse the truth of Christianity, or of the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, are punishable as blasphemous libels. *R.* v. *Bradlaugh*, 15 Cox, 217, Coleridge, C.J.: *R.* v. *Hetherington*, 4 St. Tr. (N. S.) 563, 590, Denman, C.J. If the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy. *R.* v. *Ramsay and Foote*, 15 Cox, 231, 238; 1 Cab. & Ell. 126, Coleridge, C.J. The cases upon this subject are: *R.* v. *Atwood*, Cro. Jac. 421: *R.* v. *Taylor*, 3 Keb. 621; Tremayne, 226; 1 Vent. 293; Starkie, Slander (6th ed.), 615: *R.* v. *Clendon*, 2 Str. 790, *cit.*: *R.* v. *Hall*, 1 Str. 416: *R.* v. *Curl*, 2 Str. 789; 17 St. Tr. 153: *R.* v. *Annet*, 1 W. Bl. 395; 3 Burn. Eccl. Law (9th ed.), 386: *R.* v. *Williams*, 26 St. Tr. 653: *R.* v. *Eaton*, 31 St. Tr. 927: *R.* v. *Richard Carlile*, 1 St. Tr. (N. S.) 1387; 3 B. & Ald. 161; *R.* v. *Waddington*, 1 L. J. (K. B.) 37; 1 St. Tr. (N. S.) 1339; 1 B. & C. 26: *R.* v. *Holyoake*, 4 St. Tr. (N. S.) 1381: *R.* v. *Pooley*, 8 St. Tr. (N. S.) 1089: *R.* v. *Taylor, supra: R.* v. *Bradlaugh*, 15 Cox, 217: *R.* v. *Ramsay and Foote*, 15 Cox, 231: *R.* v. *Boulter*, 72 J. P.

188; *R.* v. *Gott*, 16 Cr. App. R. 87. Phillimore, J., refused to state a case on the point as to whether the direction of Coleridge, C.J., in *R.* v. *Foote* (*supra*) was the test as to whether or not the words charged constituted in law blasphemous libel. *R.* v. *Boulter*, *ante*, p. 1162. A number of other cases not fully reported are collected in Starkie on Slander (6th ed.), 615-620, and Odgers on Libel (5th ed.), 479-484. The provision in 6 & 7 Vict. c. 96, s. 73 (*ante*, p. 1115), as to allowing exculpatory evidence in answer to a *primâ facie* case of liability for publication, applies to a prosecution for the publication of a blasphemous libel. *R.* v. *Bradlaugh*, 15 Cox, 217, Coleridge, C.J.

51 & 52 Vict. c. 64, s. 3 (post, p. 1241), which gives a qualified protection to newspaper reports of judicial proceedings, and s. 4 (*post*, p. 1242), which gives a modified protection to newspaper reports of public meetings, both contain provisoes that nothing in those sections shall authorize the publication of any blasphemous matter. These provisions merely save the law as it previously stood. *R.* v. *Mary Carlile*, 1 St. Tr. (N. S.) 1033: *Steele* v. *Brannan* L. R. 7 C. P. 261; 41 L. J. (M. C.) 85. 6 & 7 Vict. c. 96, s. 6 (*post*, p. 1239), does not apply to blasphemous libel. *R.* v. *Duffy*, 6 St. Tr. (N. S.) 303; 9 Ir. L. R. 329; 2 Cox, 45; and a justification of a blasphemy cannot be pleaded, nor is argument as to its truth permitted; *R.* v. *Tunbridge*, 1 St. Tr. (N. S.) 1368. *Cooke v. Hughes*, Ry. & M. 112, 114; for the gist of the offence is vilification of the tenets of the Christian religion with intent to bring religion into contempt, corrupt public morals, and shock or insult believers. *See* Steph. Dig. Cr. Law (6th ed.), 125; 2 Steph. Hist. Cr. Law, 298. There is no copyright in a blasphemous libel. *Lawrence* v. *Smith*, Jacob, 471; *Murray* v. *Benbow*, 4 St. Tr. (N. S.) 1409.

Evidence.

The evidence of publication is the same as in the case of seditious libel (*ante*, p. 1120); or defamatory libel (*post*, pp. 1248 *et seq.*). *And see R.* v. *Hetherington*, 4 St. Tr. (N S.) 563.

SECT. 2.

DISTURBING PUBLIC WORSHIP, ETC.

Common Law.

It is an indictable misdemeanor at common law to strike any person in a church or churchyard. *Wilson* v. *Greaves*, 1 Burr. 240, 243, Lord Mansfield: *and see* Star Chamber Reports (ed. Baildon), p. 336; 2 Chit. Cr. L. 21. Ecclesiastical jurisdiction over such offences, except when committed by a person in holy orders, was abolished in 1860 (23 & 24 Vict. c. 32, s. 1). As to contemptuous words with reference to the book of common prayer. etc., *see* "Blasphemy" (*ante*, p. 1106).

Statutes.

1 *Mar. sess.* 2, *c.* 3.]—*Punishment for disturbing licensed preachers in their sermons or priests saying mass, and for defacing crucifixes, etc.*

1 *Eliz. c.* 2 (*Act of Uniformity*), *s.* 3.]—*Punishment for unlawfully interrupting ministers of the Established Church.*

1 *W. & M. c.* 18 (*Toleration Act*), *s.* 15.]—*Punishment for unlawful disturbance of worship of Established Church or Nonconformist congregation.* (See R. *v.* Wroughton), 3 Burr. 1683.)

52 *G.* 3, *c.* 155 (*Places of Religious Worship Act*, 1812), *s.* 12.]—And . . . if any person or persons, at any time after the passing of this Act (29th July, 1812), do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this Act, or any former Act or Acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognizances in the penal sum of fifty pounds, to answer for such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions, and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of forty pounds. [*This Act did not extend to Quakers' meeting-houses* (s. 14), *nor does it extend to the meetings for religious worship mentioned in* 18 & 19 Vict. c. 86, s. 1; but see 9 & 10 Vict. c. 59, s. 4, infra.]

2 *& 3 W.* 4, *c.* 115 (*Roman Catholic Churches Act*, 1832), *s.* 1.]—His Majesty's subjects professing the Roman Catholic religion, in respect to their schools, places for religious worship, education, and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant dissenters are subject to in England in respect to their schools and places for religious worship, education, and charitable purposes, and not further nor otherwise.

9 *& 10 Vict. c.* 59 (*Religious Disabilities Act*, 1846), *s.* 2.]—*Persons professing the Jewish religion to be subject to the same laws as Protestant dissenters as to their schools, places for religious worship, education, and charitable purposes.*

Sect. 4.]—All laws now (18th Aug., 1846) in force against the wilfully and maliciously or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by any former Act or Acts of Parliament, or the disturbing, molesting, or misusing any preacher, teacher, or person officiating at such meeting,

assembly, or congregation, shall apply respectively to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and the preachers, teachers, or persons officiating at such last-mentioned meetings, assemblies, or congregations, and the persons there assembled.

18 & 19 *Vict.* c. 81 (*Places of Public Worship Registration Act*, 1855), *s.* 2.]—*Places of public worship of Protestant dissenters and of persons professing the Roman Catholic religion to be certified to the Registrar-General.*

Sect. 3.]—*Places of worship to be recorded by Registrar-General.*

Sect. 4.]—*Certification to Registrar-General of places certified before the passing of the Act* (30*th July*, 1855).

Sect. 10.]—*Places of worship of Church of England or Ireland not within the Act.*

Sect. 11.—*Proof of certification.*]—The Registrar-General, on payment to him of a fee of two shillings and sixpence, shall, with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncancelled, give to any person demanding the same a certificate, sealed or stamped with the seal of the general register office, that at the time or respective times in such certificate in that behalf stated the place therein described was duly certified and duly recorded as required by this Act, and that at the date of such sealed or stamped certificate the record of such certification remained uncancelled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned without any further or other proof of the same.

18 & 19 *Vict.* c. 86 (*Liberty of Religious Worship Act*, 1855), *s.* 2.]—*Applies to Roman Catholic and Jewish places of worship the laws for the time being in force as to Protestant dissenters.*

23 & 24 *Vict.* c. 32 (*Ecclesiastical Courts Jurisdiction Act*, 1860), *s.* 1.]—*Abolishes ecclesiastical jurisdiction as to persons guilty of brawling who are not in holy orders.* (See 5 & 6 Edw. 6, c. 4; 27 Geo. 3, c. 44, s. 27.)

Sect. 2.]—*Summary punishment of persons guilty of riotous, violent, or indecent behaviour in places of worship of the Established Church or places of worship certified under* 18 & 19 Vict. c. 81, *during celebration of divine service* (*including an ordination service*, Kensit *v.* Dean and Chapter of St. Paul's [1905] 2 K. B. 249; 74 L. J. (K. B.) 454; *or at any other time, or in a churchyard or burial ground. This section applies to clergy as well as laity.* Vallancey *v.* Fletcher [1897] 1 Q. B. 265; 66 L. J. (Q. B.) 297. *Persons in holy orders are also liable to proceedings in ecclesiastical courts under* 5 & 6 Edw. 6, c. 4, *or* 55 & 56 Vict. c. 32 (Clergy Discipline Act, 1892). Girt *v.* Fillingham [1901] P. 176. And see 1 Russ. Cr. (7th ed.) 407.

Sect. 4.]—*Appeal to quarter sessions from any conviction.*

Sect. 6.]—Nothing hereinbefore contained shall be taken to repeal or alter 1 Mar. sess. 2, c. 3; *or* 1 Eliz. c. 2; *or* 1 W. & M. c. 18, s. 15 (s. 18 in Ruffhead), *ante*, p. 1164.

24 & 25 *Vict. c.* 97, *ss.* 1, 8, 11, 12.—*Malicious injury to churches.*]—Ante, pp. 736, 738, 763, 764.

24 & 25 *Vict. c.* 100, *s.* 36.]—*Arresting, etc., ministers of religion when in discharge of their functions* (ante, p. 955).

43 & 44 *Vict. c.* 41 (*Burial Laws Amendment Act*, 1880), *s.* 7.]—. . . And every person guilty of any riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial, or any such service as aforesaid, . . . shall be guilty of a misdemeanor. (*For other offences created by the section*, see ante, p. 1161.)

6 & 7 *G.* 5, *c.* 50, *s.* 24.—*Sacrilege.*]—Ante, p. 654.

Indictment for disturbing a Congregation of Baptists during Divine Service. (52 *G.* 3, *c.* 155, *s.* 12, ante, p. 1164.)

STATEMENT OF OFFENCE.

Disturbing religious worship, contrary to section 12 of the Places of Religious Worship Act, 1812.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of Middlesex, wilfully and maliciously disturbed a congregation of persons assembled for religious worship, permitted by law, at the Baptist Chapel in the parish of Hornsey, in the said county.

Fine: 40*l.* *for each defendant* (52 G. 3, c. 155, s. 12). R. *v.* Hube, 5 T. R. 542; Peake (3rd ed.), 180. 23 & 24 Vict. c. 32 (ante, p. 1165). See also Williams *v.* Glenister, 2 B. & C. 699.

This offence may be tried at quarter sessions; 52 G. 3, c. 155, s. 12; *or in the High Court of Justice* (*K. B. D.*): R. *v.* Wroughton, 3 Burr. 1683; *or at the assizes, if removed from the sessions by* certiorari; R. *v.* Hube, supra.

Evidence.

1. Prove that the chapel or meeting-house was certified and registered; which may be done by the clerk of the peace producing the book, etc., in which the same was registered, or by an examined or certified copy of the entry, under 14 & 15 Vict. c. 99, s. 14 (*ante*, p. 443). Where the chapel or meeting-house has been registered under the *Places of Worship Registration Act*, 1855 (18 & 19 Vict. c. 81), the registration may be proved by the certificate mentioned in s. 11 of that Act (*ante*, p. 1165). 1 W. & M. c. 18, has been held to extend to a registered congregation of foreign Lutherans. *R.* v. *Hube*, *supra.* It is immaterial whether the officiating clergyman has qualified according to the statute or not. *Id.*

2. Prove the disturbance. Where, in a contest for the situation of a clerk to a meeting-house, one clerk pulled the other from the desk, it was held to be a disturbance within the statute, *R.* v. *Hube*, *supra*, although the statute was certainly intended principally to apply to persons who with violence oppose a form of worship inconsistent with their own ideas and tenets.

3. On an indictment under this section (as extended by 9 & 10 Vict. c. 59) for disturbing a meeting of the Catholic Apostolic Church, it appeared that the defendant was a deacon of the church, and he raised at the trial a contention that as such deacon he was entitled to make the objection to the service for which he was charged, viz., putting on his hat and using violent language in the presence of the assembly. Held, that, on the defence thus raised, the jury ought to have been directed to find whether he had acted wilfully, contemptuously, and maliciously. *R.* v. *Dinnick*, 74 J. P. 32; 26 T. L. R. 74 (C. C. A.).

CHAPTER III.

OFFENCES AGAINST PUBLIC JUSTICE.

SECT. 1.

ESCAPE.

Common Law.

"Escape" proper is where a person having a prisoner lawfully in his custody voluntarily or negligently suffers him to go at large. 1 Hale, 570; Steph. Dig. Cr. Law (6th ed.), p. 115; Halsbury's Laws of England, vol. ix., p. 508. The custodian is said to be guilty of treason who "voluntarily" suffers the escape of a man in custody for treason; 1 Hale, 234; Steph. Dig. Cr. Law (6th ed.), 115; and to be liable as an accessory after the fact to the prisoner's crime if he is guilty of felony, 1 Hale, 235; and to be guilty of a misdemeanor if the prisoner was in custody for misdemeanor; Steph. Dig. Cr. Law (6th ed.), p. 115. A custodian who "negligently" allows his prisoner to escape from lawful custody is guilty of a misdemeanor. 1 Hale, 600; Steph. Dig. Cr. Law (6th ed.), 115; *and see* indictment, *post*, p. 1173.

It is also an indictable misdemeanor at common law, punishable by fine and imprisonment (with or without hard labour: 14 & 15 Vict. c. 100, s. 29, *ante*, p. 246), for a prisoner whether innocent or guilty to escape without the use of force from lawful custody on a criminal charge, whether the escape is effected by artifice, or in consequence of neglect in the custodian, and whether it is made from gaol or in transit thereto. 2 Hawk. c. 19; 1 Hale, 590; 2 Chit. Cr. L. 159: *R.* v. *Allan*, C. & Mar. 295; Halsbury's Laws of England, vol. ix., p. 508.

Persons who aid a prisoner to escape are at common law guilty as principals, or may be indicted for rescue (*post*, p. 1177); *and see R.* v. *Allan*, *supra*.

Statutes.

31 *Edw.* 3, *st.* 1, *c.* 14.]—*Item*, it is accorded that the escapes of thieves and felons and the chattels of felons and of fugitives, and also escapes of clerks convict out of their ordinaries' prison, from henceforth to be judged before any of the King's justices shall be levied from time to time as they shall fall, as well of the time past as of the time to come.

16 *G.* 2, *c.* 31 (*Prison Escape Act*, 1742), *s.* 1.—*Aiding escapes.*]—For the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody (*be it enacted, etc., that*), if any person shall, from and after the 24th day of June, 1743, by any means whatsoever, be aiding or assisting to (*sic*) any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years [*now penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour;* see 20 & 21 Vict. c. 3; 54 & 55 Vict. c. 69, s. 1, ante, pp. 238, 239]; and in case such prisoner then was convicted of, committed to, or detained in any gaol for petty larceny, or any other crime not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever for any debt, damages, costs, sum or sums of money amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be liable to a fine and imprisonment. (*As to common law liability in such cases*, see 1 Russ. Cr. (7th ed.) 555 et seq.)

It is difficult to say how far 16 G. 2, c. 31, ss. 1, 2, *are still in force.* See 1 Russ. Cr. (7th ed.) 569n. *They were repealed by* 4 G. 4, c. 64, s. 1, *so far "as relates to the escape of any prisoner from any gaol or prison to which"* 4 G. 4, c. 64, *extended. The prisons to which* 4 G. 4, c. 64, *extended are stated*

in 2 Statutes Revised (2nd ed.), p. 160. *That Act specially excepted Bethlehem, Bridewell, the King's Bench, and Fleet Prisons, the prison of the Marshalsea and Palace Courts, the Millbank Penitentiary and Gloucester Penitentiary, and vessels provided for the reception and employment of convicts sentenced to transportation: and this exception was not affected by the subsequent repeal of* 4 G. 4, c. 64, *by* 28 & 29 Vict. c. 126, s. 73. *The Millbank and Gloucester Penitentiaries and the hulks have been abolished, and convict prisons have been substituted for the hulks. As to escapes from such prisons,* see post, p. 1176. *The Fleet Prison and the prison of the Marshalsea and Palace Courts were abolished, and "the Queen's Prison" was substituted by* 5 & 6 Vict. c. 22. *That prison was discontinued and Whitecross Street Prison substituted* (25 & 26 Vict. c. 104). *The latter prison was discontinued in* 1870 *under s.* 12 *of the Act last mentioned, and the City Prison at Holloway was substituted as "the Queen's Prison." It had been made a valid prison by* 15 & 16 Vict. c. 70, *and is a local prison within* 28 & 29 Vict. c. 126 (see Home Office Orders, 19th May, 1886; Statutory Rules and Orders Revised (ed. 1904), vol. 10, tit. Prison E., p. 72). *Brixton Prison, appointed by order of* 16*th October,* 1901, *is now used for male prisoners committed by the High Court, and Holloway only for female prisoners. The result seems to be that* 16 G. 2, c. 31, ss. 1, 2, *can apply now only to the City Bridewell (used only for recalcitrant apprentices), and to Bethlehem Hospital, which is now an asylum for criminal lunatics within* 23 & 24 Vict. c. 75, s. 12, *and is not on the site of the old hospital.*]

Sect. 2.—*Conveying into prison the means of escape.*]—And . . . if any person shall, from and after the said 24th day of June, 1743, convey or cause to be conveyed into any gaol or prison any vizor, or other disguise, or any instrument or arms proper to facilitate the escape of the prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any gaol or prison, every such person although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizor, or other disguise, or instrument, or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer (i.e., *clearly and expressly stated;* R. *v.* Walker, 1 Leach, 97: R. *v.* Greenlif, Id. 98 n., 363); every person so offending and being thereof lawfully convicted, shall in like manner be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years [*now penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour, for not more than two years* (54 & 55 Vict. c. 69, s. 1, ante, pp. 238, 239]; but in case the prisoner to whom, or for whose use, such vizor or disguise, instrument, or arms shall be so delivered, then was convicted, committed, or detained for *petty larceny*, or any other crime not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever for any debt, damages, costs, sum or sums of money,

amounting in the whole to the sum of one hundred pounds, every such person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be in like manner liable to a fine and imprisonment. [*As to how far s.* 2 *is in force, see note to s.* 1, supra. *The fact that the prisoner had already been pardoned, or that the accused did not know of what specific offence the prisoner had been convicted, is no defence to an indictment under this section.* R. *v.* Shaw, R. & R. 526. *The statute does not apply where an actual escape has been effected.* R. *v.* Tilley, 2 Leach. 662.]

Sect. 3.—*Aiding escape from constable.*]—And . . . if any person shall from and after the 24th day of June, 1743, aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason or any felony except petty larceny expressed in such warrant; or if any person shall be aiding or assisting to (*sic*) any felon to attempt to make his escape from on board any boat, ship, or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation, then every person so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years [*now penal servitude or imprisonment.* 20 & 21 Vict. c. 3; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239].

Sect. 4.—*Limitation.*]—Provided always . . . that there shall be no prosecution for any of the said offences, unless such prosecution be commenced within one year after such offence committed. (*See ante*, p. 65.)

52 *G.* 3, *c.* 156 (*Prisoners of War Escape Act*, 1812), *s.* 1.]—Every person who shall, from and after the passing of this Act (29th July, 1812), knowingly or wilfully aid or assist any alien enemy of his Majesty, being a prisoner of war in his Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in his Majesty's dominions or any part thereof on his parole to escape from such prison or other place of confinement, or from his Majesty's dominions, if at large on parole, shall, upon being convicted thereof, be adjudged guilty of felony, and be liable to be transported as a felon for life, or for such term of fourteen or seven years (*see now* 54 & 55 Vict. c. 69, s. 1, *ante*, p. 238), as the Court before whom such person shall be convicted shall adjudge. [*Prior to this Act the offence was a misdemeanor only.* R. *v.* Martin, R. & R. 196.]

Sect. 2.]—Provided always . . . that every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of his Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of his Majesty's dominions, shall be deemed guilty of aiding the escape of such person under the provisions of this Act.

Sect. 3.]—*Same punishment for British subjects assisting on the high seas in the escape of prisoners of war who have escaped from his Majesty's dominions. Venue:* see ante, pp. 31-36.

Sect. 4.]—*Act not to prevent other modes of trial; but accused not to be prosecuted both ways.* (Cf. 52 & 53 Vict. c. 63, s. 22, ante, p. 160.]

1 & 2 *Vict. c.* 82, *ss.* 12, 13, 14.]—*Escapes from Parkhurst Prison.*

5 & 6 *Vict. c.* 29, *ss.* 24, 25, 28.]—*Escapes from Pentonville Prison. Venue: Evidence.*

23 & 24 *Vict. c.* 75 (*Criminal Lunatic Asylums Act*, 1860), *s.* 12.]—Any person who rescues any person ordered to be conveyed to an asylum for criminal lunatics during the time of his conveyance thereto, or of his confinement therein, and any officer or servant in any asylum for criminal lunatics, who through wilful neglect or connivance permits any person confined therein to escape therefrom, or secretes or abets or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding four years (*now* semble, *not more than five and not less than three years*, 54 & 55 Vict. c. 69, s. 1, ante, p. 238), or to be imprisoned for any term not exceeding two years, with or without hard labour, at the discretion of the Court; and any such officer or servant who carelessly allows any such person to escape shall, on summary conviction, forfeit any sum not exceeding 20*l.* nor less than 2*l.* [For summary *punishment for wilfully permitting escape of non-criminal lunatic*, see 53 & 54 Vict. c. 5, s. 323. *The asylums for criminal lunatics are Broadmoor and Parkhurst Prisons.* See Statutory Rules and Orders Revised (ed. 1904), vol. 8, tit. Lunatic E., p. 78, and Statutory Rules and Orders, 1906, p. 388.]

28 & 29 *Vict. c.* 126 (*Prison Act*, 1865) *s.* 37.—*Assisting prisoners to escape.*]—Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years. (*For indictment*, see post, p. 1175.)

Sect. 3.—*Application of Act.*]—This Act shall not extend to Scotland or Ireland, and shall not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison.

Sect. 4.—*Meaning of word "prison."*]— . . . "*Prison*" shall mean gaol, house of correction, bridewell or penitentiary; it shall include the airing grounds, or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto. . . .

29 & 30 *Vict. c.* 109, *s.* 82.]—*Escapes from naval prisons.*

44 & 45 *Vict. c.* 58, *ss.* 20, 22.]—*Escapes from military prisons.*

61 & 62 *Vict, c.* 41, (*Prison Act*, 1898), *s.* 1.]—*Prison commissioners under* 28 & 29 Vict. c. 126, *to be directors of convict prisons.*

Sect. 10.]—Every prison officer while acting as such shall, by virtue of his appointment, have all the powers, authorities, protections and privileges of a constable.

3 & 4 *Geo.* 5, *c.* 28 (*Mental Deficiency Act*, 1913), *s.* 62.—*Protection of officers for the purposes of arrest.*]—The managers of an institution and the owner of a certified house and every officer of such institution or house authorized in writing by the managers or owner, for the purpose of conveying a person to or from the institution, or house. or of apprehending and bringing him back to the institution or house in case of his escape or refusal to return, shall, for that purpose and while engaged in that duty. have all the powers, protections, and privileges of a constable.

Indictment against a Constable for negligently permitting an Escape. (*Common Law.*)

STATEMENT OF OFFENCE.

Permitting an escape.

PARTICULARS OF OFFENCE.

A. B., being a police constable of the Metropolitan Police and having C. D., a person arrested under a lawful warrant for stealing, lawfully in his custody, on the —— day of ——, in the county of London, negligently permitted the said C. D. to escape out of his custody.

Where the escape is negligently permitted by an officer, the punishment is said to be fine only. 2 Hawk. c. 19; 1 Hale, 600; 1 Russ. Cr. (7th ed.) 561. *This appears to be erroneous, and to arise from a misconception of the nature of a fine.* See 2 Pollock & Maitland, Hist. Eng. Law, 512. *Officers of county, borough, or metropolitan police are in the same position as a parish constable at common law.* See 10 G. 4, c. 44, s. 4; 2 & 3 Vict. c. 93, s. 8; 45 & 46 Vict. c. 50, s. 191.

Where a private person is guilty of negligently permitting an escape, the punishment is fine and (or) imprisonment. 2 Hawk. c. 20, s. 6 (ante, p. 246). *The offender must be restrained of his liberty for some criminal matter, otherwise the escape is not indictable at common law; but it is punishable under* 16 G. 2, c. 31, s. 1 (ante, p. 1169). *It is actionable under* 5 & 6 Vict. c. 98, s. 31; *and where the escape is due to the negligence of sheriffs or other officers, may be dealt with under* 50 & 51 Vict. c. 55, s. 29, *or by attachment. In case of negligent escape, the custodian may, it seems, retake his prisoner by force.* 2 Hawk. c. 19, s. 13: R. *v.* Forster, 1 Lew. 187: R. *v.* Dadson, 20 L. J. (N. S.) M. C. 57; 2 Den. 35.

Evidence.

Prove that A. B. is a police constable and that he had C. D. in actual custody under a lawful warrant. *See* 2 Hawk. c. 19, ss. 1, 4. And, lastly, prove the escape. It is not necessary to prove negligence in the defendant; the law implies it; *see* 1 Hale, 600; but if the escape were not in fact negligent, if C. D. by force rescued himself, or were rescued by others, and the constable made fresh pursuit after him, but without effect, all this must be proved upon the part of the defendant. Also, it is immaterial whether C. D. were guilty of the larceny or not, provided that the warrant were such as would justify A. B. in detaining him. (*See ante*, pp. 897 *et seq.*)

Indictment against a Gaoler for a Voluntary Escape.

(*Common Law.*)

Statement of Offence.

Permitting escape.

Particulars of Offence.

A. B., then being the Governor of his Majesty's Prison at ——, in the county of London, and having the lawful custody of C. D., a prisoner undergoing a sentence of imprisonment in the said prison, on the —— day of ——, unlawfully permitted the said C. D. to escape.

A voluntary escape amounts to the same offence, and is punishable in the same degree as the offence of which the prisoner was guilty, and for which he was in custody, whether treason, felony, or misdemeanor (trespass). The officer, however, cannot be thus punished until after the original delinquent has been convicted; but before such conviction he may be fined and imprisoned as for a misdemeanor. 4 Bl. Com. 130; 1 Hale, 235; 2 Hawk. c. 19, s. 22; Steph. Dig. Cr. Law (6th ed.), p. 115.

Evidence.

Prove the conviction of C. D., and that, upon his conviction, he was remanded or committed to the custody of the defendant. The conviction may be proved in the manner pointed out by 14 & 15 Vict. c. 99, s. 13 (*ante*, p. 421), or 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 422). Prove him afterwards to have been in the custody of the defendant, in pursuance of his sentence. And, lastly, prove the escape. An escape is voluntary where the keeper gives the prisoner his liberty with the object of saving him from trial and punishment. *See* 2 Hawk. c. 19, s. 10; 1 Russ. Cr. (7th ed., 557). It does not seem to be necessary to prove that the escape was voluntary; the law, it would seem, will presume that, until the contrary appear.

On the transfer of local prisons to the Crown, orders were made constituting particular prisons, whether within or without a county, as the common gaol for such county. For list of these orders, *see* Index to Statutory Rules and Orders (ed. 1919), p. 767, tit. Prison E.; *and see* 28 & 29 Vict. c. 126, ss. 57, 58; 40 & 41 Vict. c. 21, s. 30. Removal of prisoners from one prison to another under lawful authority is not an escape. 28 & 29 Vict. c. 126, ss. 63-65; 40 & 41 Vict. c. 21, s. 28.

Indictment for aiding Escape. (16 *G.* 2, *c.* 31, *s.* 1, ante, p. 1169.)

For precedent, see R. *v.* Shaw, R. & R. 526.

Indictment for conveying Files into a Local Prison, with intent to facilitate Escape of Prisoner. (28 *& 29 Vict. c.* 126, *s.* 37, ante, p. 1172.)

STATEMENT OF OFFENCE.

Assisting a prisoner to escape, contrary to the Prison Act, 1865, s. 37.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to facilitate the escape of C. D., a prisoner in his Majesty's Prison at ——, conveyed or caused to be conveyed unto the said prisoner two steel files.

Felony: 28 & 29 Vict. c. 126, s. 37 (ante, p. 1172), *imprisonment with hard labour for not more than two years.* 28 & 29 Vict. c. 126, *applies to all local prisons in England and Wales, but not to "convict" prisons (which include Aylesbury (females), Borstal, Dartmoor, Parkhurst, and Portland Prisons); nor to any military or naval prison* (28 & 29 Vict. c. 126, ss. 3, 4). (See ante, p. 1172.)

Evidence.

Prove that C. D. was in custody, and a prisoner in the gaol mentioned in the indictment. The words of the statute are, "any prisoner." Prove that whilst C. D. was so in custody, the defendant conveyed to him one or more files; and prove that such files were calculated to facilitate his escape by filing his irons, or the window bars, or the like. The mere delivery of such instruments to the prisoner is a fact from which the jury may well infer the intent, and it is immaterial, upon this statute, whether an escape be actually made or not. A crowbar is an "article or thing" within the meaning of this section. *R.* v. *Payne*, L. R. 1 C. C. R. 27; 35 L. J. (M. C.) 170.

SECT. 2.

BREACH OF PRISON.

Common Law.

Breach of prison consists in the escape from lawful custody by the use of any force. It is immaterial whether the custody is criminal or civil and whether the prisoner is actually within a gaol, or is only in the constable's house or a lock-up or the stocks, etc., provided that he is lawfully imprisoned or restrained of his liberty. 2 Hawk. c. 18, s. 21.

Breaking prison and escaping seem to have been felony at common law, if the prisoner was detained on a charge of treason or felony, and whether he had been convicted or not; conspiracy or unsuccessful attempt to break prison seems to be only a misdemeanor. 2 Chit. Cr. L. 150 n.; 1 Hale, 607; 2 Hawk. c. 18; Halsbury's Laws of England, vol. ix., p. 507.

Statute

23 *Edw.* 1, *Stat. de frang. pris.* (1 *Edw.* 2, *st.* 2, *c.* 1, *Ruffhead*).—*Punishment.*]—Concerning prisoners which break prison, our lord the King willeth and commandeth, that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise.

Indictment for breaking Prison (Common Law.)

STATEMENT OF OFFENCE.

Breaking prison.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, then being a prisoner in his Majesty's prison at Wormwood Scrubs, in the county of London, serving a sentence of twelve months' imprisonment with hard labour passed on him at the Central Criminal Court on the —— day of —— upon a conviction for stealing, broke the said prison by cutting two iron bars of the prison by means whereof he escaped.

Felony, if the defendant was in custody for treason or felony (23 Edw. 1, supra; 2 Chit. Cr. L. 158; 1 Hale, 612): *penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour.* 7 & 8 G. 4, c. 28, s. 8 (ante, p. 236); 20 & 21 Vict. c. 3, (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

Misdemeanor, if the defendant was in custody for any other offence: fine and (or) imprisonment, without hard labour. 2 Hawk. c. 18, s. 1; Steph. Dig. Cr. Law (6th ed.), p. 119.

Evidence.

Prove that the accused was in prison as alleged; and prove that, while in custody there, he broke the prison and escaped.

The escape must be proved, if the breaking is charged as a felony; 2 Hawk. c. 18, s. 12; but not, it would seem, if the breaking is charged as a misdemeanor only. The breaking proved must be an actual breaking; merely getting over the walls, or passing out through a door, or the like, is an escape only, and not a breach of prison; 1 Hale, 611; 2 Chit. Cr. L. 150 n.; *and see R. v. Burridge*, 3 P. Wms. 439. For this reason, it would seem that the manner of the breaking should be stated in the indictment, as in the above precedent, in order that the Court may see that it was such as is necessary in law to constitute a breach of prison. But the breaking need not be intentional; and therefore where a prisoner, in effecting his escape, by accident threw down some loose bricks at the top of the prison wall, placed there to impede escape and give alarm, it was held to be a prison breach. *R. v. Haswell*, R. & R. 458.

Although it is not material, on this indictment, whether the defendant was guilty of the offence for which he was imprisoned or not, 2 Hawk. c. 18, s. 16, yet if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him, 1 Hale, 610, 611, or if he has been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison. The mere dismissal, however, by a justice, on the preliminary examination before him, of the charge on which the defendant was imprisoned, is no defence to an indictment for the breach of prison by the defendant while in custody on the charge which was afterwards so dismissed. *R. v. Waters*, 12 Cox, 390, Martin, B.

SECT. 3.

RESCUE.

Common Law.

Rescue at common law is forcibly liberating a prisoner from lawful custody, 1 Co. Inst. 160; 1 Hale, 606, 611; 2 Hawk. c. 21; 2 Chit. Cr. L. 182; 1 Russ. Cr. (7th ed.) 567; Steph Dig. Cr. Law (6th ed.). p. 116. If the prisoner is in private custody, the rescuer is not liable criminally unless he knew that the prisoner was in custody on a criminal charge. *Id.* The offence is treason, felony, or misdemeanor, according to the quality of the offence of the person rescued; but if the latter is not convicted of the offence for which he was in custody, the rescue is only a misdemeanor. *Id.* (*See post*, p. 1179.)

Statutes.

25 *G.* 2, *c.* 37 (*Murder Act*, 1751), *s.* 9.—*Rescuing murderers while proceeding to execution.*]—. . . If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person out of prison, who shall be committed for or found guilty of murder, or rescue, or attempt to rescue any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony. . . .

1 & 2 *G.* 4, *c.* 88 (*Rescue Act*, 1821), *s.* 1.]—*Whereas divers daring attempts have of late been made to effect the rescue or prevent the detention of persons charged with or committed for or on suspicion of felony; and whereas it might tend more effectually to prevent the commission of such offences, if such further provisions were made for the punishment of persons who may hereafter be convicted thereof, as are hereinafter enacted; be it therefore enacted, that from and after the passing of this Act*, if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with or suspected of or committed for any felony or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony and be entitled to benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the Court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years. [*Preamble* rep., 53 & 54 Vict. c. 51 (Stat. Law. Rev.). *As to present punishment*, see *note to precedent*, infra.]

5 *G.* 4, *c.* 84, *s.* 22.—*Rescue of prisoners during conveyance for transportation.*]—*See post*, p. 1180.

7 *W.* 4 & 1 *Vict. c.* 91 (*Punishment of Offences Act*, 1837), *s.* 1.—*Punishment for rescuing murderers.*]—*Recites* 25 G. 2, c. 37, s. 9 (supra), *and enacts that*, "if any person shall after the commencement of this Act (1st Oct., 1837), be convicted of the offence thereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable to be transported beyond the seas for the term of the natural life of such person. . . ." [*Now penal servitude for life, or such less punishment as is provided by* 54 & 55 Vict. c. 69, s. 1 (ante, p. 238). *Rest* rep., 55 & 56 Vict. c. 19 (Stat. Law Rev.).]

14 & 15 *Vict. c.* 100. *s.* 29.—*Imprisonment with hard labour.*]—Ante, p. 242.

Indictment for the Rescue of a Felon from a Constable. (Common Law.)

STATEMENT OF OFFENCE.

Rescuing a prisoner in custody.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, forcibly rescued C. D., then in the lawful custody of E. F., a police constable in the Metropolitan Police.

Fine and imprisonment as for a misdemeanor (ante, pp. 239, 242, 246) *if the party rescued has not been convicted of the offence for which he was in custody;* 2 Hawk. c. 21, s. 8. *Hard labour may be imposed;* 14 & 15 Vict. c. 100, s. 29 (ante, p. 242). *If he has been convicted for high treason, the rescue is high treason; if for felony, felony; if for a misdemeanor, a misdemeanor.* 1 Hale, 607; Steph. Dig. Cr. Law (6th ed.), 117. *If the rescuers are convicted of felony, the Court may sentence them to penal servitude for not more than seven nor less than three years, or to imprisonment for not more than two years, with or without hard labour.* 1 & 2 G. 4. c. 88, s. 1; 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

Evidence.

Prove that C. D. was in the lawful custody of E. F., a police constable. If the party was convicted, the conviction may be proved by a certificate of the proper officer. 14 & 15 Vict. c. 99, s. 13 (*ante*, p. 421); 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 422). And prove that whilst so in custody the defendant forcibly rescued him, as stated in the indictment. A warrant of a justice of the peace to apprehend any person founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such person, is good (*see* 11 & 12 Vict. c. 42, s. 3), and therefore, if upon such warrant the person is arrested, and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanor. *R.* v. *Stokes*, 5 C. & P. 148.

As to evidence for the defendant, it may be observed, that any circumstances that will excuse a breach of prison will excuse a rescue. *See ante*, p. 1177 2 Hawk. c. 21, ss. 1, 2.

SECT. 4.

BEING AT LARGE DURING A SENTENCE OF PENAL SERVITUDE.

Statutes.

5 *G.* 4, *c.* 84 (*Transportation Act*, 1824), *s.* 22.—*Punishment.—Venue.*]—If any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself, on certain conditions, either for life or any number of years, under the provisions of this or any former Act (*e.g.*, 2 G. 2. c. 25, s. 2 (rep.)), shall be afterwards at large, within any part of his Majesty's dominions without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself [*every such offender so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony, without the benefit of clergy*, rep. 4 & 5 W. 4, c. 67, post, p. 1181], and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished;

And if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler or other person conveying, removing, transporting, or reconveying him or her, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted;

And whosoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted. (*See post*, p. 1182.) [*This enactment is applied to penal servitude by* 20 & 21 Vict. c. 3, s. 3, ante, p. 238.]

Sect. 24.—*Evidence of conviction.*]—The clerk of the Court or other officer having the custody of the records of the Court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction, or sentence or order for the transportation or banishment of such offender: and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the Court,

or by the signature of the judge, or one of the judges of the Court, without further proof. *See* 8 & 9 Vict. c. 113, s. 1 (*ante*, p. 442); 14 & 15 Vict. c. 99, s. 13 (*ante*, p. 421); 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 422).

4 & 5 *W.* 4, *c.* 67 (*Transportation Act*, 1834).]—*Recites* 5 G. 4, c. 84, s. 22, supra, and enacts, that any person convicted of any offence above specified in the said *Transportation Act*, 1824, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life. (*For present punishment*, see *infra*.)

20 & 21 *Vict. c.* 3 (*Penal Servitude Act*, 1857), *s.* 3.—*Provisions of former enactments as to persons unlawfully at large while under sentence of transportation to apply to penal servitude.*]—Ante, p. 238.

22 *Vict. c.* 25 (*Convict Prisons Abroad Act*, 1859), *ss.* 2, 14.—*Rescue or attempted rescue of persons sent to penal servitude in British possessions abroad.*]—*Not triable in England*, see s. 19. *The powers given by this Act to send convicts abroad to serve their sentences are not now exercised.*

Indictment. (5 *G.* 4, *c.* 84, *s.* 22, ante, p. 1123.)

STATEMENT OF OFFENCE.

Being at large, contrary to section 3 of the Penal Servitude Act, 1857.

PARTICULARS OF OFFENCE.

A. B., being a person undergoing a sentence of seven years' penal servitude passed upon him on the —— day of ——, at the Central Criminal Court, while such sentence remained in force and had not expired, on the —— day of —— was unlawfully at large in the county of ——.

Venue: the county where the defendant was apprehended, or the county whence he was ordered to be transported or kept in penal servitude. 5 G. 4. c. 84, s. 22.

Felony: 5 G. 4, c. 84, s. 22 : *penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.* 4 & 5 W. 4, c. 67, supra; 20 & 21 Vict. c. 3 (ante. p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106.)

Evidence.

The *Penal Servitude Act*, 1857 (20 & 21 Vict. c. 3, *ante*, p. 237), which abolished sentences of transportation and substituted penal servitude, provides (s. 3) that all Acts and provisions then (26th June, 1857) applicable to the

punishment of offenders under sentence or orders of transportation, if at large without lawful cause before the expiration of their sentence, and all provisions then applicable to and in the case of persons under sentence or order of transportation, are to apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation. There is no express provision as to escape of penal servitude prisoners from a convict prison in England (*see ante*, p. 1172).

Prove the sentence of penal servitude by a certificate in writing, which must be given on application by the clerk of the Court, or other officer having the custody of the records of the Court where such order was made (*see R.* v. *Jones*, 2 C. & K. 524 : *R.* v. *Parsons*, L. R. 1 C. C. R. 24; 35 L. J. (M. C.) 167; 5 G. 4, c. 22, s. 24), and is made evidence if it purports to be signed by the person having the custody of the records of the Court, without any proof of the signature or official character of such person (8 & 9 Vict. c. 113, s. 1, *ante*, p. 442); *see also* 14 & 15 Vict. c. 99, s. 13 (*ante*, p. 421); 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 422). The certificate must contain the effect and substance of the indictment and conviction of such offender, and of the sentence of penal servitude. Merely stating that the prisoner was convicted of felony, without stating the nature of the felony, is insufficient. *See R.* v. *Watson*, R. & R. 468, decided on 56 G. 3, c. 27, s. 8 (*rep.*), which is in substance the same as 5 G. 4, c. 84, s. 22. Prove also the prisoner's identity.

Prove also that the defendant was at large before the expiration of the term for which he was ordered to be kept in penal servitude. The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence—the judgment remaining unreversed; although it appear on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which, according to the certificate, he had been convicted. *R.* v. *Finney*, 2 C. & K. 774. For the defence, it may be proved that the prisoner is at large conditionally under a licence of ticket-of-leave or otherwise, and that the conditions have been observed. *See* 27 & 28 Vict. c. 47, ss. 4, 5, 8; 34 & 35 Vict. c. 112, ss. 4, 5; 54 & 55 Vict. c. 69, ss. 2-5; 3 Geo. 5, c. 4; or that he has been pardoned. *R.* v. *Miller*, 2 W. Bl. 797; 1 Leach, 74. Where the terms of a conditional pardon are not observed the sentence revives. *R.* v. *Madan*, 1 Leach, 223 : *Aickles' case*, *Id.* 390.

The judge at the trial has power to order the county treasurer to pay the prosecutor the reward under 5 G. 4, c. 84, s. 22. *R.* v. *Emmons*, 2 M. & Rob. 279 : *R.* v. *Ambury*, 6 Cox, 79. (*See ante*, p. 289.)

SECT 5.

PERJURY, SUBORNATION AND ATTEMPTED SUBORNATION OF PERJURY, FABRICATION OF EVIDENCE, AND FALSE STATEMENTS AND DECLARATIONS.

PERJURY.

The *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), has consolidated and simplified the law relating to perjury and kindred offences and rendered it unnecessary to set out much of the matter which appeared in former editions of this work under this head. Such cases as are retained are included as illustrative of the law before the statute and now embodied in it.

Statutes.

1 & 2 *Geo.* 5, *c.* 6 (*Perjury Act*, 1911), *s.* 1.—*Perjury.*]—(1) If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

(2) The expression "judicial proceeding" includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath.

(3) Where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorized by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.

(4) A statement made by a person lawfully sworn in England for the purposes of a judicial proceeding—

(*a*) in another part of his Majesty's dominions; or

(*b*) in a British tribunal lawfully constituted in any place by sea or land outside his Majesty's dominions; or

(*c*) in a tribunal of any foreign state,

shall, for the purposes of this section, be treated as a statement made in a judicial proceeding in England.

(5) Where, for the purposes of a judicial proceeding in England, a person is lawfully sworn under the authority of an Act of Parliament—

(*a*) in any other part of his Majesty's dominions; or

(*b*) before a British tribunal or a British officer in a foreign country, or within the jurisdiction of the Admiralty of England;

a statement made by such person so sworn as aforesaid (unless the Act of Parliament under which it was made otherwise specifically provides) shall be

treated for the purposes of this section as having been made in the judicial proceeding in England for the purposes whereof it was made.

(6) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial.

"Lawfully sworn."]—By s. 15 (1), *post*, p. 1193, for the purposes of this Act, the forms and ceremonies used in administering the oath are immaterial if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection or has declared to be binding on him. By s. 15 (2) oath includes affirmation and declaration. For other statutes, *see post*, pp. 1199, 1200. As to summary punishment of children of tender years giving false evidence without oath, *see* the *Children Act*, 1908 (8 Edw. 7, c. 67), s. 30 (*b*), ante, p. 989.

Judicial proceeding.]—Before this Act there were many decisions as to whether the proceeding in which the statement, the subject of the indictment, was made was a judicial proceeding or not, but having regard to the wide terms of sub-ss. (2) (5) of this section it does not seem necessary to include them now. An action brought against a non-existent person has been held to be a judicial proceeding. *R.* v. *Castiglione*, 23 Cox, 46; 106 L. T. 1023; 76 J. P. 351; 28 T. L. R. 403; 7 Cr. App. R. 233.

Competent jurisdiction.]—At common law it was necessary to prove that the false statement was made before a court of competent jurisdiction, and if it was made before a person who had no jurisdiction of the cause (3 Co. Inst. 16; *Paine's case*, Yelv. 111) the prosecution failed. *See* 1 Hawk. c. 69, ss. 3, 4; Bac. Abr. Perjury (A.): *R.* v. *Crossley*, 7 L. R. 315; *Dunn* v. *R.* 12 Q. B. 1026; 18 L. J. (M. C.) 41; *R.* v. *Dunn*, 1 D. & R. 10; *R.* v. *Hanks*, 3 C. & P. 419; *R.* v. *Stone*, Dears. 251; 23 L. J. (M. C.) 14; *R.* v. *Townsend*, 10 Cox, 356; 4 F. & F. 1089. The *Perjury Act*, 1911, does not contain the expression "competent jurisdiction," and having regard to the definition of "judicial proceeding" in s. 1 (2) it would seem that perjury may be committed though the court had no jurisdiction in the particular cause in which the statement was made.

"Material in that proceeding."]—The statute requires that the statement in question shall be *material* in the judicial proceeding. At common law it was also necessary to prove that that part of the oath upon which the perjury was assigned was material to the matter then under the consideration of the Court. 3 Co. Inst. 167; *R.* v. *Griepe*, 1 Ld. Raym. 256; 2 Salk. 513: *R.* v. *Nicholl*, 1 B. & Ald. 21; 8 L. J. (O. S.) M. C. 112: *R.* v. *Townsend*, 10 Cox, 356; 4 F. & F. 1089: *R.* v. *Hadfield*, 16 Cox, 148 (C. C. R.). For instance, if a witness were asked whether goods were paid for on a particular day, and he answered in the affirmative—if the goods were really paid for, though not on that particular day, it would not be perjury, 2 Rolle Rep. 41, 42, unless the

day was material. So, if a man swore that J. S. beat another with a sword, and it turned out that he beat him with a stick, this was not perjury; for all that was material was the battery. *Allen* v. *Westley*, Hetley, 97. *See* 1 Hawk. c. 69, s. 8. It has been held that denial of an agreement void under the Statute of Frauds is not material, and that perjury cannot be assigned on it. *R.* v. *Benesech*, Peake, Add. Cas. 93: *sed quære*. *See R.* v. *Dunston*, Ry. & M. 109. On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife, an assignment of perjury on a statement by the defendant, as a witness for the husband, that he had seen the wife committing adultery, of which he had told the husband just before the assault, was held bad for immateriality, as the supposed statement could not be legally relevant to the charge of assault as affording no ground of legal justification, although it might afford some ground for mitigation of punishment. *R.* v. *Tate*, 12 Cox, 7, Cockburn, C.J. This decision was doubted in *R.* v. *Hewitt*, 9 Cr. App. R. 192, and it has since been decided that evidence given by the accused after conviction in mitigation of sentence is evidence given in "a stage of the proceeding" within the meaning of the Criminal Evidence Act, 1898, s. 2, and if false may be made the subject of an indictment for perjury within the Perjury Act, 1911, s. 1 (1). *R.* v. *Wheeler* [1917] 1 K. B. 283; 86 L. J. (K. B.) 40; 81 J. P. 75; 25 Cox 603; 12 Cr. App. R. 159; 33 T. L. R. 21. Perjury may be assigned upon a man's testimony as to the credit of a witness. *R.* v. *Griepe*, *supra*. And every question in cross-examination which goes to a witness's credit (as, whether he has before been convicted of felony) is material for this purpose. *R.* v. *Lavey*, 3 C. & K. 26: *R.* v. *Overton*, C. & Mar. 655; 2 Mood. 263: *R.* v. *Baker* [1895] 1 Q. B. 797; 64 L. J. (M. C.) 177. The last of these cases must be treated as disposing of the doubts expressed on this point by Kelly, C.B., and Byles and Lush, J.J., in *R.* v. *Tyson*, L. R. 1 C. C. R. 107: 37 L. J. (M. C.) 7; 11 Cox, 1; and by Martin, B., in *R.* v. *Gibbon*, L. & C. 109; 31 L. J. (M. C.) 98. In *R.* v. *Baker* (*supra*), the accused had been prosecuted before a magistrate under 35 & 36 Vict. c. 94, s. 3 (*rep.*), for selling beer without a licence. On that charge he was a competent witness under 35 & 36 Vict. c. 94, s. 51 (4) (*rep.*), and gave evidence in which he denied that he had authorized his solicitor to put in a plea of guilty for him to a previous charge for the same offence. This evidence was held to be material to the question under trial before the magistrate, although the accused had admitted the existence of the previous conviction. In *R.* v. *Overton* (*supra*), the date of a receipt given for the price of a greyhound was held material. *Cf. R.* v. *Altass*, 1 Cox, 17. On the hearing of an application for an affiliation order against H., in respect of a full-grown bastard child born in March, the mother, in answer to questions put to her in cross-examination, denied having had connection with G. in the September previous to the birth. G. was called to contradict her, and he wilfully and falsely swore that he had had connection with her at the time specified. It was held, that although the evidence of G. ought not to have been admitted to contradict the mother on a matter which went only to her credit, still, as it was admitted, it was evidence material to

her credit; and, consequently, so far material in the inquiry before the justices as to be capable of being made the subject of an indictment against G. for perjury. *R.* v. *Gibbon*, *ante*, p. 1185. Upon an indictment for robbery committed on the night of the 13th April, a witness swore, not only (1) that the prisoner was at home on that night, but (2) that the prisoner had lived in the same house for two years previous, and (3) that during the whole of that time he had not been absent from home for more than three nights. The last two statements were proved to be false, and it was held that they were material, and proper subjects of assignments of perjury, inasmuch as they tended to render more probable the statement that the prisoner was at home on the night of the 13th April. *R.* v. *Tyson*, *ante*, p. 1185. Evidence of the payment of money by the putative father of a bastard child, within twelve months before the issuing of an affiliation summons against him, is material on the hearing of such summons. *R.* v. *Berry*, Bell, 46; 28 L. J. (M. C.) 86; 8 Cox, 121. Where a prisoner charged with robbery before a magistrate, having cross-examined the prosecutor whether he had not, the day before that of the alleged robbery, met him (the prisoner) in company with M., and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M. to prove it, it was held that M.'s evidence was not material to the issue, so that it could be made the subject of an indictment for perjury. *R.* v. *Murray*, 1 F. & F. 80; *cf. R.* v. *Holden*, 12 Cox, 166. On the trial of A. for perjury, in an affidavit made by him, and used on the taxation of costs, the signature to the affidavit was proved to be in A.'s handwriting, but the commissioner who had administered the oath was unable to identify A. as the person who made the affidavit. B was thereupon called as a witness, and swore that the affidavit was used before the taxing-master, when A. was present, and that it was then publicly said that it was A.'s affidavit. B. was afterwards indicted for perjury on A.'s trial, and it was held that the above evidence given by him on that trial was material as corroborative evidence of the affidavit having been made by A. *R.* v. *Alsop*, 11 Cox, 264; 17 W. R. 621 (C. C. R.). On the trial of an action of trover, the plaintiff's case was that the defendant had tricked him out of the goods, the subject of the action, while the plaintiff was drunk. The defendant's case was that he had fairly bought the goods from the plaintiff, who had sent for the goods from a railway station where they were lying, had signed a delivery note for them, and had then sold them to the defendant. The defendant, who was called as a witness in support of his own case, swore that the plaintiff's name on the delivery note was plaintiff's writing, and that he saw him write it. It was held that this was evidence material to the issue, upon which perjury might be assigned, the question in the action being whether the plaintiff had been imposed on by a fraud while drunk, and that it therefore became essential to ascertain whether the handwriting on the delivery note was his, as a step in ascertaining whether or not he was drunk at the time of the transaction. *R.* v. *Naylor*, 11 Cox, 13; 16 W. R. 374 (C. C. R.).

On a trial of a plaint in the county court, the judge having decided that a debt was due from the defendant, while considering how it was to be paid, asked defendant what was his christian name. Defendant wilfully and falsely swore that his name was "Edward," and not "Bernard," he being called in

the summons "Bernard Edward Mullany," and the judge thereupon struck out the cause. It was held that the answer was relevant to the inquiry, and that defendant was liable to be indicted for perjury. *R.* v. *Mullany*, L. & C. 593; 34 L. J. (M. C.) 111.

Where an action and all matters in difference are referred to arbitration, and perjury is assigned on evidence given before the arbitrator, the indictment ought to state, and the evidence must show, whether the evidence alleged to be false was material in respect of the matters in issue in the action, or to the other matters in difference. *R.* v. *Ball*, 6 Cox, 360 : *cf. R.* v. *Newman*, 2 Den. 390; 21 L. J. (M. C.) 75.

It is perjury to give false evidence, whereby the judge is induced to admit other material evidence—even though the latter evidence is afterwards withdrawn by counsel, or was not legally receivable. *R.* v. *Phillpotts*, 2 Den. 302; 3 C. & K. 135; 21 L. J. (M. C.) 18. *See R.* v. *Pepys*, Peake (3rd ed.), 187 : *R.* v. *Benesech*, Peake, Add. Cas. 93 : *R.* v. *Dunston*, Ry. & M. 109 : *R.* v. *Meek*, 9 C. & P. 513 : *R.* v. *Yates*, C. & Mar. 132 : *Ryalls* v. *R.*, 11 Q. B. 781; 17 L. J. (M. C.) 92.

Before the Act of 1911 there had been some difference of opinion as to whether on an indictment for perjury, the materiality of the matter in which the false swearing is proved was a question of fact for the jury, or a question of law for the judge. The Act has now by sub-s. (6) of s. 1 settled the matter in favour of the latter view.

Falsity.]—By the statute the defendant must know the statement to be false or not believe it to be true. So also at common law the matter sworn must either have been false in fact, or if true the defendant must not have known it or not have believed it to be so. 1 Hawk. c. 69, s. 6; 3 Co. Inst. 166 : *R.* v. *Ockley*, Palmer, 294. So it was held that where a man swears to a particular fact, without knowing at the time whether the fact is true or false, it is as much perjury as if he knew the fact to be false, and equally indictable. *R.* v. *Mawbey*, 6 T. R. 619, 637, Lawrence, J., and that if a man swears that J. N. revoked his will in his presence—if he really had revoked it, but it was unknown to the witness that he had done so, it is perjury. *Allen* v. *Westley*, Hetley, 97. And a man might be indicted for perjury in swearing that he *believed* a fact to be true which he must know to be false. *R.* v. *Pedley*, 1 Leach, 325, *per* Lord Mansfield : *R.* v. *Schlesinger*, 10 Q. B. 670; 17 L. J. (M. C.) 29. *Sed contra, see* 1 Hawk. c. 69, s. 7; 3 Co. Inst. 166; 1 Russ. Cr. (7th ed.), 476, and authorities there mentioned. But it would seem that perjury cannot be assigned on evidence stating the opinion of the witness as to the construction of a deed. *R.* v. *Crespigny*, 1 Esp. 280, Kenyon, C.J.

The false oath must be taken deliberately and intentionally; for if taken from inadvertence or mistake, it cannot amount to wilful and corrupt perjury. 1 Hawk. c. 69, s. 2; *and see R.* v. *Mawbey*, *supra*, *and post*, p. 1189. Therefore where perjury is assigned on an answer in equity, or an affidavit, etc., the part on which the perjury is assigned may be explained by another part, or even by a subsequent answer, etc. 1 Sid. 419; Com. Dig., Just. of Peace

(B.), 102. On the trial of a cause a witness was asked three or four times by the advocate and judge whether at any time he had any coals on credit from F., to which the witness always answered "I did not." It was held that the witness's attention had been sufficiently called to the subject to found a charge of perjury against him upon the answer, although no distinct transactions on credit were suggested to him during his examination. *R.* v. *London*, 12 Cox, 50 (C. C. R.) : *cf. R.* v. *Stolady*, 1 F. & F. 518.

Sect. 2.—*False statements on oath made otherwise than in a judicial proceeding.*]—If any person—

(1) being required or authorised by law to make any statement on oath for any purpose, and being lawfully sworn (otherwise than in a judicial proceeding) wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true; or

(2) wilfully uses any false affidavit for the purposes of the Bills of Sale Act, 1878, as amended by any subsequent enactment,

he shall be guilty of a misdemeanor, and, on conviction thereof on indictment, shall be liable to penal servitude for a term not exceeding seven years or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

Sect. 3.—*False statements, etc., with reference to marriage.*]—(1) If any person—

(*a*) for the purpose of procuring a marriage, or a certificate or licence for marriage, knowingly and wilfully makes a false oath, or makes or signs a false declaration, notice or certificate required under any Act of Parliament for the time being in force relating to marriage; or

(*b*) knowingly and wilfully makes, or knowingly and wilfully causes to be made, for the purpose of being inserted in any register of marriage, a false statement as to any particular required by law to be known and registered relating to any marriage; or

(*c*) forbids the issue of any certificate or licence for marriage by falsely representing himself to be a person whose consent to the marriage is required by law knowing such representation to be false,

he shall be guilty of a misdemeanor, and, on conviction thereof on indictment, shall be liable to penal servitude for a term not exceeding seven years or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.

(2) No prosecution for knowingly and wilfully making a false declaration for the purpose of procuring any marriage out of the district in which the parties or one of them dwell shall take place after the expiration of eighteen months from the solemnization of the marriage to which the declaration refers.

Sect. 4.—*False statements, etc., as to births or deaths.*]—(1) If any person—

(*a*) wilfully makes any false answer to any question put to him by any registrar of births or deaths relating to the particulars required to be

registered concerning any birth or death, or, wilfully gives to any such registrar any false information concerning any birth or death or the cause of any death; or

(*b*) wilfully makes any false certificate or declaration under or for the purposes of any Act relating to the registration of births or deaths, or, knowing any such certificate or declaration to be false, uses the same as true or gives or sends the same as true to any person; or

(*c*) wilfully makes, gives or uses any false statement or declaration as to a child born alive as having been still-born, or as to the body of a deceased person or a still-born child in any coffin, or falsely pretends that any child born alive was still-born; or

(*d*) makes any false statement with intent to have the same inserted in any register of births or deaths:

he shall be guilty of a misdemeanor and shall be liable—

(i) on conviction thereof on indictment, to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine instead of either of the said punishments; and

(ii) on summary conviction thereof, to a penalty not exceeding ten pounds.

(2) A prosecution on indictment for an offence against this section shall not be commenced more than three years after the commission of the offence.

Wilfully.]—"Wilfully" means "intentionally," that is, as applied to s. 4 (*b*), knowing at the time of making the certificate that he was making false statements in relation to documents which purported to be made under the Act for the registration of births or deaths, and could be used under the Act. *R.* v. *Ryan*, 24 Cox, 135; 10 Cr. App. R. 4.

Sect. 5.—*False statutory declarations and other false statements without oath.*]—If any person knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made—

(*a*) in a statutory declaration; or

(*b*) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, or other document which he is authorised or required to make, attest, or verify, by any public general Act of Parliament for the time being in force; or

(*c*) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any public general Act of Parliament for the time being in force;

he shall be guilty of a misdemeanor and shall be liable on conviction thereof on indictment to imprisonment, with or without hard labour, for any term not exceeding two years, or to a fine or to both such imprisonment and fine.

Sect. 6.—*False declarations, etc., to obtain registration, etc., for carrying on a vocation.*]—If any person—

(*a*) procures or attempts to procure himself to be registered on any register or roll kept under or in pursuance of any public general Act of Parliament

for the time being in force of persons qualified by law to practise any vocation or calling; or

(*b*) procures or attempts to procure a certificate of the registration of any person on any such register or roll as aforesaid,

by wilfully making or producing or causing to be made or produced either verbally or in writing, any declaration, certificate, or representation which he knows to be false or fraudulent, he shall be guilty of a misdemeanor and shall be liable on conviction thereof on indictment to imprisonment for any term not exceeding twelve months, or to a fine, or to both such imprisonment and fine.

Sect. 7.—*Aiders, abettors, suborners, etc.*]—(1) Every person who aids, abets, counsels, procures, or *suborns* another person to commit an offence against this Act shall be liable to be proceeded against, indicted, tried and punished as if he were a principal offender.

(2) Every person who incites or attempts to procure or suborn another person to commit an offence against this Act shall be guilty of a misdemeanor, and, on conviction thereof on indictment, shall be liable to imprisonment, or to a fine, or to both such imprisonment and fine.

Subornation of perjury.]—Subornation of perjury by the common law is the procuring of a man to take a false oath amounting to perjury, who actually takes such false oath. 1 Hawk. c. 69, s. 10; Steph. Dig. Cr. L. (6th ed.), p. 109; 2 Chit. Cr. L. 317.

Sect. 8.—*Venue.*]—Where an offence against this Act or any offence punishable as perjury or as subornation of perjury under any other Act of Parliament is committed in any place either on sea or land outside the United Kingdom, the offender may be proceeded against, indicted, tried, and punished in any county or place in England where he was apprehended or is in custody as if the offence had been committed in that county or place; and, for all purposes incidental to or consequential on the trial or punishment of the offence, it shall be deemed to have been committed in that county or place.

Sect. 9.—*Power to direct a prosecution for perjury.*]—(1) Where any of the following authorities, namely, a judge of, or person presiding in, a court of record, or a petty sessional court, or any justice of the peace sitting in special sessions, or any sheriff or his lawful deputy before whom a writ of inquiry or a writ of trial is executed, is of opinion that any person has, in the course of a proceeding before that authority, been guilty of perjury, the authority may order the prosecution of that person for such perjury, in case there shall appear to be reasonable cause for such prosecution, and may commit him, or admit him to bail, to take his trial at the proper court, and may require any person to enter into a recognizance to prosecute or give evidence against the person whose prosecution is so ordered, and may give the person so bound to prosecute a certificate of the making of the order for the prosecution, for which certificate no charge shall be made.

(2) An order made or a certificate given under this section shall not be given in evidence for the purpose or in the course of any trial of a prosecution resulting therefrom.

Sect. 13.—*Corroboration.*]—A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

Corroboration.]—So also before the Act one or more of the assignments of perjury were required to be proved either by two witnesses, or by one witness with proof of other material and revelant facts substantially confirming his testimony. *R.* v. *Champney*, 2 Lew. 258 : *R.* v. *Lee*, 1 Russ. Cr. (7th ed.) 508 : *R.* v. *Boulter*, 2 Den. 396; 21 L. J. (M. C.) 57; 3 C. & K. 236 : *R.* v. *Gardiner*, 8 C. & P. 737; 2 Mood. 95 : *R.* v. *Yates*, C. & Mar. 132 : *R.* v. *Parker*, C. & Mar 639 : *R.* v. *Roberts*, 2 C. & K. 607 : *R.* v. *Webster*, 8 Cox, 187; 1 F. & F. 515 : *R.* v. *Braithwaite*, *Id.* 638; 8 Cox, 254. This now applies under the Act. *See R.* v. *Threlfall*, 10 Cr. App. R. 112, at p. 114; 24 Cox, 230. A letter or account written by defendant contradicting his sworn evidence is corroboration. *R.* v. *Mayhew*, 6 C. & P 315. *And see R.* v. *Threlfall*, *supra*. And the assignment so proved must be upon a part of the matter sworn which was material to the matter before the Court at the time the oath was taken. Where the indictment was for perjury alleged to have been committed on the trial of A. for perjury, who was convicted, it was held to be no defence that the judgment against A. was afterwards reversed on error. *R.* v. *Meek*, 9 C. & P. 513. Upon an indictment for perjury in giving evidence before the quarter sessions, the prosecutor produced the examination of the defendant before a magistrate, in which he deposed in the direct negative to everything he had sworn before the Court, but Gurney, B., held this not sufficient *per se* without other evidence to show that the statement before the Court was false, and that before the magistrate true. *R.* v. *Wheatland*, 8 C. & P. 238. *See R.* v. *Knill*, 5 B. & Ald. 929 n. : *R.* v. *Hook*, Dears. & B. 606; 27 L. J. (M. C.) 222. (*a*) On an indictment for perjury, in deposing in an affidavit that A. B., a defendant in a suit in which the party indicted was plaintiff, owed him 50*l.*, the assignment is not proved by evidence that the cause, after the making of the affidavit, was referred to an arbitrator, who made an award that A. B. owed the defendant nothing. *R.* v. *Fontaine-Moreau*, 11 Q. B. 1028; 17 L. J. (Q. B.) 187. Also, it must not only be proved that the matter sworn, or part of it, is false, but it must appear, either directly or from circumstances, that the defendant knew it to be so, and that he swore to it deliberately. (*See ante*, p. 1187.) Where the assignment of perjury was that the prisoner swore that she had not had connection with a "man," it was

(*a*) In *R.* v. *Cleland* [1901] 20 N. Z. L. R. 509, it is suggested that *R.* v. *Knill* was not merely criticized, but actually overruled by *R.* v. *Hook*.

held by Manisty, J., that the evidence of connection with one man only could be received, but by Lindley, J., and Thesiger, L.J., that the evidence of several men that they had had connection with the prisoner, was admissible. *R.* v. *Adams*, 14 Cox, 215. In *R.* v. *Saldanha*, 85 J. P. 47, a general direction as to the need of corroboration, without any specific mention of the statutory requirement concerning it, was held to be a sufficient compliance with the law. As to corroboration generally, *see ante*, p. 455.

Sect. 10.—*Jurisdiction of quarter sessions.*]—A court of quarter sessions shall not have jurisdiction to try an indictment for any offence against this Act, or for an offence which under any enactment for the time being in force is declared to be perjury or to be punishable as perjury, or as subornation of perjury.

Sect. 11.—*Application of Vexatious Indictments Act*, 1859.]—The provisions of the *Vexatious Indictments Act*, 1859, and the Acts amending the same, shall apply in the case of any offence punishable under this Act, and in the case of any offence which under any other enactment for the time being in force, is declared to be perjury or subornation of perjury or is made punishable as perjury or as subornation of perjury, in like manner as if all the said offences were enumerated in section one of the said *Vexatious Indictments Act*, 1859: Provided that in that section a reference to this Act shall be substituted for the reference therein to the *Criminal Procedure Act*, 1851. [*See ante*, pp. 67 *et seq.*]

Sect. 12.—*Form of indictment.*]—(1) In an indictment—

(*a*) for making any false statement or false representation punishable under this Act; or

(*b*) for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, solemn declaration, statutory declaration, affidavit, deposition, notice, certificate, or other writing,

it is sufficient to set forth the substance of the offence charged, and before which court or person (if any) the offence was committed without setting forth the proceedings or any part of the proceedings in the course of which the offence was committed, and without setting forth the authority of any court or person before whom the offence was committed.

(2) In an indictment for aiding, abetting, counselling, suborning, or procuring any other person to commit any offence herein-before in this section mentioned, or for conspiring with any other person, or with attempting to suborn or procure any other person, to commit any such offence, it is sufficient—

(*a*) where such offence has been committed, to allege that offence, and then to allege that the defendant procured the commission of that offence; and

(*b*) where such offence has not been committed, to set forth the substance of the offence charged against the defendant without setting forth any matter or thing which it is unnecessary to aver in the case of an indictment for a false statement or false representation punishable under this Act.

Sect. 14.—*Proof of certain proceedings on which perjury is assigned.*]—On a prosecution—

(*a*) for perjury alleged to have been committed on the trial of an indictment for felony or misdemeanor; or

(*b*) for procuring or suborning the commission of perjury on any such trial, the fact of the former trial shall be sufficiently proved by the production of a certificate containing the substance and effect (omitting the formal parts) of the indictment and trial purporting to be signed by the clerk of the court, or other person having the custody of the records of the court where the indictment was tried, or by the deputy of that clerk or other person, without proof of the signature or official character of the clerk or person appearing to have signed the certificate.

Sect. 15.—*Interpretation, etc.*]—(1) For the purposes of this Act, the forms and ceremonies used in administering an oath are immaterial, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him.

[*Oath in this sub-section includes affirmation and it appears to override* R. *v.* Moore, 61 L. J. (M. C.) 80.]

(2) In this Act—

The expression "oath" in the case of persons for the time being allowed by law to affirm or declare instead of swearing, includes "affirmation" and "declaration," and the expression "swear" in the like case includes "affirm" and "declare"; and

The expression "statutory declaration" means a declaration made by virtue of the Statutory Declarations Act, 1835, or of any Act, Order in Council, rule or regulation applying or extending the provisions thereof; and

The expression "indictment" includes "criminal information."

Form of oath.]—By the *Oaths Act*, 1838 (1 & 2 Vict. c. 105), as amended by the *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), in all cases in which an oath may lawfully be and shall have been administered to any person as a juryman in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding. *See ante*, pp. 476, 1184. "Oath" in this Act does not include affirmation or declaration in lieu of an oath.

Substitution of affirmation for oath in certain cases.]—By the *Oaths Act*, 1888 (51 & 52 Vict. c. 46), s. 1, as amended by the *Perjury Act*, 1911 (1 & 2 Geo. 5, c. 6), every person upon objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where

an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath. *See ante*, p. 478.

Power to administer oaths.]—By the *Evidence Act*, 1851 (14 & 15 Vict. c. 99), s. 16, every court, judge, justice, officer, commissioner, arbitrator or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively. The section does not apply to commissioners for oaths, and the like, who have no power to examine evidence.

Sect. 16.—*Savings.*]—(1) Where the making of a false statement is not only an offence under this Act, but also by virtue of some other Act is a corrupt practice or subjects the offender to any forfeiture or disqualification or to any penalty other than penal servitude, or imprisonment, or fine, the liability of the offender under this Act shall be in addition to and not in substitution for his liability under such other Act.

(2) Nothing in this Act shall apply to a statement made without oath by a child under the provisions of the *Prevention of Cruelty to Children Act*, 1904, and the *Children Act*, 1908.

(3) Where the making of a false statement is by any other Act, whether passed before or after the commencement of this Act, made punishable on summary conviction, proceedings may be taken either under such other Act or under this Act: Provided that where such an offence is by any Act passed before the commencement of this Act, as originally enacted, made punishable only on summary conviction, it shall remain only so punishable.

[*An offence is not "punishable only" on summary conviction where an offender under the provisions of* s. 17 (1) of the Summary Jurisdiction Act, 1879 (*ante*, p. 7) *may elect to be tried on indictment. R.* v. *Bradbury & Edlin* [1921] 1 K. B. 562; 85 J. P. 128; 15 Cr. App. R. 76.]

Indictment for Perjury in an Action in the High Court.
(1 & 2 *Geo.* 5, *c.* 6, *s.* 1 (1), ante, p. 1183.)

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence:—

STATEMENT OF OFFENCE.

Perjury, contrary to section 1 (1) of the Perjury Act, 1911.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being a witness upon the trial of an action in the Chancery Division of the High Court of Justice in which one —— was plaintiff and one —— was defendant, knowingly falsely swore that he saw one M. N. in the street called the Strand, London, on the —— day of ——.

Two or more persons cannot be jointly indicted for perjury. R. *v.* Philips, 2 Str. 921.

Punishment: penal servitude for a term not exceeding seven years, or imprisonment, with or without hard labour, for a term not exceeding two years, or a fine or both penal servitude or imprisonment and fine. 1 & 2 Geo. 5, c. 6, s. 1 (1) (ante, p. 1183). *At common law the judge might also require the offender to find sureties to keep the peace and be of good behaviour for a further period.* R. *v.* Hart, 30 St. Tr. at 1344 : R. *v.* Dunn, 12 Q. B. 1026; 18 L. J. (M. C.) 41. *The* Perjury Act, 1911, *however, contains no provision to this effect.*

The Vexatious Indictments Act (ante, p. 67) *applies to perjury.* 1 & 2 Geo. 5, c. 6, s. 11 (ante, p. 1192).

Perjury is not triable at quarter sessions. 1 & 2 Geo. 5, c. 6, s. 10 (ante, p. 1192). *Justices of the peace had not cognizance of the offence of perjury at common law, so as to apprehend or commit a person charged with it, until* 11 & 12 Vict. c. 42, s. 1, *gave them power to grant a warrant for any indictable offence.* See 2 Hawk. c. 8, s. 64 : R. *v.* Bartlett, 1 Dowl. & L. 95; 12 L. J. (M. C.) 127.

Evidence.

Let an officer from the Central Office of the Royal Courts of Justice (*see* R. S. C. 1883, Order 61) produce the record (*i.e.*, the writ, pleadings, etc.) of the trial at which the perjury is alleged to have taken place; or produce a copy thereof and prove it to be an examined copy, or produce a copy thereof purporting to be signed and certified as a true copy by the officer to whose custody the original record is entrusted. 14 & 15 Vict. c. 99, s. 14 (*ante*, p. 442); *and see ante*, pp. 402, 420 *et seq.* Production of the originals cannot be obtained by *subpœna*, but only by order of a judge or master. R. S. C. 1883, O. 61, rr. 28, 29. As to production of impounded documents, *see* R. S. C. 1883, O. 42, r. 33 A. Upon an indictment for perjury before 1883, charged as having been committed on the trial of an action in the High Court of Justice, in order to prove that the action mentioned in the indictment was pending and was tried as alleged, the following documents were tendered in evidence :—1. The copy (filed under R. S. C. 1875, O. 5, r. 7) of the original writ of summons. 2. The copy of the pleadings in the action filed under R. S. C. 1875, O. 41, r. 1. 3 The original order to dismiss the action. Nos. 1 and 2 were produced by an officer from the Record and Writ Clerks' Office, and No. 3 was produced by the solicitor for the defendant in the action. It was held that these documents were properly received in evidence, and that they sufficiently proved the existence and trial of the action. *R.* v. *Scott*, 2 Q. B. D. 415; 46 L. J. (M. C.) 259.

Then prove the evidence the defendant gave upon the trial by the testimony of some person who was present at the trial. It is sufficient for this purpose if the witness states from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence given by the defendant, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. *R.* v. *Rowley*, 1 Mood. 111 : *R.* v. *Munton*, 3 C. & P. 498 : *R.* v. *Browne*, 3 C. & P. 572; M. & M. 315. It is said that all evidence admissible on the trial of the indictment in which the perjury is alleged to have been committed is admissible on the trial for the perjury. *R.* v. *Harrison*, 9 Cox, 503, Bramwell, B.

Statements made by the judges, etc., before whom the perjury is alleged to have been committed are not admissible on the trial for the offence. *R.* v. *Britton*, 17 Cox, 627, Hall, Recorder. It is not necessary to produce the judge's notes, which are not the best evidence of what took place at the trial, and are not admissible except to refresh the memory of the judge if called as a witness. *R.* v. *Child*, 5 Cox, 197 : *R.* v. *Morgan*, 6 Cox, 107. The judges of superior courts should not be called. *R.* v. *Gazard*, 8 C. & P. 595, Patteson, J.; but there seems to be no reason why the judges of inferior courts should not be called to prove their notes; *R.* v. *Harvey*, 8 Cox, 99, Byles, J. The notes or minutes of the clerk of the Court are in the same position as those of the judge; *R.* v. *Newall*, 6 Cox, 21; and of no greater authority than those of a shorthand writer or other person who took a note of the evidence. *Id.* Grand jurors cannot be called to prove perjury before them. *R.* v. *Hughes*, 1 C. & K. 519, Tindal, C.J. And the conviction or judgment in the prior case is not evidence on an indictment for committing perjury in the prior case. *R.* v. *Goodfellow*, C. & Mar. 569.

It is necessary to prove in substance the whole of what is set out in the indictment as having been sworn by the defendant, and of the evidence connected with it and necessary to explain it; proving a part only, it seems, is not sufficient. *R.* v. *Jones*, Peake (3rd ed.), 51 : *R.* v. *Dowlin*, Peake (3rd ed.), 227; 5 T. R. 317. And it must be proved literally or substantially as set out. *R.* v. *Leefe*, 2 Camp. 134. And the evidence must be clear and precise, and not ambiguous. *R.* v. *Bird*, 17 Cox, 387.

Evidence on an indictment for Perjury in an Affidavit in Answer to Interrogatories. (1 & 2 *G.* 5, *c.* 6, *s.* 1 (1), (3).)

1. Where the perjury is alleged to have taken place on a judicial inquiry, it must be proved what the charge was, on the hearing of which the false evidence was given, as otherwise it would be impossible to ascertain whether it was material to the issue. *R.* v. *Carr*, 10 Cox, 564 (C. C. R.). And this must be proved by the best evidence (*see ante*, p. 367); therefore, where perjury is alleged as having been committed before justices at petty sessions

on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction must be proved so as to let in secondary evidence of its contents. *R.* v. *Dillon*, 14 Cox, 4, Lopes, J. As to proof of records, judgments, etc., *see ante*, pp. 420 *et seq.*: *R.* v. *Scott*, 2 Q. B. D. 415; 46 L. J. (M. C.) 259 (*ante*, p. 1195). As to proof of proceedings on an appeal to quarter sessions, *see R.* v. *Ward*, 6 C. & P. 366.

(2) The matter sworn must be proved. If in writing, and in existence, it must be produced. On an indictment for perjury in an affidavit, get the officer in whose custody the affidavit is to produce it at the trial; and prove, either directly or circumstantially, that it was sworn to and signed by the defendant (*see R.* v. *Barnes*, 10 Cox, 539), as, for instance, that the name subscribed to it is of the defendant's handwriting, and that an action between C. D. and E. F. was pending, or the like. Where the deponent was illiterate, it is necessary to show that he knew that the affidavit contained the statements on which the perjury is assigned, *i.e.*, that he gave instructions for their insertion, or had the affidavit read over to him. *R.* v. *Hailey*, 1 C. & P. 258; Ry. & M. 94: *R.* v. *Petricus*, 67 J. P. 378. It does not seem essential that the jurat should comply with R. S. C. 1883, O. 38, r. 13. *See R.* v. *Hailey*, *supra*. Where perjury was assigned on an affidavit of service of notice of application for leave to issue execution against a shareholder in a joint-stock company, the production of the affidavit alone without the notice annexed (to which the affidavit referred as being annexed) was held insufficient. *R.* v. *Hudson*, 1 F. & F. 56. Upon proof that the affidavit had been lost or destroyed, secondary evidence may be given of its contents, and of the defendant's signature to it. *R.* v. *Milnes*, 2 F. & F. 10. Upon an indictment for perjury in falsely swearing that there was no draft of a statutory declaration which had been prepared by the defendant, the materiality of the existence of such draft turned upon its contents, and the fact of certain alterations having been made in it. Parol evidence of the contents of the draft and of the alterations made in it was held inadmissible, no notice to produce such draft having been given to the defendant. *R.* v. *Elworthy*, L. R. 1 C. C. R. 103; 37 L. J. (M. C.) 3.

On an indictment for perjury in bastardy proceedings, evidence must be given of the complaint, by producing the original of the order made, or secondary evidence. *R.* v. *Newall*, 6 Cox, 21, Wightman, J. Production of the summons is not essential. *R.* v. *Smith*, L. R. 1 C. C. R. 110; 37 L. J. (M. C.) 6, which apparently overrules on this point *R.* v. *Newall*, *supra*, and *R.* v. *Whybrow*, 8 Cox, 438.

Indictment for making a False Statutory Declaration. (1 & 2 G. 5, c. 6, s. 5 (a), ante, p. 1189.)

Commencement as ante, p. 1194.

STATEMENT OF OFFENCE.

Making a false statutory declaration, contrary to section 5 (a) of the Perjury Act, 1911.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, wilfully made a statement false in a material particular in a declaration made under [*quote the statute, etc., by virtue of which it was made*].

Misdemeanor: punishable by imprisonment with or without hard labour, for not more than two years and (or) fine. 1 & 2 G. 5, c. 6, s. 5, ante, p. 1189.

This offence is not triable at quarter sessions. 1 & 2 G. 5, c. 6, s. 10 (ante, p. 1192).

Evidence.

By s. 15 (2) of the *Perjury Act*, 1911 (*ante*, p. 1193), the expression "statutory declaration" means a declaration made by virtue of the *Statutory Declarations Act*, 1835 (5 & 6 W. 4, c. 62), or of any Act, Order in Council, rule, or regulation applying or extending the provisions thereof. *See also* the *Interpretation Act*, 1889 (52 & 53 Vict. c. 63), s. 21.

Prove that the declaration was taken under the statute alleged, and the materiality and falsity of the statement impugned in the same manner as on a charge of perjury. Corroboration is necessary (*ante*, pp. 455, 1191).

Where the declaration confirms any writing, the latter must be produced or secondary evidence of it, given after proof of proper notices to produce. *R.* v. *Cox*, 9 Cox, 301; 4 F. & F. 42. On an indictment for a false declaration as to the occurrence of a fire in the defendant's house, it was held that to prove the declaration to be wilfully false, evidence might be given that certificates sent to the insurers with the declaration were forged; *R.* v. *Boynes*, 1 C. & K. 65.

FABRICATION OF FALSE EVIDENCE.

It is an indictable misdemeanor to fabricate evidence with intent to mislead a judicial tribunal, even if the tribunal never sits and the evidence is not used. *R.* v. *Vreones* [1891] 1 Q. B. 360; 60 L. J. (M. C.) 62; 17 Cox, 267. For form of indictment, *see* that case. The offence is punishable by fine and (or) imprisonment, with or without hard labour (*see ante*, pp. 239, 241, 246). In *R.* v. *Eddols*, Bristol Assizes, 15 Feb., 1910, the defendant was indicted and convicted for attempting to pervert justice by tampering with the contents

of churns of milk. When he did this act a summons was pending against him for adulteration of milk, and he had given notice of a defence that the milk had been sold to him with a warranty by the farmer with whose churns of milk he subsequently tampered while they were still on the farm awaiting despatch. The making use of a false instrument in order to pervert the course of justice is a misdemeanor. *O'Mealy* v. *Newell*, 8 East, 364, Ellenborough, C.J.

MISSTATEMENTS, ETC., UNDER LUNACY ACT AND MENTAL DEFICIENCY ACT.

53 & 54 *Vict.* c. 5 (*Lunacy Act*, 1890) s. 317.—*Misstatements.*]—(1) Any person who makes a wilful misstatement of any material fact in any petition, statement of particulars, or reception order under this Act, shall be guilty of a misdemeanor. (2) Any person who makes a wilful misstatement of any material fact in any medical or other certificate, or in any statement or report of bodily or mental condition under this Act, shall be guilty of a misdemeanor. (3) A prosecution for a misdemeanor under this section shall not take place except by order of the Commissioners [*now the Board of Control under the Mental Deficiency Act*, 1913], or by the direction of the Attorney-General or the Director of Public Prosecutions.

Sect. 318.—*False entries.*]—Any person who in any book, statement, or return, knowingly makes any false entry as to any matter as to which he is by this Act or any rules made under this Act required to make any entry, shall be guilty of a misdemeanor.

3 & 4 *G.* 5, *c.* 28 (*Mental Deficiency Act*, 1913), *s.* 57.—*False entries.*]—Any person who in any book, statement, or return knowingly makes any false entry as to any matter as to which he is by this Act or any rules made under this Act required to make an entry shall be guilty of a misdemeanor.

Sect. 58.—*Untrue statement for purpose of obtaining certificate or approval.*]—If any person, for the purpose of obtaining any certificate or approval under this Act or the renewal of any such certificate or approval, wilfully supplies to the Board any untrue or incorrect information, plan, description, or notice he shall be guilty of a misdemeanor.

Sect. 60.—*Punishment for Offences.*]—(1) An offence under this Act declared to be a misdemeanor shall be punishable by fine or by imprisonment for a term not exceeding two years, with or without hard labour, but may, except where otherwise expressly provided, instead of being prosecuted on indictment, be prosecuted summarily, and, if so prosecuted, shall be punishable only with imprisonment for a term not exceeding three months, with or without hard labour, or with a fine not exceeding fifty pounds, or both.

FRAUDS AGAINST THE DECLARATION OF TITLE ACT, 1862.

By s. 44 of the *Declaration of Title Act*, 1862 (25 & 26 Vict. c. 67), as amended by the *Perjury Act*, 1911 (1 & 2 G. 5, c. 6), the suppression of material documents in proceedings before the court is a misdemeanor punishable with imprisonment with or without hard labour for three years or with fine.

SECT. 6.

ADMINISTERING, ETC., VOLUNTARY OATHS, ETC.

Statute.

5 & 6 W. 4, c. 62 (Statutory Declarations Act, 1835), s. 13.]—. . . It shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath no jurisdiction or cognizance by some statute in force at the time being; provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.

Sect. 6.—*Act not to apply to oath of allegiance.*]—Provided always, that nothing in this Act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such oath of allegiance shall continue to be required, and shall be administered and taken, as well and in the same manner as if this Act had not been passed. (*See Promissory Oaths Acts*, 1868 (31 & 32 Vict. c. 72), *and* 1871 (34 & 35 Vict. c. 48).)

Sect. 7.—*Not to apply to oaths in courts of justice, etc.*]—Provided also, that nothing in this Act contained shall extend or apply to any oath, solemn affirmation, or affidavit, which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations and affidavits shall continue to be required, and to be administered, taken and made, as well and in the same manner as if this Act had not been passed.

Indictment.

STATEMENT OF OFFENCE.

Administering an unlawful oath, contrary to section 13 of the Statutory Declarations Act, 1835.

PARTICULARS OF OFFENCE.

A. B., being a justice of the peace for the county of ——, on the —— day of ——, in the said county, unlawfully administered an oath to C. D. in a matter in which he the said A. B. had no jurisdiction, namely [*state the matter in ordinary language*].

Misdemeanor, as being a breach of the positive directions of the statute 5 & 6 W. 4, c. 62, s. 13 (see ante, p. 1200). *Fine and (or) imprisonment, with or without hard labour* (see ante, pp. 239, 241, 246). *This offence seems not to be triable at quarter sessions* (5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant is a justice of the peace for the county mentioned in the indictment; evidence of his acting as such will, *primâ facie*, be sufficient. Prove that he administered to C. D. an oath of the nature and touching the subject-matter mentioned in the indictment. It is not necessary to show that he acted *wilfully* in contravention of the statute; the doing so, even inadvertently, is punishable. (*a*) *R.* v. *Nott*, 4 Q. B. D. 768.

SECT. 7.

EMBRACERY.

Common Law.

Embracery is a misdemeanor indictable at common law, punishable by fine and imprisonment, and consists in attempting by bribes or any corrupt means whatsoever, other than evidence and argument in open court, to influence or instruct jurors, or to incline them to favour one party to a judicial proceeding (*b*). 1 Hawk. c. 85; 1 Russ. Cr. (7th ed.) 598: *R.* v. *Young*, 2 East, 14, *cit.* It is referred to as a crime in 34 Edw. 3, c. 8, and 38 Edw. 3, st. 1, c. 12 (both repealed), and an alternative remedy against persons embracing free-

(*a*) Where the defendant pleaded guilty, it was held that the Court could not consider a point reserved as to whether it was necessary to prove *mens rea*. *R.* v. *Martin* [1904] 4 N. S. W. St. R. 720.

(*b*) The English authorities are fully discussed in *Re Dunn* [1906] Vict. L. R. 493.

holders or jurors is given by 32 H. 8, c. 9, s. 3. But the criminal remedy continues (*see* 6 G. 4, c. 50, s. 61). In *R.* v. *Baker*, 113 Cent. Crim. Ct. Sess. Pap. 374, an indictment for embracery was quashed as insufficient. On a second indictment for the same offence preferred at a subsequent session, the prisoner was convicted. *Id.* p. 589.

SECT. 8.

INTERFERENCE WITH WITNESSES.

Common Law.

At common law interference with witnesses in courts of justice, by threats or persuasion to induce them not to give evidence, is a misdemeanor, punishable on indictment or information. 2 Chit. Cr. L. 220, 235: Taylor, Evid. (11th ed.), s. 1341A.: *R.* v. *Lawley*, 2 Str. 904: *R.* v. *Steventon*, 2 East, 362: *R.* v. *Loughran*, 1 Crawf. & Dix. (Ir.) 79: *R.* v. *Tally* [1875] 82 Cent. Crim. Ct. Sess. Pap. 518; also noted in Stone's Justice's Manual (54th ed.), p. 314; *and see R.* v. *Gray* [1903] 22 N. Z. L. R. 52, *and R.* v. *Silverman* [1908] 12 Canada Cr. Cas. 79, where the defendant was indicted for dissuading a witness from giving evidence. The offence seems to be committed whether defendant dissuades him from giving evidence at all or dissuades him from giving certain evidence. *R.* v. *Silverman*, *supra*. There is no distinction between the offence of endeavouring to persuade a witness to alter evidence already given, and the offence of attempting to dissuade a witness from giving evidence of a certain character. *R.* v. *Greenberg*, 121 L. T. 288; 83 J. P. 167. The offence is also summarily punishable as a contempt of court (*see* 1 Russ. Cr. (7th ed.) 541: *Shaw* v. *Shaw*, 2 Sw. & Tr. 517; *and see R.* v. *Steventon*, *supra*, and *Onslow's and Whalley's cases*, L. R. 9 Q. B. 219; 12 Cox, 358.) To prevent a witness duly summoned from attending court is punishable as a contempt; *R.* v. *Hall*, 2 W. Bl. 1110: *Commonwealth* v. *Feeley*, 2 Virg. Cas. 1; or, in the event of combination, is indictable as a conspiracy to pervert the court of justice. 3 Chit. Cr. L. 1151: *R.* v. *Hamp*, 6 Cox, 167; *and post*, tit. Conspiracy.

Statute.

55 & 56 *Vict. c.* 64 (*Witnesses Public Inquiries Protection Act*, 1892), *s.* 1.]—In this Act the word "inquiry" shall mean any inquiry held under the authority of any royal commission, or by any committee of either house of parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by a court of justice.

Sect. 2.]—Every person who commits any of the following acts, that is to say, who threatens or in any way punishes, damnifies or injures, or attempts

to punish, damnify, or injure any person for having given evidence upon any inquiry, or upon account of the evidence which he has given upon any such inquiry shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable on conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.

Sect. 3.]—A prosecution for any offence under this Act may be heard and determined by a court of summary jurisdiction, under the *Summary Jurisdiction Acts;* provided that should either the complainant (*qu.* informant) or the party charged object to the case being dealt with summarily, the Court shall send such case for trial to the quarter sessions or assizes, or, in cases arising within the metropolitan area, to the Central Criminal Court.

Sects. 4, 5.]—*Power to order the offender to pay compensation to parties aggrieved, and costs of prosecution; mode of enforcing the order.—As to costs generally*, see ante, p. 267 *et seq.*

Sect. 7.]—*Saving as to privilege of parliament, and powers under other statutes.*

Sect. 9.

BARRATRY, CHAMPERTY, AND MAINTENANCE.

Common Law.

Barratry.]—It is an indictable misdemeanor to be a common barrator, *i.e.*, "habitually to move, excite or maintain suits and quarrels." 8 Co. Rep. 36. The offence is rarely prosecuted. *See* the old authorities collected 1 Hawk. c. 81, and Encyclopædia of English Law (2nd ed.), *s.v.* Barratry, Vol. II., p. 124. Jurisdiction over the offence was given to sessions of the peace by 34 Edw. 3, c. 1. By 12 G. 1, c. 29, s. 4, persons practising as solicitors after conviction of common barratry are liable on summary conviction in the High Court to transportation (penal servitude) for seven years. *See* Steph. Dig. Cr. L. (6th ed.), p. 113.

Champerty and maintenance.]—Champerty and maintenance are indictable misdemeanors, possibly at common law, but more probably under the statutes named below. *See Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210; 54 L. J. (Q. B.) 449, Lord Selborne: *contra*, *Pechell* v. *Watson*, 11 L. J. (N. S.) (Ex.) 225; 8 M. & W. 691. "Champertors be they that move pleas or suits or cause to be moved either by their own procurement or by others, and sue them at their proper costs for to have part of the land in variance, or part of the gains." 33 Edw. 1 (Ordinacio de Conepiratoribus). Champerty is punishable at the King's pleasure, or by fine and imprisonment, if committed by the King's officers. *See* 3 Edw. 1, c. 25; 13 Edw. 1 (Stat. West. Sec.), c. 49; 28 Edw. 1, c. 11, and the Statutum de Conspiratoribus, 1 Rev. Stat. (2nd ed.)

77. As to what is champertous, *see Re Thomas* [1894] 1 Q. B. 747; 63 L. J. (Q. B.) 572: *Rees* v. *De Bernardy* [1896] 2 Ch. 437; 65 L. J. (Ch.) 656; 1 Russ. Cr. (7th ed.) 594. As to venue, *see* 31 Eliz. c. 5. Maintenance is said to consist in the unlawful taking in hand or upholding of or assisting in civil suits, or quarrels of others, to the disturbance of common right, and from other than charitable motives. *See Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1; 52 L. J. (Q. B.) 454: *Harris* v. *Brisco*, 17 Q. B. D. 504; 55 L. J. (Q. B.) 423: *Alabaster* v. *Harness* [1895] 1 Q. B. 339 (A.); 64 L. J. (Q. B.) 76: *Holden* v. *Thompson* [1907] 2 K. B. 489; 76 L. J. (K. B.) 889, Phillimore, J.: *British Cash, etc., Co.* v. *Lamson Store Co.* [1908] 1 K. B. 1006, 1014; 77 L. J. (K. B.) 649, Moulton, L.J.; *Neville* v. *London "Express" Newspaper, Ltd.* [1919] A. C. 368.

A man may lawfully maintain a suit respecting any property in which he has an equitable interest: *Master* v. *Miller*, 4 T. R. 340, Buller, J. It is not maintenance to assist another in a criminal prosecution. *Harris* v. *Brisco*, *supra*. *See* 1 Hawk. cc. 83, 84; 1 Russ. Cr. (7th ed.) 589; Roscoe, Cr. Ev. (13th ed.).

Indictment for Maintenance and Barratry.

Commencement as ante, p. 1194.

STATEMENT OF OFFENCE.

First Count.

Maintenance.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, unlawfully maintained an action in the King's Bench Division of the High Court of Justice between C. D., plaintiff, and E. F., defendant.

STATEMENT OF OFFENCE.

Second Count:

Barratry.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, unlawfully excited or maintained actions in the King's Bench Division of the High Court of Justice between, etc.

Misdemeanors: punishable by fine and (or) imprisonment, with or without hard labour (ante, pp. 239, 241, 246).

SECT. 10.

BRIBERY OF PUBLIC OFFICIALS.

Common Law.

It has been held to be a misdemeanor at common law to bribe a privy councillor (*R.* v. *Vaughan*, 4 Burr. 2494, 2500), or to bribe a juryman, *R.* v. *Young*, 2 East, 14, 16, *cit.* (*and see* "Embracery," *ante*, p. 1201). The offer of a bribe is an attempt to bribe, and is also a misdemeanor. 3 Co. Inst. 147: *R.* v. *Vaughan*, *supra*. So is the taking of a bribe by an officer judicial or ministerial. *Id.*, *and see* 3 Edw. 1 (Stat. West. Prim.), c. 26 (*post*, p. 1206); 20 Edw. 3, c. 1 (*rep.*); Com. Dig. Officer (1); 1 Hawk. c. 67; 3 Chit. Cr. L. 683. A ministerial officer is simply an officer who is not a judicial officer. A colonel of a regiment is both a public and a ministerial officer. *R.* v. *Whitaker* [1914] 3 K. B. 1283; 84 L. J. (K. B.) 225; 24 Cox, 272; 30 T. L. R. 627; 79 J. P. 28; 10 Cr. App. R. 245. Some of the text-books confine the offence of bribery to bribery of officers of justice (*see* 3 Steph. Hist. Cr. L. 250; 3 Co. Inst. 145; *Lord Macclesfield's case*, 16 St. Tr. 767: *Re Cannon* [1908] 14 Canada Cr. Cas. 186), but this definition of the offence is too narrow and confined. *See R.* v. *Beale*, 1 East, 183, *cit.*: *R.* v. *Vaughan*, 4 Burr. 2494. It is a common law misdemeanor for an officer who has a duty to do something in which the public are interested to receive a bribe either to act in a manner contrary to his duty or to show favour in the discharge of his functions. To bribe the colonel of a regiment to show favour in the matter of a canteen contract for the regiment is a misdemeanor at common law; similarly, for the colonel to receive such a bribe is a misdemeanor. *R.* v. *Whitaker* (*supra*). Payment, or the promise of payment, for votes at the election of an assistant overseer of a parish, is bribery, and as such has been held to be an indictable common law misdemeanor. *R.* v. *Lancaster and Worrall*, 16 Cox, 737, where Wills, J., held that the nature of the office of the person bribed was immaterial so long as it was public. *See R.* v. *Bowler*, C. & Mar. 559: *R.* v. *Boyes*, 2 F. & F. 157. On this subject *see also ante*, p. 129, and 1 Russ. Cr. 7th ed.) 627.

The offence is punishable by fine and imprisonment with or without hard labour (*Criminal Justice Administration Act*, 1914, s. 16, *ante*, p. 240), whether the bribe is accepted or not. 3 Co. Inst. 147.

It is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1, *ante*, p. 106.

For examples of attempting to bribe a constable, *see R.* v. *Richardson*, 111 Cent. Crim. Ct. Sess. Pap. 612; and *R.* v. *Lehwess*, 140 Cent. Crim. Ct. Sess. Pap. 731: to bribe a justice of the peace, *see R.* v. *Gurney*, 10 Cox, 550.

Statutes.

The purchase or sale of public offices is punishable under 5 & 6 Edw. 6, c. 16, and 49 G. 3, c. 126. *See* 3 Chit. Cr. L. 681 (c); 1 Russ. Cr. (7th ed.) 619. It is said to be regarded at common law as a form of bribery. *See R.* v.

Pollman, 2 Camp. 229 n. The taking of bribes by Indian officials is punishable in England under 33 G. 3, c. 52, s. 62. *See* Ilbert, Government of India (2nd ed.) 255 : *R.* v. *Douglas*, 13 Q. B. 42.

As to bribery at parliamentary and municipal elections, *see post*, p. 1396. As to bribery, etc., of or by members of public bodies, *see post*, p. 1408. As to corruption of and by agents, *see post*, p. 1411.

Bribery of customs officers and their acceptance of bribes is punishable by fine under 39 & 40 Vict. c. 36, s. 217, and like provisions are made as to officers of inland revenue, by 53 & 54 Vict. c. 21, s. 10. But the offences created by those statutes are not indictable.

SECT. 11.

EXTORTION BY PUBLIC OFFICIALS.

Statutes.

3 *Edw.* 1 (*Stat. West. Prim.*), *c.* 26.—*Extortion by King's officers.*]—And that *no sheriff* nor other the King's officer take any reward to do his office, but shall be paid of that which they take by the King, and he that so doth shall yield twice so much, and shall be punished at the King's pleasure. [*Rep. as to sheriffs and their officers*, 50 & 51 Vict. c. 55, s. 39.]

10 *W.* 3, *c.* 12, *s.* 8.]—Ante, p. 26.

55 *G.* 3, *c.* 50, *s.* 9.—*Extortion by gaolers and clerks of court.*]—Any clerk of assize, clerk of the peace, clerk of the Court, or their deputies or other officers exacting such fees, shall be rendered incapable of holding his or their offices, and shall be guilty of a misdemeanor. [*The prohibited fees are enumerated in* s. 5 *and in* 8 & 9 Vict. c. 114, s. 1, ante, p. 227.]

Sect. 13.]—Any gaoler who shall exact from any prisoner any fee or gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or who shall detain any prisoner in custody for non-payment of any fee or gratuity, shall be rendered incapable of holding his office, be guilty of a misdemeanor, and be punished by fine and imprisonment.

5 *G.* 4, *c.* 95, *s.* 50.]—*Taking excessive turnpike toll not punishable as extortion.*]—See R. *v.* Hamlyn, 4 Camp. 379.

50 & 51 *Vict. c.* 55 (*Sheriffs Act*, 1887), *s.* 29 (2) (*b*).—*Extortion by sheriffs or their officers punishable in the same way as contempt of court.*]—*As to the effect of this section*, see Lee *v.* Dangar [1892] 1 Q. B. 231; 2 Q. B. 337; 61 L. J. (Q. B.) 780 : Shoppee *v.* Nathan [1892] 1 Q. B. 245 : Bagge *v.* Whitehead [1892] 2 Q. B. 355; 61 L. J. (Q. B.) 778 : Trustee of Woolford's Estate *v.* Levy [1892] 1 Q. B. 772; 61 L. J. (Q. B.) 546.

50 & 51 *Vict. c.* 71 (*Coroners Act*, 1887), *s.* 8 (2).]—A coroner who is guilty of extortion, or of corruption or wilful neglect of his duty, or of misbehaviour in the discharge of his duty, shall be guilty of a misdemeanor. . . . [*Here follow provisions for removal from office.*]

Indictment against a Constable for Extortion. (*Common Law.*)

Commencement as ante, p. 1194.

STATEMENT OF OFFENCE.

Extortion.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of London, being a constable in the Metropolitan Police Force, corruptly and under colour of his office extorted from C. D. the sum of —— by alleging to C. D. that the said sum was due as a fee from C. D. to him.

Misdemeanor: *fine and* (*or*) *imprisonment, with or without hard labour* (ante, pp. 239, 241, 246); *and amotion from office.* 1 Hawk. c. 68, s. 5.

Extortion is triable at quarter sessions. R. *v.* Loggen, 1 Str. 73, 75; 3 Co. Inst. 149; and see 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove that the defendant exacted money as a fee due as stated in the indictment.

The gist of the offence lies in taking under colour of office from any person any money or valuable thing which is not due from him; if the act is done otherwise than in good faith. *Beawfage's case*, 10 Co. Rep. 102 *a; and see* 1 Russ. Cr. (7th ed.) 613. And it is equally extortion where a greater fee is exacted than what is legally due, as where money is exacted as a fee, where none whatever is payable. *See* 1 Hawk. c. 68, s. 1: *R.* v. *Baines*, 2 Ld. Raym. 1265; 2 Salk. 680. The offence may be committed by judicial or executive officers. *See cases collected*, 1 Russ. Cr. (7th ed.) 613. For a gaoler to detain the corpse of a prisoner for a debt due to him is a misdemeanor. *R.* v. *Fox*, 2 Q. B. 246: *R.* v. *Scott*, *Id.* 248 n.; *Jones* v. *Ashburnham*, 4 East, 455, 460. For other offences akin to extortion, *see* Official Index to Statutes (ed. 1922), tit. Extortion, 1. As to trial in England of Indian officials for extortion, *see ante*, p. 1206), and Ilbert, Government of India (2nd ed.), 255.

SECT. 12.

MISCONDUCT OF OFFICERS OF JUSTICE.

Common Law.

Every malfeasance or culpable non-feasance of an officer of justice with relation to his office is a misdemeanor. *See R.* v. *Wyatt*, 1 Salk. 380 (neglect by a constable to levy a penalty under a justice's warrant directed to him); *Crouther's case*, Cro. Eliz. 654 (refusal by a constable on notice to pursue a felon); and 2 Chit. Cr. L. 267; 1 Russ. Cr. (7th ed.) 601 *et seq.* As to misconduct by sheriffs and their officers, *see* 50 & 51 Vict. c. 55, s. 29 (*ante*, p. 1206). As to misconduct by coroners, *see* 50 & 51 Vict. c. 71, s. 8 (2), (*ante*, p. 1207), and *R.* v. *Whitcomb*, 1 C. & P. 124.

SECT. 13.

DISOBEYING JUDICIAL ORDERS.

Disobedience to orders of courts of record is punishable on indictment or information as a misdemeanor, but is usually dealt with summarily as for contempt. *See* 1 Russ. Cr. (7th ed.) 542.

Disobedience to a lawful order of justices, whether made at quarter or petty sessions or out of sessions, is a misdemeanor at common law. *See* 2 Chit. Cr. L. 279; 1 Russ. Cr. (7th ed.) 543.

SECT. 14.

COMPOUNDING OFFENCES.

Common Law.

Compounding felony.]—The offence of theft-bote at common law is committed "where the owner not only knows of the felony, but taketh of the thief his goods again, or amends for the same to favour or maintain him, that is, not to prosecute him to the intent that he may escape." 3 Co. Inst. 134.

The punishment of theft-bote is ransom (*i.e.*, fine) and imprisonment, without hard labour. *Id.* 134; 1 Hale, 619; 2 Hale, 400; 1 Hawk. c. 59, ss. 5, 6; 2 Chit. Cr. L. 220. The offence may be committed by a person not the owner of the goods. *R.* v. *Burgess*, 16 Q. B. D. 141, 147. It is now usually described

as compounding a felony. It differs from misprision of felony, which can be committed without taking any active steps to protect the felon from justice. *See* 3 Co. Inst. 140; 1 Hale, 373; 1 Chit. Cr. L. 232; 1 Russ. Cr. (7th ed.) 579. The offence of compounding is complete when the agreement not to prosecute is made, whether it is performed or not (*R.* v. *Burgess*, *supra*); and the agreement not to prosecute for felony is no defence to an indictment for the felony preferred in breach of the agreement. *R.* v. *Daly*, 9 C. & P. 342: *cf. Re Bryant*, 27 J. P. 277, 289. It is said that except where the attorney-general enters a *nolle prosequi* (*ante*, p. 122), it is necessary to obtain the leave of the Court to abandon a prosecution after the indictment is found, whether the prosecution desire to effect this purpose by offering no evidence, or otherwise. *R.* v. *Nicholson*, Cent. Crim. Ct., June 28, 1899, Darling, J. In *R.* v. *Roxburgh*, 12 Cox, 8, where, on a trial for felony, the jury disagreed, Cockburn, C.J., directed their discharge, that the accused might plead guilty to a common assault, and make compensation for the injuries caused. In the 21st edition of this work, at p. 186, it was stated that "it has not been infrequent on trials at the Central Criminal Court, and probably in other criminal courts, for the prosecutor to abandon the prosecution, the person accused agreeing to bring no action for false imprisonment or malicious prosecution." An instance of this practice will be found in *Jones* v. *German* [1896] 2 Q. B. 418, 422; [1897] 1 Q. B. 374; 65 L. J. (M. C.) 212. But it does not appear that such arrangements are made with the sanction or approval of the Court. (*a*)

Withdrawing from or stifling prosecutions for misdemeanor.]—Except in cases within 18 Eliz. c. 5 (*post*, p. 1211), there seems to be no precedent of an indictment for compounding a misdemeanor, or stifling a prosecution for misdemeanor, unless it is done under circumstances constituting a conspiracy to pervert or defeat justice (*see* 1 Steph. Hist. Cr. L. 502; 1 Russ. Cr. (7th ed.) 580; 1 Chit. Cr. L. 3), or amounting to interferences with witnesses (*see ante*, p. 1202). The illegality of such a transaction from the point of view of enforcing any contract made for such a purpose is well established (*a*), and it is the

(*a*) Contracts to stifle or withdraw from a prosecution for any offence, even if made with the sanction of a court, are illegal and unenforceable, either at law or in equity. *Windhill Local Board* v. *Vint*, 45 Ch. D. 351; 59 L. J. Ch. 608: *In re Campbell*, 14 Q. B. D. 32: *Kaufmann* v. *Gerson* [1904] 1 K. B. 591 (C. A.); 73 L. J. K. B. 320; *Johnson* v. *Ogilby*, 3 P. Wms. 277; 24 Eng. Rep. 1064: *Collins* v. *Blantern*, 2 Wils. (K. B.) 341; 1 Smith, L. C. (12th ed.): *Edgcombe* v. *Rodd*, 5 East, 294, 302: *Rawlings* v. *Coal Consumers' Association*, 43 L. J. (M. C.) 111. They do not affect the jurisdiction to proceed with the trial of the offence in question, *Re Bryant*, 27 J. P. 277, 289; and even in civil proceedings, though the illegality is not pleaded, the Court may intervene and dismiss the action. *Scott* v. *Brown* [1892] 2 Q. B. 724; 61 L. J. Q. B. 738: *Whitmore* v. *Farley*, 45 L. T. 99; 14 Cox, 617; 29 W. R. 825.

In *Windhill Local Board* v. *Vint*, *supra*, the plaintiffs, a local board, had indicted the defendants for obstructing a highway. At the trial of the indictment, a compromise was made by the parties and sanctioned by the judge, and afterwards confirmed by deed. By this deed the defendants covenanted to restore the road within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant. It was held by the Court of Appeal, affirming the judgment of Stirling, J., that as the indictment was for a public injury,

undoubted right of the Crown to proceed with a prosecution for a misdemeanor notwithstanding any such transaction. (*a*) Moreover, by s. 5 of the *Prosecution of Offences Act*, 1879 (42 & 43 Vict. c. 22), it is the duty of every clerk to a justice or to a police court to transmit, in accordance with the regulations under the Act (printed in Statutory Rules and Orders Revised (ed. 1904), vol. 4, tit.

the agreement to consent to a verdict of "not guilty" was illegal, and that the plaintiffs could not maintain an action on the defendants' covenant.

The following cases have been held to fall within the rule: a contract to stop an election petition (*Coppock* v. *Bower*, 4 M. & W. 361; 8 L. J. (Ex.) 9); securities given to stop a prosecution for cheating at cards (*Osbaldiston* v. *Simpson*, 13 Sim. 513); a promissory note given on condition that the plaintiff would not prosecute the defendant for obtaining money by false pretences (*Clubb* v. *Hutson*, 18 C. B. (N. S.) 414; *cf. Pool* v. *Bousfield*, 1 Camp. 55); a bill accepted by a person accused of embezzlement in consideration of refraining from prosecution, unless it is in the hands of a *bonâ fide* holder for value without notice (*Fivaz* v. *Nicholls*, 15 L. J. (N. S.) C. P. 125; 2 C. B. 501: *cf. Wallace* v. *Hardacre*, 1 Camp. 45); a bond given to secure abstention from prosecution (*Cannon* v. *Rands*, 11 Cox, 631). As to substituting a genuine for a forged bill, *see Wallace* v. *Hardacre*, *supra*. As to lending money to take up a forged bill, *see Re Mapleback*, 4 Q. B. D. 150, 156; 46 L. J. Bnkr. 14; 13 Cox, 374.

Where a third person acting under undue influence enters into a contract for the *express* purpose of securing another from criminal prosecution, the contract is invalid. *Williams* v. *Bayley*, L. R. 1 H. L. 200; 35 L. J. (Ch.) 717: *Jones* v. *Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173; 65 L. J. (Ch.) 138; 17 Cox, 389: *McClatchie* v. *Haslam*, 17 Cox, 402 (C. A.): *and see Kaufmann* v. *Gerson* [1904] 1 K. B. 591; 73 L. J. (K. B.) 320. But to invalidate a contract of this kind there must be pressure and more than mere inducement (*Flower* v. *Sadler*, 9 Q. B. D. 83; 10 Q. B. D. 572: and *McClatchie* v. *Haslam*, *supra*), and the discontinuance of the proceedings must be part of the consideration. *See Harding* v. *Cooper*, 1 Stark. (N. P.) 467.

For the rule to apply it would seem that the prosecution must have been instituted, or that there are reasonable grounds, not necessarily amounting to complete proof, for commencing it. *Kirwan* v. *Goodman*, 9 Dowl. 330; 5 Jur. (O. S.) 293: and *Rourke* v. *Mealy*, 4 L. R. Ir. 166, Palles, C.B.: S. C. *sub nom. Bourke* v. *Mealy*, 14 Cox, 329: *Davies* v. *London, etc., Marine Ins. Co.*, 8 Ch. D. 469; 47 L. J. (Ch.) 511.

The following cases have been held not to fall within the rule: Where a man gave a warrant of attorney to secure a debt, the mere fact that he believed he would not be prosecuted for his conduct when incurring the debt was held not to invalidate the warrant. *Ward* v. *Lloyd*, 6 M. & G. 785; 7 Scott (N. R.) 499: *cf. Ex parte Critchley*, 15 L. J. (Q. B.) 124; 3 D. & L. 527. A payment of money to postpone a trial for perjury has been held not to be illegal. *Harvey* v. *Morgan*, 2 Stark. (N. P.) 17; Ellenborough, C.J., *sed quære*. An agreement *after* conviction to pay part of the expenses of a prosecution for misdemeanor has been held legal (*Beeley* v. *Wingfield*, 11 East, 46); but arrangements of this kind are seldom approved by the Court. *See Re Parkinson*, 76 L. T. (N. S.) 715.

It is suggested in *Keir* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371; 13 L. J. (Q. B.) 359; 15 L. J. (Q. B.) 360, that a compromise may be legally made of an offence which might be made the subject of a civil action, such as common assault or libel; and in *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. App. 297; 44 L. J. (N. S.) Ch. 500, it was held that as the prosecutor had the choice in a trade-mark case between civil and criminal remedies, he could legally compromise as to the criminal remedy. But some of the dicta in this case (at p. 302) are inconsistent with the conclusion of the Court of Appeal in *Windhill Local Board* v. *Vint* (*ante*, p. 1209 *n.*), which appears also to be inconsistent with *Fallows* v. *Taylor*, 7 T. R. 475: *Crooke* v. *Lord Powerscourt*, 16 W. R. 969: *Drage* v. *Ibberson*, 2 Esp. 643: and *Elworthy* v. *Bird*, 2 Bing. 258; and it is settled that where the assault is coupled with riot, a compromise is illegal (*Keir* v. *Leeman*, *supra*), and no bar to an action for malicious prosecution.

(*a*) This question is discussed and the English authorities considered in *Kerridge* v. *Simmonds* [1906] 4 Aust. C. L. R. 253, and *Morgan* v. *McFee* [1908] 14 Canada Cr. Cas. 308.

Criminal Procedure, E., p. 7), to the Director of Public Prosecutions a copy of the information and of all depositions and other documents relating to any case in which a prosecution for an offence instituted before such justice or court is withdrawn or is not proceeded with within reasonable time. In the draft Criminal Code of 1878 it was provided (art. 127) that 'every one shall be guilty of an indictable offence, and shall be liable on conviction to two years' imprisonment with hard labour, who wilfully attempts *in any way*, though not otherwise criminal, to obstruct, prevent, pervert, or defeat the course of justice or the administration of the law." (*Cf.* Steph. Dig. Cr. L. (6th ed.), p. 122.) This clause appears to have been considered by the judges who reported on the code to state the existing law. (*See their report*, p. 21.) As will be seen, it is not confined to cases of conspiracy (*post*, p. 1415), or interference with witnesses (*ante*, p. 1202), or fabrication of evidence (*ante*, p. 1198), or incitement to give false evidence (*ante*, p. 1190). And the clause is wide enough to cover cases of assisting a misdemeanant to escape arrest, or compounding or stifling a prosecution for misdemeanor. The old distinction between felony and misdemeanor has to a great extent disappeared during the present century, and the considerations of public policy stated in *Windhill Local Board* v. *Vint* (45 Ch. D. 351; 59 L. J. (Ch.) 608), and by Palles, C. B., in *Dillon* v. *O'Brien* (20 L. R. Ir. 316; 16 Cox. 245), point to the conclusion that with respect to criminal responsibility for compounding a misdemeanor, there is no ground for a different rule from that in force as to compounding a felony, except perhaps in the case of common assault (*Keir* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371; 13 L. J. (Q. B.) 359; 15 L. J. (Q. B.) 360), or where the prosecution is one merely to try a civil right, *e.g.* in cases which fall within the *Evidence Act*, 1877 (40 & 41 Vict. c. 14): and even in such cases, compromise of the prosecution has been held illegal. *Windhill Local Board* v. *Vint* (*ante*, p. 1209 *n.*). Another rule of law points in the same direction, viz. that any indemnity given to bail, whether by the prisoner or by a third person, is illegal and unenforceable. *Consolidated Exploration and Finance Co.* v. *Musgrave* [1900] 1 Ch. 37; 69 L. J. (Ch.) 11.

An agreement between an accused person and his bail whereby the latter is to be indemnified is unlawful and indictable as a conspiracy, even if there is no evidence that it was intended to defeat justice. *R.* v. *Porter* [1910] 1 K. B. 369; 79 L. J. (K. B.) 241; 26 T. L. R. 200; 3 Cr. App. R. 237. *(a)*

Statutes.

18 *Eliz. c. 5, ss. 4, 5.*]—*Compounding informations on penal statutes without leave of the Court; misdemeanor.* [*This statute is said not to apply to offences punishable on summary conviction.* See Paley on Convictions (8th ed.), 56:

(a) *In R.* v. *Broome*, 18 L. T. (O. S.) 19, Martin, R., said that it was no objection to bail for a prisoner that they had been indemnified by or on behalf of the prisoner. This dictum was followed by Fulton, Recorder, in *R.* v. *Stockwell*, 66 J. P. 376, where he held an agreement to indemnify bail was not indictable unless a deliberate intention to pervert justice was proved. In the 23rd edition of this work it was submitted that these rulings were both erroneous, and they are now definitely overruled by *R.* v. *Porter*, *supra*.

but independently of the statute, such informations cannot legally be compromised. Edgcombe *v.* Rodd, 5 East, 294 : R. *v.* Wiltshire Justices, 8 L. T. 242 : Ex parte Bryant, 27 J. P. 277 : White *v.* Spettigue, 14 L. J. (N. S.) Ex. 99; 13 M. & W. 603.]

6 *& 7 Geo.* 5, *c.* 50 (*Larceny Act*, 1916), s. 5 (3).]—Every person who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any stolen dog or any dog which is in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and on conviction thereof liable to imprisonment for any term not exceeding eighteen months, with or without hard labour. [*This repeals but re-enacts s.* 20 of the Larceny Act, 1861.]

For decisions as to what is within the statute, *see R.* v. *Southerton*, 6 East, 126; *R.* v. *Gotley*, R. & R. 84 : *R.* v. *Crisp*, 1 B. & Ald. 282. A person may be convicted under it for taking money as a reward for forbearing to prosecute, although in fact no offence liable to a penalty has been committed. *R.* v. *Best* 2 Mood. 125; 9 C. & P. 368.

Sect. 34.—*Taking money for restoring property stolen, etc.*]—Every person who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to recover any property which has, under circumstances which amount to felony or misdemeanor, been stolen, or obtained in any way whatsoever, or received, shall (unless he has *used all due diligence* to cause the offender to be brought to trial for the same) be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding seven years, and, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable. [*This substantially re-enacts section* 101 *of the* Larceny Act, 1861.]

24 *& 25 Vict. c.* 96 (*The Larceny Act*, 1861), *s.* 102.—*Advertising reward for the return of stolen property.*]—Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit. [*This section re-enacts* 7 & 8 G. 4, c. 29, s. 59. *It has been held to apply to the offer of a reward for a stolen dog, "No questions will be asked."* Mirams *v.* Our Dogs Publishing Co., Ltd. [1901] 2 K. B. 564; 70 L. J. (K. B.) 879.]

33 & 34 *Vict.* c. 65 (*Larceny* (*Advertisements*) *Act*, 1870), *s.* 3.—*Limitation of actions for advertisements of reward for return of stolen property.*]—Every action against the printer or publisher of a newspaper to recover a forfeiture under s. 102 of the *Larceny Act*, 1861 (24 & 25 Vict. c. 96), shall be brought within six months after the forfeiture is incurred, and no such action against the printer or publisher of a newspaper shall be brought unless the assent in writing of his Majesty's attorney-general or solicitor-general for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of such action. [*See Wilkins* v. *Gill*, 20 T. L. R. 3.]

Sect. 2.—*Definition of "newspaper."*]—In this Act the term "newspaper" means a newspaper as defined for the purpose of the Acts for the time being in force relating to the carriage of newspapers by post. (*See* 8 Edw. 7, c. 48, ss. 2, 20, 21, 22.)

Indictment for compounding a Felony. (*Common Law.*)

STATEMENT OF OFFENCE.

Compounding a felony.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, received from C. D. the sum of 10*l.* as a reward for desisting from prosecuting the said C. D. for stealing the ring of the said A. B.

The indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon. R. *v.* Burgess, 16 Q. B. D. 141; 55 L. J. (M. C.) 97.

Misdemeanor at common law: punishable by fine and (or) imprisonment, with or without hard labour (ante, pp. 239, 241, 246). See 1 Hawk. c. 59, s. 6, etc.; Steph. Dig. Cr. L. (6th ed.), p. 122.

Evidence.

Prove the felony to have been committed by C. D., as directed *ante*, p. 511; and prove that A. B. received the money, or some part thereof, from C. D. upon an understanding that A. B. would not further prosecute C. D. for the felony. A person commits this offence of "compounding" a felony as soon as he enters into the agreement not to prosecute, although he may in fact afterwards prosecute (*R.* v. *Burgess*, 16 Q. B. D. 141; 55 L. J. (M. C.) 97; 15 Cox, 779); and although he may not be the owner of the stolen property, nor a material witness for the prosecution. *Id.* This decision overrules *R.* v. *Stone*, 4 C. & P. 379.

Indictment for taking a Reward for the Recovery of Stolen Property.
(*Larceny Act*, 1916, *s.* 34, ante, p. 1212.)

STATEMENT OF OFFENCE.

Corruptly taking a reward, contrary to section 34 of the Larceny Act, 1916.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, corruptly took the sum of 10*l.* from C. D. under pretence of helping him to recover his watch which had been stolen.

Felony : penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour; and, if a male under the age of eighteen years, with or without whipping. As to recognizances and sureties for keeping the peace, 6 & 7 Geo. 5, c. 50, s. 37 (5) (b) (ante, p. 501).

Evidence.

Prove that the goods, etc., were stolen or obtained in the mode stated in the indictment : and prove that the defendant received the money from C. D. or some person on his behalf, upon the pretence or account stated in the indictment. It was decided to be an offence within 4 G. 1, c. 11, s. 4 (*rep.*), which was similar to the present section, to take money under pretence of helping a man to recover goods stolen from him, although the defendant had no acquaintance with the felon, and did not pretend that he had; and though he had no power to apprehend the felon, and though the goods were never restored, and the defendant had no power to restore them. *R.* v. *Ledbitter*, 1 Mood. 76. And where A. had her goods stolen, and B., who knew the thieves, received money from A. to endeavour to purchase the stolen property from the thieves for A., but not meaning to bring the thieves to justice; it was held that B. was guilty of the felony of taking money on account of helping A. to the return of stolen goods within 7 & 8 G. 4, c. 29, s. 58 (*rep.*), which was similar to the present enactment. *R.* v. *Pascoe*, 1 Den. 456; 2 C. & K. 927; 18 L. J. (M. C.) 186.

Indictment for compounding Information on a Penal Statute without Leave of the Court. (18 *Eliz. c.* 5, ante, p. 1211.)

For precedents, see 2 Chit. Cr. L. 222, and R. *v.* Southerton, 6 East, 126.

Misdemeanor (18 Eliz. c. 5, ss. 4, 5; 56 G. 3, c. 138, s. 2 (ante, p. 242) : *fine and* (*or*) *imprisonment, with or without hard labour* (ante, pp. 239, 241, 246).

As to procedure for compounding penal actions, see R. S. C. 1883, O. 50, rr. 13-15.

Evidence.

For decisions as to what is within the statute, *see R.* v. *Southerton*, *supra* : *R.* v. *Gotley*, R. & R. 84 : *R.* v. *Crisp*, 1 B. & Ald. 282. A person may be convicted under the statute for taking money as a reward for forbearing to prosecute, although in fact no offence liable to a penalty has been committed by the person from whom money is taken. *R.* v. *Best*, 2 Mood. 125; 9 C. & P. 368.

SECT. 15.

LIBELS REFLECTING ON THE ADMINISTRATION OF JUSTICE, AND CONTEMPT OF COURT.

There are three different kinds of contempt (*a*); one kind of contempt is scandalizing the Court itself; another, abusing parties who are concerned in causes; another, prejudicing mankind against persons before the cause is heard. *R.* v. *Read and Huggonson*, 2 Atk. 469, 471, Lord Hardwicke, L.C.

Scandalizing the Court itself.]—"Committals for contempt of court are ordinarily in cases where some contempt *ex facie* of the Court has been committed, or for comments upon cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the Court itself." *McLeod* v. *St. Aubyn* [1899] A. C. 549, 561; 68 L. J. (P. C.) 137. In that case it was said that summary proceedings for this offence are obsolete in England; but in *R.* v. *Gray* [1900] 2 Q. B. 36; 69 L. J. (Q. B.) 502; 64 J. P. 484, the publication of the scurrilous personal attack upon a judge, with reference to observations made by him in the course of a case which had been concluded, was held to be summarily punishable as a contempt of court, and the law as laid down in *R.* v. *Almon*, Wilmot's Opinions, 243; 5 Burr. 2685, was followed. The defendant in a criminal case may be committed for contempt if he insults the Court, even in his address to the jury. *R.* v. *Davison*, 4 B. & Ald. 329; 1 St. Tr. (N. S.) 1366 : *and see R.* v. *Giles*, *ante*, p. 173.

The offence of "scandalizing the Court" is also a misdemeanor punishable on information or indictment. It may be committed by words either spoken or written; but for spoken words to be indictable, they must be used of the judge or magistrate in his office and with intent to defame him in that capacity. *R.* v. *Weltje*, 2 Camp. 142, Ellenborough, C.J. : *cf. R.* v. *Pocock*, 2 Str. 1157 : *R.* v. *Read and Huggonson*, *supra*; 2 Chit. Cr. L. 916; 1 Russ. Cr. (7th ed.) 537.

(*a*) "The essence of contempt of court is action or inaction amounting to interference with or obstruction to, or having a tendency to interfere with or to obstruct, the due administration of justice." *Re Dunn* [1906] Vict. L. R. 493, where the English authorities are reviewed.

It is an aggravated misdemeanor to publish an invective against judges and juries with a view to bring into suspicion and contempt the administration of justice. *R.* v. *White*, 30 St. Tr. 1131; 1 Camp. 359 n.: *Re McDermott*, L. R. 1 P. C. 260; 2 P. C. 341: *Macleod* v. *St. Aubyn* [1899] A. C. 549; 68 L. J. (P. C.) 137, where the authorities are collected at pp. 550, 551. But it is lawful with candour and decency to discuss the merits of the verdict of a jury, or the decision of a judge, which are matters of public interest and concern, and the defence of fair comment, if proved, negatives the presumed malice of the publication, *Id.; and see R.* v. *Sullivan*, 11 Cox, 50 (Ir.).

Libels on a judge or jury may, in certain events, be seditious; in which case it would seem that justification cannot be pleaded under s. 6 of *Lord Campbell's Act* (6 & 7 Vict. c. 96, *post*, p. 1239), nor fair comment and absence of malice under s. 4 of the *Law of Libel Amendment Act*, 1888 (51 & 52 Vict. c. 64, *post*, p. 1242). *R.* v. *M'Hugh*, [1901] 2 Ir. Rep. 569; *and see ante*, pp. 1124, 1125.

The misdemeanor is punishable by fine and (or) imprisonment with or without hard labour. *See R.* v. *Hart and White*, 30 St. Tr. 1131; 1 Camp. 359 n.: *R.* v. *Watson*, 2 T. R. 199.

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (*ante*, p. 106. The *Vexatious Indictments Act*, (*ante*, p. 67) applies to libel. 44 & 45 Vict. c. 60, s. 6 (*post*, p. 1241). A criminal prosecution may not be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers, the application for which shall be made on notice to the person accused, who shall have an opportunity of being heard against it. 51 & 52 Vict. c. 64, s. 8 (*post*, p. 1242). It would seem from *R.* v. *M'Hugh*. [1901] 2 Ir. Rep. 569, that defence of justification could not be pleaded to an indictment of this kind, on the ground that the offence is in substance a seditious libel. *But see R.* v. *Gray*, 10 Cox, 184 (Ir.), *ante*, p. 1124. As to evidence, *see post*, pp. 1248 *et seq.*

For examples of indictments for slanderous words spoken to a magistrate in the execution of his office, *see R.* v. *Revel*, 1 Str. 421: *R.* v. *Pocock*, 2 Str. 1157: *R.* v. *Weltje*, 2 Camp. 142: *Ex parte Duke of Marlborough*, 5 Q. B. 955; 13 L. J. (N. S.) (M. C.) 105: *R.* v. *Rea*, 17 Ir. C. L. Rep. 584: 2 Chit. Cr. L. 916; and cases collected in Odgers on Libel (5th ed.), 530-533. It is not clear whether this offence is to be regarded as sedition, or contempt of court, or a distinct form of crime. If there is any doubt as to the words, lay them differently in different counts. Justices out of general or quarter sessions have no power to commit for contempt, even if committed in their presence. Judges of inferior courts of record have no jurisdiction to commit for contempt unless committed in *facie curiæ*. *R.* v. *Lefroy*, L. R. 8 Q. B. 134; 42 L. J. (N. S.) (Q. B.) 121: *R.* v. *Judge of Brompton County Court* [1893] 2 Q. B. 195; 62 L. J. (Q. B.) 604.

It is sufficient to prove that the magistrate was acting as such. *Berryman* v. *Wise*, 4 T. R. 366: *R.* v. *Gordon*, 1 Leach, 515. As to the proof of the words, *see ante*, pp. 1121, 1126, *post*, p. 1249.

It appears not to be sufficient to prove that slanderous words were spoken

of a magistrate in his absence; *R.* v. *Weltje*, 2 Camp. 142; nor to a magistrate out of court to his face, unless there was an intent to provoke to a breach of the peace. *Ex parte Chapman*, 4 A. & E. 773; *and see ante*, p. 1216.

Prejudicing the fair trial of cases pending.]—It is a misdemeanor punishable on information or indictment to publish, either verbally or by writing, comments, whether defamatory or not, or even to give theatrical representations, relating to pending cases, which are calculated to prejudice the fair trial of those cases, and so interfere with the course of justice. *See R.* v. *Tibbits and Windust* [1902] 1 K. B. 77; 71 L. J. (K. B.) 4; 20 Cox, 70, in which case the defendants were convicted on an indictment charging them with the publication in a newspaper of articles affecting the character and conduct of persons under remand before justices for an indictable offence, there being a count charging each article as (1) an attempt to pervert the course of justice, and (2) an act calculated to have that result. The facts in that case were also held to support counts for conspiracy to pervert the course of justice: following *R.* v. *Jolliffe*, 4 T. R. 285: *R.* v. *Fisher*, 2 Camp. 563: *R.* v. *Williams*, 2 L. J. (O. S.) K. B. 30: *Onslow's and Whalley's cases*, L. R. 9 Q. B. 219, 227; *Skipworth's case*, Id. 230; *and see Re Pollard*, L. R. 2 P. C. 106: *Re a special reference from the Bahama Islands* [1893] A. C. 138.

This kind of interference with the course of justice is also punishable summarily as a contempt of court. Where the case is pending in any branch of the High Court, including courts of assize and the Central Criminal Court, or where a case is pending before justices which may ultimately be tried before a court of assize, the High Court can summarily punish for any publication calculated to interfere with a fair trial, and it is not necessary to proceed by indictment or information, nor to wait till application can be made to the Court of trial. *R.* v. *Parke* [1903] 2 K. B. 432; 72 L. J. (K. B.) 839, where the prior and conflicting decisions on the subjects are collected and reviewed. The offence is committed if the publication is calculated to interfere with a fair trial. *R.* v. *Davies* [1906] 1 K. B. 32; 75 L. J. (K. B.) 104. The power may be exercised against a corporate body (*R.* v. *Freeman's Journal* [1902] 2 Ir. Rep. 82), and even after the disagreement of the jury on the first trial if further proceedings were contemplated or naturally to be anticipated. *Id.; and see* 1 Russ. Cr. (7th ed.) 540. The procedure is by motion to the King's Bench Division for a rule calling upon the party whose conduct is complained of to show cause why a writ of attachment should not issue against him for his contempt. *See* Short and Mellor, Cr. Pr. (2nd ed.) 342 *et seq.*

CHAPTER IV.

OFFENCES AGAINST THE PUBLIC PEACE.

SECT. 1.

UNLAWFUL ASSEMBLY.

Common Law.

An unlawful assembly at common law is an assembly of three or more persons (a) for purposes forbidden by law, such as that of committing a crime by open force; Steph. Dig. Cr. Law (6th ed.), 55; or (b) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to endanger the public peace, or to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. Steph. Dig. Cr. Law (6th ed.), p. 55; 1 Hawk. c. 65, s. 9: *R.* v. *Hunt*, 3 B. & Ald. 566; 1 St. Tr. (N. S.) 171: *R.* v. *Brodribb*, 6 C. & P. 571: *R.* v. *Dewhurst*, 1 St. Tr. (N. S.) 529: *R.* v. *Stephens*, 2 St. Tr. (N. S.) 1189: *Redford* v. *Birley*, 1 St. Tr. (N. S.) 1071: *R.* v. *Vincent*, 3 St. Tr. (N. S.) 1037; 9 C. & P. 91: *R.* v. *Graham*, 10 Cox, 420: *R.* v. *Clarkson*, 17 Cox, 483 (C. C. R.). Assemblies under arms even for self-defence appear to be unlawful, except where they are for defence of a dwelling-house. *See* 1 Russ. Cr. (7th ed.) 423, 424; 25 Edw. 3, st. 5, c. 2 (*ante*, p. 1053). It includes meetings forbidden by statute as unlawful assemblies or unlawful combinations or associations; *R.* v. *O'Connell*, 2 St. Tr. (N. S.) 629: *R.* v. *Ball*, 6 C. & P. 563: *R.* v. *Dixon*, 6 C. & P. 601; 3 St. Tr. (N. S.) 1281; meetings to intimidate the executive or parliament; *see Redford* v.

Birley, 1 St. Tr. (N. S.) 1071 : *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1, 779; meetings for the purpose of spreading sedition or listening to seditious speeches; *Redford* v. *Birley*, *supra* : *R.* v. *Fussell*, 6 St. Tr. (N. S.) 723; assemblies to obstruct the officers of the law; *R.* v. *M'Naughten*, 14 Cox, 576 (Ir.); or for the purpose of night poaching, *R.* v. *Brodribb*, 6 C. & P. 571. In *R.* v. *Clarkson*, 17 Cox, 483, a march of a Salvation Army band through the streets of a town in which street music was prohibited, was held not to be an unlawful assembly, on the ground that the men did not know that their acts were calculated to cause a breach of the peace. *See also Beatty* v. *Gillbanks*, 9 Q. B. D. 308; 51 L. J. (M. C.) 117; 15 Cox, 138 : *Beaty* v. *Glenister*, 51 L. T. (N. S.) 304. "There is no authority for the proposition that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act," *per* Field, J., in *Beatty* v. *Gillbanks*, *supra* : *and see R.* v. *Clarkson*, 17 Cox, 483 (C. C. R.). As to meetings for illegal drilling or training, *see ante*, p. 1135.

It appears to be immaterial whether the common purpose of the assembly is unlawful or lawful if the manner of the meeting endangers the public peace or causes general alarm. Steph. Dig. Cr. Law (6th ed.), 55. An assembly of persons to witness a prize-fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. *R.* v. *Billingham*, 2 C. & P. 234 : *R.* v. *Perkins*, 4 C. & P. 537 : *and see R.* v. *Hunt*, 1 Cox, 177 : *R.* v. *Coney*, 8 Q. B. D. 534; 51 L. J. (M. C.) 66. As to the difference between a mere sparring match and an unlawful fight, *see R.* v. *Young*, 10 Cox, 371; *and R.* v. *Orton*, 14 Cox, 226 (C. C. R.) (*ante*, p. 879). Persons assembling for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly will be opposed, and with good reason to suppose that a breach of the peace will be committed by those who oppose it, are not guilty of an unlawful assembly. *Beatty* v. *Gillbanks*, *supra*. If at a meeting lawfully convened seditious words are spoken, of such a nature as to be likely to produce a breach of the peace, that meeting may become unlawful. *R.* v. *Burns*, 16 Cox, 355.

It is said that the distinction between a riot, rout, and unlawful assembly is that the first is a tumultuous meeting of persons who are guilty of actual violence; the second where they endeavour to commit an act which would make them rioters; and the last where they meet with an intention to make a riot, but neither carry their purpose into effect, nor make any endeavour towards it. 3 Co. Inst. 176; 2 Hawk. c. 65, ss. 1, 8, 9; 2 Chit. Cr. L. 488 : *R.* v. *Birt*, 5 C. & P. 154 : *R.* v. *Woolcock*, 5 C. & P. 516. This seems too narrow; *see* 3 St. Tr. (N. S.) 1350, Alderson, B.; 9 C. & P. 93 n.; because even if the purpose were treasonable the assembly would still be unlawful, and in most of the modern cases of unlawful assembly the object of unlawful meetings has been treasonable or seditious : *see R.* v. *Rankin*, 7 St. Tr. (N. S.) 711 : and not merely in support of some private enterprise, which is the case in an unlawful assembly leading to riot (*see post*, p. 1221).

Persons who attend or speak at such a meeting, in pursuance of previous agreement or in approval of its object, are guilty of the offence or of conspiracy : but those persons are not liable who merely attend out of curiosity. *R.* v.

Rankin, 7 St. Tr. (N. S.) 711, 789, Alderson, B. : *cf. R.* v. *Coney*, 8 Q. B. D. 534; 51 L. J. (M. C.) 66 : *R.* v. *Atkinson*, 11 Cox, 330. It is the right and duty of magistrates and the police to disperse an assembly which is in fact unlawful. 2 H. 5, st. 1, c. 8 : *Radford* v. *Birley*, 1 St. Tr. (N. S.) 1071, 1239, Abbott, C.J. : *R.* v. *Neale*, 9 C. & P. 431; 3 St. Tr. (N. S.) 1312, Littledale, J. : *O'Kelly* v. *Harvey*, 15 Cox, 435; 14 L. R. Ir. 165. The meeting need not first be proclaimed nor the proclamation under the *Riot Act* read; *R.* v. *Fursey*, 3 St. Tr. (N. S.) 543; 6 C. & P. 81; and force may be used after refusal to disperse; *R.* v. *Jones*, 6 St. Tr. (N. S.) 811; and it is illegal and riotous to resist dispersal. *R.* v. *Fursey*, *R.* v. *Jones*, *supra* : *R.* v. *Williams*, 6 St. Tr. (N. S.) 775 : *R.* v. *Sharpe*, *Id.* 1125; 3 Cox, 288.

Statutes.

5 *Ric.* 2, *st.* 1, *c.* 7; 17 *Ric.* 2, *c.* 8.]—See post, p. 1228.

13 *H.* 4, *c.* 7.—*Arrest, etc., of offenders in case of riot, assembly, or rout.*

2 *H.* 5, *st.* 1, *c.* 8.—*Penalty for default of justices in execution of* 13 H. 4, c 7.—See 1 Russ. Cr. (7th ed.) 431.

13 *Car.* 2, *st.* 1, *c.* 5, *s.* 1.—*Punishment of persons repairing to the number of over ten at one time to the King or either House of Parliament on pretence of presenting or delivering any petition, remonstrance, or declaration, or other address.—Two witnesses necessary.*]—*As to how far this Act is in force*, see R. *v.* Lord George Gordon, 21 St. Tr. 486, 487, 646; 1 St. Tr. (N. S.) 428 n. : Pankhurst *v.* Jarvis, 26 T. L. R. 118; 74 J. P. 64.

57 *G.* 3, *c.* 19 (*Seditious Meetings Act*, 1817), *s.* 25.—*Meetings of more than fifty persons within a mile of Westminster Hall, during sittings of Parliament or of the Superior Courts* (see 36 & 37 Vict. c. 66, s. 76), *for the purpose or on the pretext of considering or preferring a petition, complaint, remonstrance, or address to the King or either House of Parliament, for alteration of matters in Church or State, to be an unlawful assembly.*]—See R. *v.* Hunt, 1 St. Tr. (N. S.) 1, 180 n. : Ex parte Lewis, 21 Q. B. D. 191; 57 L. J. (M. C.) 108.

60 *G.* 3 & 1 *G.* 4, *c.* 1.—*Unlawful meetings for purposes of drilling.*]—Ante, p. 1135.

8 *Edw.* 7, *c.* 66 (*Public Meetings Act*, 1908).—*Summary punishment for endeavour to break up lawful public meetings.*

SECT. 2.

ROUT.

Rout is a disturbance of the peace by persons who assemble together with an intention to do something which if executed will amount to riot, and who actually make a move towards the execution of their common purpose, but do not complete it. *Redford* v. *Birley*, 1 St. Tr. (N. S.) 1071, 1211, 1214, Holroyd, J.: 1 Russ. Cr. (7th ed.) 422; 1 Hawk. c. 65, s. 8; Steph. Dig. Cr. Law (6th ed.), p. 56.

Indictments for the offence are not now drawn, as the jury can convict of rout on an indictment for riot if the complete riot is not proved. *See ante*, pp. 211 *et seq.*

SECT. 3.

RIOT.

Common Law.

Riot is a tumultuous disturbance of the peace by three or more persons who assemble together of their own authority, with an intent mutually to assist one another against any who oppose them in the execution of an enterprise of a private nature, and afterwards actually execute the same in a violent and turbulent manner to the terror of the people. *See* 1 Hawk. c. 65; 2 Chit. Cr. L. 487.

In order to constitute a riot five elements are necessary—(1) the presence of not less than three persons; (2) a common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another, by force if necessary, against any one who may oppose them in the execution of the common purpose; (5) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness. *Field* v. *Receiver of Metropolitan Police* [1907] 2 K. B. 853; 76 L. J. (K. B.) 1015; 23 T. L. R. 736; 71 J. P. 494; *Ford* v. *Receiver for Metropolitan Police District* [1921] 2 K. B. 344. The common purpose must be of a private nature, *i.e.*, not directed against the Crown or State, for a riot is distinct from treason, in that the acts done need not involve a resistance to the authority or prerogative of the Crown. *R.* v. *Lord George Gordon*, 21 St. Tr. 486, 644: *R.* v. *Hardie*, 1 St. Tr. (N. S.) 623, 765: *R.* v. *Frost*, 4 St. Tr. (N. S.) 85: *R.* v. *Forbes*, 2 St. Tr. (N. S.) 939. And riot is distinct from sedition (*see ante*, p. 1117). As to rout and unlawful assembly, *see ante*, p. 1218 and *supra*. As to the powers and duties of sheriffs, justices, soldiers, and private citizens in suppressing riot and resisting or arresting rioters, *see R.* v. *Pinney*, 3 St. Tr. (N. S.) 11: *R.* v. *Kennett*, 5 C. & P. 282 n.: Featherstone Riot Report, Parl. Pap. 1893-

1894, C. 7234, and the report Parl. Pap. 1908, C. 236; 1 Russ. Cr. (7th ed.) 431 *et seq.*, where the employment, powers, and duties of the military forces of the Crown for suppressing riots are dealt with. Peace officers may use force to suppress a riot. *R.* v. *Fursey*, 3 St. Tr. (N. S.) 543. Assault on peace officers engaged in dispersing an unlawful assembly may be a riot. *R.* v. *Williams*, 6 St. Tr. (N. S.) 775. And it is an indictable misdemeanor to refuse to assist a peace officer in quelling a riot. *R.* v. *Brown*, C. & Mar. 314: *R.* v. *Sherlock*, L. R. 1 C. C. R. 20; 35 L. J. (M. C.) 92; 10 Cox, 170, *ante*, p. 965.

Indictment for Riot and Assault.

THE KING *v.* A. B., C. D., AND E. F.

Hants Quarter Sessions
held at Winchester.

PRESENTMENT OF THE GRAND JURY.

A. B., C. D., and E. F. are charged with the following offence:—

STATEMENT OF OFFENCE.

Riot and Assault.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., and other persons unknown, on the —— day of ——, in the county of ——, riotously assembled together and assaulted G. H.

On this indictment the jury may acquit of riot, and convict of rout, unlawful assembly, or assault. R. *v.* O'Brien, 22 Cox, 374; 75 J. P. 192; 27 T. L. R. 204; and see ante, p. 211. *On an indictment for riotous demolition of a house, it is said that the jury may negative the felony, and convict of simple riot*: 14 & 15 Vict. c. 100, s. 9 (ante, p. 215). Casey *v.* R., Ir. Rep. 8 C. L. 408 (C. C. R.).

Misdemeanor: *fine and (or) imprisonment* (ante, pp. 239, 241, 246). *Hard labour may be imposed.* 3 G. 4, c. 114 (ante, p. 242).

This offence is triable at quarter sessions. 34 Edw. 3, c. 1; 15 Ric. 2, c. 2; 5 & 6 Vict. c. 38, s. 1 (ante, p. 106). *Restrictions are imposed by* 21 Jac. 1, c. 8, s. 4, *on removal of indictments for riot from quarter sessions.*

Evidence.

Number of persons.]—It must be proved that three persons at least were present and engaged in this unlawful assembly and assault, otherwise the defendants must be acquitted; for unless committed by three or more, it is no riot. 2 Hawk. c. 47, s. 8: *R.* v. *Scott*, 3 Burr. 1262; 1 W. Bl. 291, 350: *R.* v.

Sadbury, 1 Ld. Raym. 484 : *R.* v. *Ingram*, 2 Salk. 593. The death of one or more of four persons indicted for riot does not defeat proceedings against the survivors. *R.* v. *Scott*, *supra*.

Assembly. —It must be proved that these three or more persons assembled together; and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror; *R.* v. *Hughes*, 4 C. & P. 373 : *R.* v. *Graham*, 16 Cox, 420 : such as being armed, using threatening speeches, turbulent gestures, or the like. 1 Hawk. c. 65, s. 5.. If an assembly of persons is not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit. *Id.;* Lambarde, 178; Dalt. c. 137. It is a sufficient terror and alarm, however, to sustain the indictment, if *any one* of the King's subjects be in fact terrified. *R.* v. *Phillips*, 2 Mood. 252; *S. C.* as *R.* v. *Langford*, C. & Mar. 602. If persons meet at a fair or wake, or on any other lawful and innocent occasion, and on a sudden quarrel they fight together, this is no riot, but an affray merely; but if upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is a riot; for, in this latter case, the design to break the peace is as premeditated as if they had originally met for that purpose. 1 Hawk. c. 65, s. 3, Where a riot ensues on a meeting and in consequence of speeches there which incite to violence, the speakers may be convicted as rioters, though absent when it occurs. *R.* v. *Sharpe*, 3 Cox, 288, Wilde, C.J. Where a riot is proved to have taken place, the mere presence of a person among the rioters, even although he possessed the power, and refused to exercise it, of stopping the riot, does not render him liable as one of the rioters. *R.* v. *Atkinson*, 11 Cox, 330, Kelly, C.B. In order to render him so liable, it must be shown that he did something by word or act to take part in, help, or incite to the riotous proceedings. *Id.*

The acts of the rioters may be proved severally, before evidence is given to connect their fellow-rioters, as in conspiracy. *See R.* v. *Cooper*, 1 Russ. Cr. (7th ed.) 431, where earlier cases to the contrary are collected.

It is not necessary, to constitute a riot, that the *Riot Act* should be read. Before the proclamation can be read, a riot must exist; and the effect of the proclamation will not change the character of the meeting, but will make those guilty of a felony who do not disperse within one hour after the proclamation is read. *R.* v. *Fursey*, 3 St. Tr. (N. S.) 543; 6 C. & P. 81.

Assault.]—Prove the assault as directed *ante*, pp. 930 *et seq.* And this must be proved, otherwise the defendants must be acquitted of the riot, although it would seem that they may still be found guilty of the rout or of the unlawful assembly. For, where persons assemble together for the purpose of doing an act, and the assembly is such as is above described, if they do not proceed to execute their purpose, it is but an unlawful assembly, not a riot; if, after so assembling, they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so

assemble, but proceed to execute their design, and actually execute it, it is then a riot. 1 Hawk. c. 65, s. 1; Dalt. c. 136: *R.* v. *Birt*, 5 C. & P. 154: *R.* v. *Vincent*, 3 St. Tr. (N. S.) 1037; 9 C. & P. 91.

It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror is equally punishable, whether it be lawful or otherwise. 1 Hawk. c. 65, s. 7. Yet, where the object of the assembly is lawful, it in general requires stronger evidence of the terror of the means, to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has even been held, that, if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and other tools for that purpose, and abate it accordingly, without doing more, it is no riot, Dalt. c. 137, unless threatening language or other misbehaviour, in apparent disturbance of the peace, be at the same time used. *Id.*

Indictment for Riot. (*Common Law.*)

STATEMENT OF OFFENCE.

Riot.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., and other persons unknown, on the —— day of ——, in the county of ——, riotously assembled together.

Misdemeanor: final and (*or*) *imprisonment* (ante, pp. 239, 241, 246). *Hard labour may be imposed:* 3 G. 4, c. 114 (ante, p. 242). *As to the evidence*, see ante, p. 1222.

Statutes.

1 *G.* 1, *st.* 2, c. 5 (*Riot Act*), *s.* 1.—*Twelve or more rioters remaining one hour after proclamation.*]—Whereas of late many rebellious riots and tumults have been in divers parts of this kingdom, to the disturbance of the public peace, and the endangering of his Majesty's person and government, and the same are yet continued and fomented by persons disaffected to his Majesty, presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offences; and by such rioters, his Majesty and his administration have been most maliciously and falsely traduced, with an intent to raise divisions, and to alienate the affections of the people from his Majesty; Therefore, for the preventing and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders therein, be it enacted, *etc.*, that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace at any time after the last day of July, in the year of our Lord 1715, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the

county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony. . . .

Sect. 2. *Form of proclamation.*]—And . . . the order and form of the proclamations that shall be made by the authority of this Act shall be as hereafter followeth, (that is to say) the justice of the peace, or other person authorized by this Act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded silence to be while proclamation is making, and after that, shall openly and with a loud voice make or cause to be made, proclamation in these words, or like in effect:

"Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies.

"God Save the King."

And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorized, empowered, and required, on notice or knowledge of any such unlawful, riotous and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assembly shall be, of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid.

Sect. 5.—*Opposing proclamation.*]—Provided always . . . that if any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any other manner wilfully or knowingly let, hinder, or hurt any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering or hurting such person or persons so beginning or going to make such proclamation as aforesaid, shall be adjudged felony; . . . and that also, every such person or persons so being unlawfully, riotously and tumultuously assembled to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made if the same had not been hindered as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons. . . .

Sect. 8.—*Limitation of proceedings.*]—Provided always, that no person or persons shall be prosecuted by virtue of this Act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed. (*See ante*, p. 63.)

33 *Geo.* 3, *c.* 67 (*Shipping Offences Act*, 1793), *ss.* 1, 3, 7, 8.—*Seamen, etc., riotously assembling and forcibly preventing loading of vessels. First offence, misdemeanor, twelve months' imprisonment; second offence, felony, fourteen years' penal servitude. Trial of offences on the high seas. Prosecution to be within twelve calendar months of the offence.*

7 *W.* 4 *& 1 Vict. c.* 91 (*Punishment of Offences Act*, 1837) *s.* 1.]—*Recites* 1 G. 1, st. 2, c. 5, ss. 1, 5, *and enacts that* "if any person shall . . . be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . ." [*Rest rep.* 55 & 56 Vict. c. 19 (S. L. R.). *Penal servitude was substituted for transportation by* 20 & 21 Vict. c. 3, ante, p. 237.]

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 11.—*Riotously demolishing buildings, etc.*]—Ante, p. 763.

Sect. 12.—*Riotously damaging buildings, etc.*]—Ante, p. 764.

24 *& 25 Vict. c.* 100, *s.* 39.—*Riotously preventing loading or navigation of vessels.*]—*Punishable on summary conviction.* See 2 Russ. Cr. (7th ed.) 1916.

Sect. 40.—*Riotous interference with the trade in corn.*]—*Punishable on summary conviction.* See 2 Russ. Cr. (7th ed.) 1916.

Indictment of Rioters remaining one hour together after Proclamation.

(1 *G.* 1, *st.* 2, *c.* 5, *s.* 1, *ante*, p. 1224.)

STATEMENT OF OFFENCE.

Riot, contrary to the Riot Act, 1715.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., and other persons unknown, to the number of twelve or more, on the —— day of ——, in the county of ——, riotously assembled together, and remained and continued together for an hour after being lawfully required or commanded to disperse.

Felony: 1 G. 1, st. 2, c. 5, s. 1 : *penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without*

hard labour. 7 W. 4 & 1 Vict. c. 91, s. 1 (ante, p. 1226); 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *Opposing the making of the proclamation is also felony.* 1 G. 1, st. 2, c. 5, s. 5 (ante, p. 1224), *and subject to the same punishment.*

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

1. Prove that the defendants, together with others, to the number of twelve at least, were "unlawfully, riotously, and tumultuously" assembled together, "to the disturbance of the public peace." It does not seem from the words of the statute that it is necessary that a riot should have actually been committed; it seems to be sufficient that the assembly was of such a nature, and gathered together under such circumstances, that if they had done the act for the purpose of which they were assembled, it would have been a riot. *R.* v. *James*, 5 C. & P. 153.

2. Prove that silence was commanded, and proclamation made. The proclamation must be read correctly. Where the magistrate in reading the proclamation omitted the words "God save the King," it was held that persons remaining after the proclamation could not be capitally convicted. *R.* v. *Child*, 4 C. & P. 442. The offence is no longer capitally punishable. *See ante*, p. 1226.

3. Prove that the defendants, together with others, to the number of twelve or more, "unlawfully, riotously, and tumultuously" remained and continued together for one hour or more after proclamation so made: computed from the first reading of the proclamation. *R.* v. *Woolcock*, 5 C. & P. 516.

The prosecution must be commenced (*see ante*, p. 63) within twelve months after the offence committed. 1 G. 1, st. 2, c. 5, s. 8. The expression "month" in this section means lunar month. *See Lacon* v. *Hooper*, 6 T. R. 224, 226: *Bruner* v. *Moore* [1904] 1 Ch. 305; 73 L. J. (Ch.) 377.

Sect. 4.

AFFRAY, ETC.

An affray is a public offence to the terror of the King's subjects. There may be an affray where no actual violence occurs, *e.g.*, where a man arms himself with dangerous and unusual weapons in such a manner as will cause terror. 1 Hawk. c. 63, ss. 2, 4; 4 Bl. Com. 144; 3 Co. Inst. 158; Burn's Just. tit. Affray (I.).

Statute.

2 *Edw.* 3 (*Stat. Northampton*), *c.* 3.—*Riding or going armed in affray of the peace.*]—See 3 Co. Inst. 160: R. *v. Meade*, 19 T. L. R. 540, *where before* Wills, J., *a conviction was obtained on an indictment under this statute against a man who discharged firearms in the public street.*

Indictment for an Affray. (*Common Law.*)

STATEMENT OF OFFENCE.

Affray.

PARTICULARS OF OFFENCE.

A. B. and C. D., on the —— day of ——, in the county of ——, in a public street and highway, unlawfully fought and made an affray.

Misdemeanor at common law; fine and (*or*) *imprisonment, with or without hard labour* (ante, pp. 239, 241, 246; and see 3 Co. Inst. 158; 1 Hawk. c. 63; 1 Russ. Cr. (7th ed.) 427; Steph. Dig. Cr. Law (6th ed.), p. 54.

The words "public street and highway" *have been held to be essential.* R. *v.* O'Neill, Ir. Rep. 6 C. L. 1.

Evidence.

Prove that the defendants fought in a public street or highway; for if it is in private, it is an assault and battery merely, and not an affray. 1 Hawk. c. 63, s. 1. No quarrelsome or threatening words whatever will amount to an affray. *Id.* s. 2; 1 Hale, 456.

SECT. 5.

FORCIBLE ENTRY AND DETAINER.

A forcible entry is when a man enters into lands or tenements, *manu forti.* Co. Litt. 257; Com. Dig. Forcible Entry (A. 2). A forcible detainer is when a man who has entered peaceably, maintains his possession by force. Com. Dig. Justice (B. 1). *See* 3 Chit. Cr. L. 1135; 1 Russ. Cr. (7th ed.) 441, *et seq.*

Statutes.

5 *Ric.* 2, *st.* 1, *c.* 7 (*c.* 8 *in Ruffhead*).—*Forcible entries forbidden.*]—And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict (*sic*), he shall be punished by imprisonment of his body and thereof ransomed at the King's will. (*For indictment*, see post, p. 1231.)

15 *Ric.* 2, *c.* 2.—*Confirmation of statutes against riots or forcible entries.*]—*Item*, it is accorded and assented, that the ordinances and statutes, made and not repealed, of those that make entries with strong hand into lands and

tenements, or other possessions whatsoever, and them hold with force, and also of those that make insurrections or great ridings (*sic*), riots, routs, or assemblies, in disturbance of the peace, or of the common law, or in affray of the people, shall be holden and kept, and fully executed; joined to the same, that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict (*sic*) by the record of the same justices or justice, until they have made fine and ransom to the King: and that all the people of the county, as well the sheriffs as other, shall be attendant upon the same justices to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine to the King. And in the same manner it shall be done of them that make such forcible entries in benefices or offices of Holy Church.

17 *Ric.* 2, *c.* 8.—*Duties of sheriff as to arrest of rioters, etc., within* 5 *Ric.* 2, *st.* 1, *c.* 7.]—*See ante*, p. 1221.

8 *H.* 6, *c.* 9.]—*After the recital of* 15 *Ric.* 2, *c.* 2 (supra), *enacts*, And for that the said statute does not extend to entries in (*sic*) tenements in peaceable manner and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice, as before, nor any pain ordained if the sheriff do not obey the commandments and precepts of the said justices for to execute the said ordinance, many wrongful and forcible entries be daily made in (*sic*) lands and tenements by such as have no right; and also divers gifts, feoffments, and discontinuances sometimes made to lords, and other puissant persons, and extortioners within the said counties where they be conversant, to have maintenance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the King's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf: our lord the King considering the premisses hath ordained that the said statute, and all other statutes of such entries or alienations made in times past, shall be holden and duly executed; joined to the same that from henceforth where any doth make any forcible entry in (*sic*) lands and tenements, or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party aggrieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statute duly to be executed, and that at the costs of the party so grieved: and, moreover, though that such persons making such entry be present, or else departed before the coming of the said justices or justice, notwithstanding the same justices or justice in some good town next to the tenements so entered, or in some other convenient place according to their discretion, shall have, or either of them shall have authority and power to inquire by the people of the same

county, as well of them that make such forcible entries in (*sic*) lands and tenements, as of them which the same hold with force; and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden as afore (*sic*), and shall put the party so put out in full possession of the said lands or tenements so entered or holden as before (*sic*): [*Avoidance of feoffments, etc., made after forcible entry—Duty of sheriffs as to juries, etc.*] Provided always, that they which keep their possessions with force in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued in possession in the same by three years or more be not endamaged by force of this statute. [*As to the summary powers of justices to convict on view under these Acts*, see Ex parte Davy, 2 Dowl. Pract. Cas. (N. S.) 24 : R. *v.* Oakley, 4 B. & Ad. 307; 2 L. J. (M. C.) 24 : R. *v.* Wilson, 1 A. & E. 627; 3 Id. 817; 3 L. J. (M. C.) 96; 4 Id. 11 : Attwood *v.* Joliffe, 3 New Sess. Cas. 116. *They are not now exercised.*]

31 *Eliz. c.* 11.]—*After reciting above proviso to* 8 *H.* 6, *c.* 9 : *enacts that* No restitution upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation or hath been in quiet possession, by the space of three whole years together, next before the day of such indictment so found, and his, her, or their estate or estates therein not ended nor determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried if the other will deny or traverse the same. . . . [*Here follows a provision as to costs.*]

21 *Jac.* 1, *c.* 8, *s.* 4.—*Limitations on* certiorari *of indictments for forcible entry.*]—Ante, p. 116.

21 *Jac.* 1, *c.* 15.—*Restitution of possession.*]—Be it enacted by the authority of this present parliament that such judges, justices or justice of the peace, as by reason of any Act or Acts of Parliament now in force, are authorized and enabled upon inquiry, to give restitution of possession unto tenants of any estate of frechold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present Act have the like and the same authority and ability from henceforth upon indictment of such forcible entries, or forcible withholding before them duly found, to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights' service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden which shall be entered upon by force, or holden from them by force.

Indictment for a forcible Entry into a Freehold. (5 *Ric.* 2, *st.* 1, *c.* 7, ante, p. 1228.)

STATEMENT OF OFFENCE.

Forcible entry, contrary to 5 Ric. 2, c. 7.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with many other persons unknown, made a forcible entry upon the freehold land of C. D., of which he was in occupation, and expelled him from the possession thereof.

Counts for riot, affray, and assault may be added. A second count may be added for forcible detainer, see post, p. 1233.

Misdemeanor: imprisonment (*with or without hard labour*, ante, p. 240) *and* (*or*) *ransom at the King's will* (i.e., *fine at the discretion of the Court*). 5 Ric. 2, st. 1, c. 7, ante, p. 1228.

Evidence.

The prosecutor must prove:—*First*, that he was seised in fee of the premises in question, or otherwise in lawful possession, at the time of the forcible entry. The prosecutor's title is not part of the issue, and probably need not, for purposes of conviction, be stated with precision. *See R.* v. *Child*, 2 Cox, 102: *R.* v. *Hoare*, 6 M. & Sel. 266. And proof that he was in the actual occupation of the premises, or in the perception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. *See Lows* v. *Telford*, 1 App. Cas. 414; 45 L. J. (Ex.) 613; 13 Cox, 225: *Jayne* v. *Price*, 5 Taunt, 326. This presumption, however, may be rebutted, either by direct evidence of his having a less estate, or by evidence of circumstances from which the jury may presume it. *Jayne* v. *Price*, *supra*. But it is immaterial whether the estate thus proved is an estate by right or by wrong; for even if the defendant has a right of entry, still his asserting that right "with strong hand, or with multitude of people," is equally an offence within the statute as if he had no right; and this is so even where a landlord forcibly ejects a tenant whose term has expired. *Taunton* v. *Costar*, 7 T. R. 431; *and see Newton* v. *Harland*, 1 Scott (N. R.), 474. If he was a mere trespasser, apparently the statute does not apply. *Browne* v. *Dawson*, 10 L. J. (N. S.) Q. B. 7; 12 A. & E. 624: *Scott* v. *Brown*, 51 L. T. (N. S.) 746: *Collins* v. *Thomas*, 1 F. & F. 416, Campbell, C.J.: *R.* v. *Dillon*, 2 Chit. (K. B.) 314. The statute, however, does not extend to a case where the party ousted had the bare custody of the premises for the defendant; 1 Hawk. c. 64, s. 32; but it extends to the forcible ouster of one joint tenant, or tenant in common, by another. *Id.* s. 33. It may be considered a good general rule, also, that the statute extends to all hereditaments to which the defendant, if he had a right, might have asserted that right by a peaceable entry.

Secondly, the prosecutor must prove the forcible entry. An entry "with strong hand," or "with multitude of people," is the offence described in the

statute. Therefore, an entry by breaking the doors or windows, etc., whether any person is in the house or not, especially if it is a dwelling-house, is a forcible entry within the statute. *See* 1 Hawk. c. 64, s. 26. So, an entry where personal violence is done to the prosecutor, or to any of his family or servants, or to any person or persons keeping the possession for him (*Id.* s. 26), or even where it is accompanied with such threats of personal violence (either actual, or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like), as were likely to intimidate the prosecutor or his family, etc., and to deter them from defending their possession (*Id.* ss. 20, 21, 27 : *Milner* v. *Maclean*, 2 C. & P. 17), is a forcible entry within the statute. But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like, without further violence; Com. Dig. Forc. Ent. (A. 3); 1 Hawk. c. 64, s. 26; or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, 1 Hawk. c. 64, s. 26; or if effected by threats to destroy the owner's goods will not support an indictment for forcible entry; there must be such force or show of force as is calculated to prevent resistance. *R.* v. *Smyth*, 5 C. & P. 201; 1 M. & Rob. 155. If, however, whilst the owner is out of his house, the defendant forcibly prevents him from returning to it, and in the meantime sends persons to take possession of it peaceably, this is said to be a forcible entry. 1 Hawk. c. 64, s. 26. Also, where a party having right, and whose entry is congéable, enters or makes claim, and the other party afterwards continues to hold possession by force; this is considered a forcible *entry* in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry. *Id.* ss. 22, 34; Co. Litt. 251.

Where the party entering has in fact no right of entry, all persons in his company, those who do not use violence as well as those who do, are equally guilty; but if he has a right of entry, then those only who use or threaten violence; 3 Bac. Abr. Forc. Ent. (B.); or who actually abet those who do, are guilty. A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry in itself is lawful. *R.* v. *Smyth*, *supra*.

Thirdly, as to the expulsion; it is necessary to prove the expulsion, and that the prosecutor is still kept out of possession, merely for the purpose of obtaining restitution of the premises; 1 Hawk. c. 64, s. 41; but it is no part of the offence described by the statute, which mentions a forcible entry merely. No restitution shall be awarded, if the defendant has been permitted to remain quietly in possession for three years, previously to the finding of the indictment. 31 Eliz. c. 11 (*ante*, p. 1230).

Absence of title in the prosecutor is no defence, the gist of the offence being the force. *R.* v. *Williams*, 4 Man. & Ry. 471 : *R.* v. *Studd*, 14 W. R. 806; 14 L. T. (N. S.) 623 : *Beddall* v. *Maitland*, 17 Ch. D. 174 : *cf. Edwick* v. *Hawkes*, 18 Ch. D. 199.

A judge at the assize may, in his discretion, refuse to award restitution, after an indictment for forcible entry and detainer has been found by a grand

jury; and the High Court will not review his decision. *R.* v. *Harland*, 2 M. & Rob. 141; 8 A. & E. 826; 1 Per. & D. 93; 8 L. J. (M. C.) 60: *R.* v. *Hake*, 4 Man. & Ry. 483 n. After conviction the writ is of right and as of course: *see* Short and Mellor, Cr. Fr. (2nd. ed.) 402. As to the form of a writ of restitution, *see Id.* s. 60; Dalt. c. 182.

Forcible Detainer under 8 *H.* 6, *c.* 9 (*ante*, p. 1229).—*Evidence.*]—Prove the seisin or possession, as in the two former cases. Prove an entry; whether peaceable or not is immaterial. Proof of the expulsion, which *ex vi termini* implies force, is not material, as the gist of the offence is the forcible detainer merely. Holding the premises from the prosecutor by force, however, must be proved: and the same violence or terror which will make an entry forcible, will also make a detainer forcible. 1 Hawk. c. 64, s. 30; 1 Russ. Cr. (7th ed.) 448. But merely refusing to go out of the house (1 Hawk. c. 64, s. 30); or a tenant at will denying possession to his lessor; or a man keeping out of his land, by force, a person claiming common upon it (Com. Dig. Forc. Det. (B. 2)), is not a forcible holding within the meaning of the statutes. *See R.* v. *Oakley*, 4 B. & Ad. 307; 2 L. J. (M. C.) 24: *R.* v. *Wilson*, 1 A. & E. 627; 3 L. J. (M. C.) 96: *R.* v. *Wilson*, 3 A. & E. 817; 4 L. J. (M. C.) 114.

Forcible Entry and Detainer: Common Law.]—It is said that an indictment will lie at common law for a forcible entry, although it is generally brought on the statutes. *R.* v. *Bake*, 3 Burr. 1731, Wilmot, J.: *but see R.* v. *Storr*, 3 Burr. 1698. It is said to have been proper to indict at common law where the entry was made without legal title (1 Hawk. c. 64, s. 1: *R.* v. *Wilson*, 8 T. R. 357); or where the prosecutor would on an indictment under the old statutes have been incompetent as a witness. *R.* v. *Williams*, 9 B. & C. 549; 4 Man. & Ry. 471.

Misdemeanor at common law: fine and (or) imprisonment, with or without hard labour. See ante, pp. 239, 241, 246.

The evidence of the forcible entry, upon this indictment, must be stronger than is required to support an indictment on the statutes; that is to say, there must be proof of such a force as constitutes a public breach of the peace, or such proceedings as constitute a riot or unlawful assembly (*ante*, pp. 1218, 1221). *R.* v. *Wilson*, *R.* v. *Bake*, *supra.*

It is not necessary to set forth, or prove the particulars of the prosecutor's estate in the messuage, etc., because in this case there is no restitution: stating that J. N. was possessed, and proving his possession, will be sufficient. *R.* v. *Wilson*, 3 L. J. (M. C.) 96; 1 A. & E. 627, *supra.* For the same reason, it does not seem to be necessary to prove the expulsion or detainer, unless where the prosecutor has failed to prove the entry to have been forcible. (*See ante*, p. 1231.)

SECT. 6.

POUND-BREACH AND RESCUE OF DISTRESS.

Common Law.

Pound-breach is a misdemeanor indictable at common law. It consists in the forcible release of cattle, etc., lawfully placed in a proper pound (*Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J. (Q. B.) 435), or in forcibly damaging or destroying the pound with that object. 1 Co. Litt. 47 b; 1 Russ. Cr. (7th ed.) 551; 2 Chit. Cr. L. 205; Steph. Dig. Cr. Law (6th ed.), 121; Bullen on Distress (2nd ed.), 248: *R.* v. *Bradshaw*, 7 C. & P. 233: *R.* v. *Butterfield*, 17 Cox, 598. For precedents of indictments, *see* Cro. Circ. Comp. 199; 2 Chit. Cr. L. 205; 4 Went. 314. The offence is also summarily punishable under 5 & 6 W. 4, c. 50, s. 75, so far as relates to cattle found trespassing on highways; and under 6 & 7 Vict. c. 30. Rescue of a distress for rent seems also to be an indictable misdemeanor at common law. *R.* v. *Nicholson*, 65 J. P. 298; *and see R.* v. *Noonan*, Ir. Rep. 10 C. L. 505; 10 Cox 302 (C. C. R. Ir.): *R.* v. *Walshe*, Ir. Rep. 10 C. L. 511. For precedent of indictment, *see* Cro. Circ. Comp. 198. It consists in forcibly taking away things legally distrained from the distrainor before they are impounded. Bullen on Distress (2nd ed.), 244. But it is usual to resort to the civil remedy by treble damages under 2 W. & M. c. 5, s. 3, and 11 G. 2, c. 19, s. 10: *Kemp* v. *Christmas* [1898] 79 L. T. (N. S.) 233; 14 T. L. R. 572. Rescue of a distress for rates appears also to be indictable. *R.* v. *Brenan*, 6 Cox, 381 (Ir.); 6 Ir. Jur. (O. S.) 307: *R.* v. *Westropp*, 2 Ir. C. L. Rep. 217. It is not necessary in such a case to prove the making of the rate, or that anything is due; and it is sufficient to prove a warrant in proper form. *Id.* If the distress warrant is bad, the rescue is justifiable. *R.* v. *Boyle*, 6 Ir. C. L. Rep. 598; 7 Cox, 428: *and cf. R.* v. *Pigott*, 1 Ir. C. L. Rep. 471.

SECT. 7.

CHALLENGE TO FIGHT.

Indictment for sending a Challenge. (Common Law.)

STATEMENT OF OFFENCE.

Challenging to a duel.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, challenged C. D. to fight a duel with him.

Misdemeanor: fine and (or) imprisonment, with or without hard labour. See ante, pp. 239, 241, 246. *See* 1 Hawk. c. 63, s. 3; Steph. Dig. Cr. L. (6th ed.), 54: R. *v.* Philipps, 6 East, 464: R. *v.* O'Brien, Smith and Batty (K. B. Ir.), 79; and the precedents, Cro. Circ. Comp. 102-104; 4 Went. 315; 6 Went. 385-461; 3 Chit. Cr. L. 848.

Where the challenge is by letter, prove the letter and the handwriting. Prove also the delivery of it to C. D. Where the letter containing the challenge was put into the post-office in the county of Middlesex, to be delivered to the prosecutor in another county, Lord Ellenborough held, that the party might be indicted in Middlesex: for *sending* the challenge is the offence; whether it reaches the person to whom it is sent or not is immaterial. *R* v. *Williams*, 2 Camp. 506.

Provocation, however great, is no excuse or justification on the part of the defendant (*R.* v. *Rice*, 3 East, 581), however it may weigh with the Court in apportioning the punishment.

SECT. 8.

SENDING LETTERS CONTAINING THREATS TO MURDER OR TO INJURE PROPERTY.

Statutes.

24 *&* 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 50.—*Sending letters threatening to burn or destroy houses, etc.*]—Whosoever shall send, deliver, or utter, *or directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing, threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, *or any grain, hay, or straw, or other agricultural produce in or under any building*, or any ship or vessel, *or to kill, maim, or wound any cattle*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*Framed from* 4 G. 4, c. 54, s. 3, *and* 10 *&* 11 Vict. c. 66, s. 1, *with the additions italicized.* See *note to next enactment.*]

24 *&* 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 16.—*Sending letters threatening to murder.*]—Whosoever shall *maliciously* send, deliver, or utter, *or directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten

years. . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping.

[*This section was framed from* 4 G. 4, c. 54, s. 3; *and* 10 & 11 Vict. c. 66, s. 1. *The words secondly italicized were inserted to get rid of* R. *v.* Paddle, R. & R. 484 : R. *v.* Burridge, 2 M. & Rob. 296 : R. *v.* Jones, 1 Den. 218; 2 C. & K. 398 : and R. *v.* Grimwade, 1 Den. 30; 1 C. & K. 592, *so far as they decide that the letter must be sent to the party threatened, or put in a place where it is likely to be found and conveyed to him.* Greaves, Crim. Law Cons. Acts (2nd ed.), 50.]

6 *& 7 Geo. 5, c. 50 (Larceny Act,* 1916), *s.* 31.—*Threatening to publish or abstain from publishing a libel.*]—Ante, p. 682.

Indictment under 24 *& 25 Vict. c.* 97, *s.* 50.

STATEMENT OF OFFENCE.

Threatening to burn a house, contrary to section 50 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, sent or delivered to, or caused to be received by, C. D. a letter or writing, knowing the contents thereof, threatening to burn the house of the said C. D.

Felony: penal servitude for not more than ten nor less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 97, s. 50; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 97, s. 73 (ante, p. 740).

Evidence.

Prove that the prisoner sent or delivered the letter to C. D. as directed, *ante*, p. 683.

Sending a letter to A. B. threatening to burn a house of which he was owner, but let by him to and occupied by a tenant, was held not to be an offence within 4 G. 4, c. 54 (*rep.*), the words of which were "his or their houses," etc. *R.* v. *Burridge*, 2 M. & Rob. 296; *sed quære; see R.* v. *Grimwade*, 1 Den. 30; 1 C. & K. 592. The threat to burn any house, barn, etc., etc., is sufficient to satisfy 24 & 25 Vict. c. 97, s. 50.

Upon an indictment on 9 G. 1, c. 22 (*rep.*), the words of which were "to burn the dwelling-house, outhouses," etc., where the writer of the letter threatened to *burn* the prosecutor's mill, and to do *all the injury he was able*

to his farms, and the prosecutor proved that he had no mill at the time, but that he had farms, and buildings upon them: the judges held clearly that, as to the mill, the letter was not within the statute; and the majority of the judges held that, even as to the farms, as the letter did not necessarily imply that the injury to them was to be effected by fire, it was not within the Act. *R.* v. *Jepson*, 2 East, P. C. 1115. Neither would this threat as to the farms satisfy the term "destroy" in the present statute. Compare the cases under 6 & 7 Geo. 5, c. 50, s. 29 (*ante*, pp. 683 *et seq.*).

Indictment under 24 & 25 Vict. c. 100, s. 16.

STATEMENT OF OFFENCE.

Threatening to murder, contrary to section 16 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously sent or delivered or caused to be received by C. D. a letter or writing, knowing the contents thereof, threatening to kill or murder him.

Felony: penal servitude for not more than ten nor less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen years, with or without whipping. 24 & 25 Vict. c. 110, s. 16; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

Evidence.

Prove that the prisoner sent or delivered the letter to C. D. as directed, *ante*, p. 683.

It is for the jury to say whether the letter amounts to a threat to kill or murder. *R.* v. *Girdwood*, 2 East, P. C. 1120, 1121; 1 Leach, 142: *R.* v. *Boucher*, 4 C. & P. 562: *R.* v. *Tyler*, 1 Mood. 428.

The word "maliciously" implies the doing of that which a person has no legal right to do, and the doing of it in order to secure some object by means which are improper. *R.* v. *Syme*, 75 J. P. 535; 27 T. L. R. 562; 6 Cr. App. R. 257: *R.* v. *Johnson*, 9 Cr. App. R. 57.

SECT. 9.

DEFAMATORY LIBEL.

NOTE.—*For seditious libel*, see ante, p. 1114, *for blasphemous libel*, see ante, p. 1159; *for libel affecting the administration of justice*, see ante, p. 1215; *for obscene libel*, see post, p. 1318.

Statutes.

32 *G.* 3, *c.* 60 (*Libel Act*, 1792 (*Fox's Act*)), *s.* 1.]—Whereas doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same to give their verdict on the whole matter in issue: be it therefore declared and enacted, *etc.*, that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. [*This Act is said to be declaratory of the common law.* Capital and Counties Bank *v.* Henty, 5 C. P. D. 539; 49 L. J. (C. P.) 830, Brett, L.J. *But it was passed in consequence of rulings to the effect that the question of libel or no libel was for the judge alone and not for the jury.*]

Sect. 2.]—Provided always, that on every such trial the Court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and direction to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.

Sect. 3.]—Provided also, that nothing herein contained shall be construed to extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases.

Sect. 4.]—Provided also, that in case the jury shall find the defendant or defendants guilty it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding.

6 & 7 *Vict. c.* 96 (*Libel Act*, 1843), *s.* 4.—*Punishment for knowingly publishing a false defamatory libel.*]—If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such

fine as the Court shall award. [*This section does not create or define a new offence, but merely prescribes the punishment for a common law offence.* R. *v.* Munslow [1895] 1 Q. B. 758; 64 L. J. (M. C.) 138.]

Sect. 5.—*Punishment for defamatory libel.*]—If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the Court may award, such imprisonment not to exceed the term of one year. (*See ante*, pp. 240, 246.) *See* R. *v.* Mabin [1901] 20 N. Z. L. R. 451, *discussing* R. *v.* Munslow, *supra*, *and* Boaler *v.* R., 21 Q. B. D. 284; 57 L. J. (M. C.) 85.

Sect. 6.—*Plea of justification, etc.*]—On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same:

Provided always, that the truth of the matter charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification:

Provided also, that in addition to such plea it shall be competent to the defendant also to plead a plea of not guilty:

Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel. (*As to the law prior to this enactment*, see *notes to* Wyatt *v.* Gore, Holt (N. P.), 299, 306. *Until s. 6 was passed, the plea of not guilty was the only plea in bar allowed, and it was held that the basis of the proceeding was the actual or possible injury to the public peace.*)

Sect. 7.—*Evidence to rebut* primâ facie *case of publication by agent.*]—Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent,

or knowledge, and that the said publication did not arise from want of due care or caution on his part. [*This section would seem not to be restricted to defamatory libel.*]

Sect. 8.—*Costs.*]—*Repealed as to England by* 8 Edw. 7, c. 15, s. 10, *and* sched. *For substituted provisions*, see ante, pp. 267 et seq. *and* post, p. 1253.

44 & 45 *Vict. c.* 60 (*Newspaper Libel and Registration Act*, 1881), *s.* 1.—*Interpretation of "newspaper"—"Proprietor."*]—In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following; (that is to say,) . . .

The word "newspaper" shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers. (*See Att-Gen.* v. *Bradbury and Evans*, 7 Ex. 97; 21 L. J. (Ex.) 12.) Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

Sect. 4.—*Inquiry by court of summary jurisdiction as to newspaper libel being for public benefit or being true.*]—A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the Court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case. [*In* R. *v.* Carden, 5 Q. B. D. 1; 49 L. J. (M. C.) 1; 14 Cox, 359, *it was held that a magistrate has no jurisdiction to receive evidence of the truth of the libel where the defendant is charged before him under* 6 & 7 Vict. c. 96, s. 5 (ante, p. 1239), *with maliciously publishing a defamatory libel. The above enactment overrules that case as to newspaper libels. It seems that when the charge is under* 6 & 7 Vict. c. 96, s. 4 (ante, p. 1238), *the truth can be inquired of by the justice.* See R. *v.* Carden, 5 Q. B. D. 1; 49 L. J. (M. C.) 1, Lush, J.

Sect. 5.—*Provision as to summary conviction for newspaper libel.*]—If a court of summary jurisdiction upon the hearing of a charge against a proprietor,

publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the Court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" And, if such person assents to the case being dealt with summarily, the Court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds. Section 27 of the *Summary Jurisdiction Act*, 1879 (42 & 43 Vict. c. 49), shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, as if the *Summary Jurisdiction Acts* were therein referred to instead of the *Summary Jurisdiction Act*, 1848 (11 & 12 Vict. c. 43).

Sect. 6.—*Application of Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), *to libels generally.*]—Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17, *ante*, p. 67).

Sect. 15.—*Copies of entries in and extracts from register of newspaper proprietors, to be evidence.*]—Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

Sect. 18.—The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint-stock company duly incorporated under and subject to the provisions of the *Companies Acts*, 1862 to 1879 [*now of the* Companies Consolidation Act, 1908 (8 Edw. 7, c. 69].

51 & 52 *Vict. c.* 64 (*Law of Libel Amendment Act*, 1888), *s.* 1.—*Meaning of "newspaper."*]—In the construction of this Act the word "newspaper" shall have the same meaning as in the *Newspaper Libel and Registration Act*, 1881. (*Ante*, p. 1240.)

Sect. 3.—*Newspaper reports of proceedings in court privileged.*]—A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter. (*See* Kimber *v.* Press Association [1893] 1 Q. B. 65; 62 L. J. (Q. B.) 152; *and ante*, p. 1124.)

Sect. 4.—*Newspaper reports of proceedings of public meetings and of certain bodies and persons privileged.*]—A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the royal sign manual or other lawful warrant or authority, select committees of either house of parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

For the purposes of this section "public meeting" shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto shall be general or restricted.

Sect. 8.—*Order of judge required for prosecution of newspaper proprietor, etc.*]— . . . No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers being first had and obtained.

Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application. [*The omitted words of this section repealed* 44 & 45 Vict. c. 60, s. 3, *as to which* see ante, p. 136. *This section appears to apply to newspapers published by joint-stock companies as well as to newspapers registered under* 44 & 45 Vict. c. 60. *See s.* 18 *of that Act*, ante, p. 1241.]

Sect. 9. *Person proceeded against criminally for libel a competent witness.*]—Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent, but not compellable, witnesses on every hearing at every stage of such

charge. [*This enactment is virtually superseded as to England by the* Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), q. v. ante, pp. 458 et seq.]

8 *Edw.* 7, *c.* 15 (*Costs in Criminal Cases Act*, 1908), *s.* 6.—*Costs when payable by prosecutor or defendant.*]—See ante, p. 284, post, p. 1253.

Indictment for a Defamatory Libel. (6 & 7 *Vict. c.* 96, *s.* 4, ante, p. 1238.)

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Libel, contrary to section 4 of the Libel Act, 1843.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, published a defamatory libel concerning C. D., knowing it to be false, in the form of a letter addressed to E. F., which contained the following defamatory matters concerning the said C. D. :

1. Do you know that about the year 1886 your friend C. D. was in the employ of L. and M., and that his accounts were found to be all wrong? (meaning thereby that C. D. was guilty of acts of dishonesty and falsification of accounts whilst he was in the employ of L. and M.).

2. As soon as his defalcations were discovered and a warrant was applied for he fled to Rio (meaning thereby that the said C. D. was a fugitive from justice).

3. Some time after this he appears to have returned to England, for he was found to be keeping a disorderly house in the East End of London (meaning thereby that the said C. D. had committed the criminal offence of keeping a disorderly house).

Misdemeanor : imprisonment not exceeding two years, with or without hard labour, and (or) fine. 6 & 7 Vict. c. 96, s. 4; 4 & 5 Geo. 5, c. 58, s. 16 (1) (ante, p. 240). *If the prosecutor fails to prove the* scienter, *the defendant may nevertheless be convicted of publishing a defamatory libel* (Boaler *v.* R. 21 Q. B. D. 284; 57 L. J. (M. C.) 85), *and punished by imprisonment not exceeding one year, with or without hard labour, and (or) fine.* 6 & 7 Vict. c. 96, s. 5 (see ante, p. 1239). *The defendant may, in addition to or in substitution for*

a sentence of imprisonment, be ordered to enter into recognizances and to find sureties to keep the peace for a specified period, and, in default of so doing, to be further imprisoned for the period during which he is so ordered to find sureties. R. *v.* Trueman [1913] 3 K. B. 164; 82 L. J. (K. B.) 916; 23 Cox, 550; 109 L. T. 413; 77 J. P. 428; 29 T. L. R. 599. *It is desirable that a definite time be fixed for the duration of such recognizances.* R. *v.* Edgar, 109 L. T. 416; 77 J. P. 356; 29 T. L. R. 512; 57 S. J. 519.

No criminal prosecution can be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper as defined by 44 & 45 Vict. c. 60, s. 1, *and* 51 & 52 Vict. c. 64, s. 1 (ante, pp. 1240, 1241), *for any libel published therein, without the order of a judge at chambers, the application for which shall be made on notice to the person accused, who shall have an opportunity of being heard against it.* 51 & 52 Vict. c. 64, s. 8 (*ante*, p. 1242). *No appeal lies from the judge's decision.* Ex parte Pulbrook [1892] 1 Q. B. 86; 61 L. J. (M. C.) 91.

The Vexatious Indictments Act (ante, p. 67) *applies to defamatory libel.* 44 & 45 Vict. c. 60, s. 6 (ante, p. 1241). *As to prosecutions for newspaper libel*, see ante, pp. 1240, 1241.

Defamatory libel is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

As to costs, see ante, pp. 267, 284, post.

Pleas and Replications.

General issue.]—The defendant was at common law entitled only to plead the general issue "not guilty." *See ante*, p. 165. If the prosecution is by information in the High Court, or the indictment is removed into the High Court, the plea of "not guilty" is in writing and signed by counsel or solicitor or the defendant in person.

Justification.]—Under 6 & 7 Vict. c. 96, s. 6 (*ante*, p. 1239), the defendant, in addition to the plea of not guilty, may plead that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts by reason of which the publication was for the public benefit (*see* the plea, *infra*); and if, after such plea, the defendant is convicted, the Court may take the plea, and evidence in support of it, into consideration, in aggravation, or in mitigation.

Plea for Justification.

A. B. says he is not guilty, and for a further plea he says that all the defamatory matters alleged in the indictment are true.

Particulars.

1. On the —— day of ——, A.D. 1886, C. D. received the sum of 2*l.* 8*s.* 6*d.* from T. S., and on the —— day of ——, A.D. 1886, C. D. received the sum

of 1,100*l.* from C. F. and the sum of 500*l.* from G. H. on behalf of his employers, L. and M., which he fraudulently omitted to enter in their books or to account for in any way.

2. On the —— day of ——, A.D. 1886, soon after C. D.'s defalcations were discovered, and a warrant was applied for against him upon charges of embezzling his employers' money and falsifying their books, C. D. left England on a ship called the *Eagle* bound for Rio de Janeiro.

3. On the —— day of ——, and on other days in the year 1911, C. D. kept a house at —— Street, Mile End, for the purpose of betting, contrary to the Betting Act, 1853.

And A. B. says it was for the public benefit that the defamatory matters charged in the said indictment should be published by reason of the fact that C. D. was at the time of the publication thereof a candidate for the public office of councillor of the Borough of ——.

Replication.

H. A., clerk of assize, joins issue on behalf of our Lord the King.

Definition of defamatory libel.]—A defamatory libel consists in the writing and publishing of defamatory words of any living person, or words calculated or intended to provoke him to wrath or to expose him to public hatred, contempt, or ridicule, or to damage his reputation, or in the exhibition of a picture or effigy defamatory of him; *Monson* v. *Tussauds, Ltd.* [1894] 1 Q. B. 671; 63 L. J. (Q. B.) 454; and such a libel is an indictable misdemeanor if the publication or exhibition is calculated to cause a breach of the peace; Odgers on Libel (5th ed.), 455, and authorities there cited. As a general rule, to be indictable, the libel must also be actionable. The exceptions to this rule are stated *post*, pp. 1246, 1247, under *heads* 5, 6, 7, and 8. The law implies malice from the publication; but the allegation of malice is not essential in the indictment. *R.* v. *Munslow* [1895] 1 Q. B. 758, 762; 64 L. J. (M. C.) 138.

An indictment will not lie for a libel by a husband on his wife. *R.* v. *Lord Mayor of London*, 16 Q. B. D. 772; 55 L. J. (M. C.) 118. An indictment may be maintained for words written, for which an action could not be maintained if they were merely spoken. *Thorley* v. *Lord Kerry*, 4 Taunt, 355. As, for instance, if a man writes or prints, and publishes, of another, that he is a swindler (*I'Anson* v. *Stuart*, 1 T. R. 748) or villain (*Bell* v. *Stone*, 1 B. & P. 331), it is libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. *Savile* v. *Jardine*, 2 H. Bl. 531. But no indictment will lie for words spoken and not reduced into writing even if an action would lie upon the speaking without proof of special damage (*R.* v. *Bear*, 2 Salk. 417: *R.* v. *Langley*, 6 Mod. 125), unless they are seditious (*see ante*, p. 1114), blasphemous (*ante*, p. 1159), grossly immoral or obscene (*post*, p. 1318), or uttered to a magistrate in the execution of his office (*ante*, p. 1215), or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge (*ante*, p. 1234).

1. Words written and published are defamatory if they impute to the person of whom they are published the commission of any offence, whether indictable or summarily punishable. *Webb* v. *Beavan*, 11 Q. B. D. 609; 52 L. J. (Q. B.) 544: *Leyman* v. *Latimer*, 3 Ex. D. 15; 47 L. J. (Ex.) 470: *Monson* v. *Tussauds, Ltd.* [1894] 1 Q. B. 671; 63 L. J. (Q. B.) 454.

2. Such words are also defamatory if they impute fraud (short of crime), dishonesty, immorality, vice, or dishonourable conduct, or affliction by an infectious disorder, or anything calculated to exclude from society the person defamed; *R.* v. *Leng*, 34 J. P. 309, Blackburn, J.: Com. Dig., Action on Case for Defamation (D. 28, 29); or if they clearly tend to injure the person of whom they are published in his profession, calling, or trade.

3. Such words are also defamatory if they hold the person to whom they refer up to hatred, *R.* v. *Cooper*, 8 Q. B. 533; 15 L. J. (Q. B.) 206; ridicule, *R.* v. *Rosenberg* [1879], cited in Odgers on Libel (5th ed.), 20; or contempt, *Parmiter* v. *Coupland*, 9 L. J. (N. S.) Ex. 202; 6 M. & W. 105. But it has been ruled not to be a criminal libel to publish a placard merely stating that a man owes money. *R.* v. *Coghlan*, 4 F. & F. 316, Bramwell, B. If, however, the placard asserted or implied his inability to pay it, it would seem that it would be libellous. *Id.*

4. Writings vilifying the character of persons in a public position in England, except where the writing amounts to sedition or contempt of court, appear to be in the same position as other defamatory libels on private persons, except that in a gross case an *ex officio* information or information by the Master of the Crown Office might be filed (*ante*, pp. 129, 131). The repeal of the Acts *de scandalis magnatum* by 50 & 51 Vict. c. 59, appears to mark the abolition of any distinction for this purpose between the character of public and private persons. *See* Short and Mellor, Cr. Pr. (2nd ed.) 153, 169.

5. Writings vilifying the characters of persons deceased are libels, and may be made the subject of an indictment; the case *de libellis famosis*, 5 Co. Rep. 125 a; 1 Hawk. c. 73, s. 1; 3 Chit. Cr. L. 868; *cf. ante*, pp. 681, 686. Where an application for a criminal information for a libel upon a deceased person was made by his representative, the Court refused in its discretion to grant it, and Lord Coleridge, C.J., in pronouncing judgment, said: "It must be, I think, some very unusual publication to justify an *indictment or information* for aspersing the character of the dead. If such a case should ever arise it must stand upon its own foot." *R.* v. *Labouchere*, 12 Q. B. D. 320; 53 L. J. (Q. B.) 362.

6. It is said that writings which tend to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be proceeded upon here as libels, and the writers, publishers, etc., punished; particularly when such writings have a tendency to interrupt the pacific relations between the two countries. *R.* v. *Peltier*, 28 St. Tr. 529, where an information was filed against Peltier for a libel on Napoleon Buonaparte, then first consul of the French Republic; and the defendant was convicted; *and see R.* v. *Vint*, 27 St. Tr. 627; Holt on Libel, 78 (a libel on the Emperor of Russia): *R.* v. *Gordon*, 22 St. Tr. 177, 213 (a libel on Queen Marie Antoinette). In *R.* v. *Most*, 7 Q. B. D. 244; 50 L. J. (M. C.) 113; 14 Cox,

583, an indictment was preferred for a publication exulting over the murder of the Emperor of Russia, and the accused convicted; but on a case reserved the Court refrained from deciding whether the indictment charged any offence against English law. *See R.* v. *Antonelli*, 70 J. P. 4 (*ante*, p. 1117). In *R.* v. *Bourtzeff*, 127 Cent. Cr. Ct. Sess. Pap. 284 (February, 1898), a similar indictment was preferred and found, but not proceeded with. *See also R.* v. *D'Eon*, 1 W. Bl. 510; 3 Burr. 1513 (a libel on the French Ambassador in England).

7. Writings reflecting upon bodies of men, without mentioning any individual in particular, are indictable as libels, if they tend to stir up the hatred of the King's subjects against the members of the body generally, or to excite the individuals composing the body to a breach of the peace. *R.* v. *Osborn*, 2 Barnard. (K. B.) 138, 166: *R.* v. *Gathercole*, 2 Lew. 237: *R.* v. *Feargus O'Connor*, 3 St. Tr. (N. S.) 1299; *and see ante*, p. 1117.

8. Documents containing defamatory matter, even if published only to the person defamed, may be made the subject of indictment, though such publication would not give a cause of action. But the document must reasonably tend or be calculated to provoke a breach of the peace. Odgers on Libel (5th ed.), 455. A letter written and sent by a man to a young woman containing a proposal in plain terms that she should surrender her chastity to him for a sum of money is a defamatory libel, because it reasonably or probably tends to provoke a breach of the peace on her part or on the part of those connected with her. *R.* v. *Adams*, 22 Q. B. D. 66; 58 L. J. (M. C.) 1; 16 Cox, 544.

Form of imputation.]—It is immaterial whether the libel imputes crime, etc., to the prosecutor, in a direct manner, or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published; taking the words in the same sense in which the rest of mankind would ordinarily understand them, it is for the jury to say whether, in their minds, they convey the idea imputed. *R.* v. *Watson*, 2 T. R. 199, 206, Buller, J. Therefore, where one man said of another that "his character was infamous; that delicacy forbade him from bringing a direct charge, but it was a male child who complained to him," such words were understood to mean a charge of unnatural practices, and to be sufficiently certain in themselves, without the aid of an innuendo. *Woolnoth* v. *Meadows*, 5 East, 463. So, if a man were to write or say of J. N., "There is a vast difference between my character and his; I never robbed my master," or the like; it would be the same as if he had directly charged J. N. with having robbed his master. *See Snell* v. *Webling*, 2 Lev. 150; 1 Vent. 276; Com. Dig., Action on the Case for Defamation (E. 8). And the same where the imputation is conveyed obliquely, *Id.* (E. 1), or indirectly, *Id.* (E. 7), or by way of question, *Id.* (E. 2), conjecture, *Id.* (E. 3), or exclamation, *Id.* (E. 6), or by irony, 1 Hawk. c. 73, s. 4, or the like. So a defamatory writing, expressing one or two letters only of a name, is as much a libel, and punishable as such, as if it expressed the name in full, if it appears evident upon the face of the libel, from the context, etc., what name was meant (1 Hawk. c. 73, s. 5), or if it appears from the evidence of persons acquainted with the parties what person was meant by such initials or letters.

In some cases it may be necessary to insert prefatory averments to explain the innuendoes. Thus, for instance, in an action on the case against a man for saying of another, "*He has burnt my barn*," the plaintiff cannot by way of innuendo, say "*meaning my barn full of corn;*" Barham's case, 4 Co. Rep. 20 a; because this is not an explanation derived from anything which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn he had spoken the above words of the plaintiff, an innuendo of its being a barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete. So, in an action for the words "*He is a thief*," you cannot explain the defendant's meaning in the use of the word "*he*," by an innuendo "*meaning the prosecutor*," or the like, unless something appear previously upon the record to ground that explanation; but if you had previously charged the words to have been spoken of and concerning the prosecutor, then such an innuendo would be correct; for, when it is alleged that the defendant said of the prosecutor, "*He is a thief*," this in an evident ground for the explanation given by the innuendo, that the prosecutor was referred to by the word "*he*." *See* 1 Rolle Abr. 83, pl. 7, 85, pl. 7; Cro. Jac. 39, 126; 1 Sid. 52; 2 Str. 934; 1 Wms. Saund. (6th ed.) 242 (*b*), n. 3: *Clement* v. *Fisher*, 6 L. J. (K. B.) 39; 7 B. & C. 459: *Tomlinson* v. *Brittlebank*, 4 B. & Ad. 630: *Sweetapple* v. *Jesse*, 5 B. & Ad. 27; 2 Nev. & M. 36: *Curtis* v. *Curtis*, 10 Bing. 477: *Slowman* v. *Dutton*, 10 Bing. 402. But where the words or libel are in the second person, and the libel is directed to the party slandered or libelled, and it is so alleged in the indictment—as, where a declaration charges that the defendant, in a discourse with the prosecutor, said to him, "*You are a thief*," it is unnecessary to aver that they were spoken or written of and concerning the prosecutor; nor is there any need of an innuendo, for it is plain enough without it that "*you*" means the prosecutor. *Scutt* v. *Hawkins*, 2 Rolle Rep. 243, 244; *and see* 1 Rolle Abr. 85, pl. 8. An indictment which charged that the defendant published a libel concerning A., the prosecutor, according to the tenor and effect following, viz., "A. (meaning the said A.), game and rabbit destroyer, and his wife (meaning C., the wife of the said A.), the seller of the same in country and town," was held bad, the words used not being *primâ facie* libellous, and there being no innuendoes or averments showing that such words were intended to charge the prosecutor with an indictable offence or with any improper conduct. *R.* v. *Yates*, 12 Cox, 233, Quain, J.

Evidence for the Prosecution.

The evidence for the prosecution is in substance the same as in an action for libel.

1. Publication.]—The prosecutor must prove the publication of the libel. As stated *ante*, pp. 1245, 1247, the publication proved may be to the prosecutor only or to third persons. Mere possession of a libel is not publication, and to constitute a publication there must be a sending or delivery or showing to

another person by a person having knowledge of the contents of the libel. *See Vizetelly* v. *Mudies, Ltd.* [1900] 2 Q. B. 170 (C. A.); 69 L. J. (Q. B.) 645: *Emmens* v. *Pottle*, 16 Q. B. D. 354; 55 L. J. (Q. B.) 51: *R.* v. *Topham*, 4 T. R. 126: *R.* v. *Harvey*, 2 L. J. (K. B.) 4; 2 St. Tr. (N. S.) 1; 2 B. & C. 257: *R.* v. *Holt*, 5 T. R. 436. Where the publication is by an innocent agent, the person who procures it is liable as principal. (*See post*, p. 1432.) Where the person charged with publication is not the printer nor the first or main publisher, but has taken a subordinate part in the dissemination of the libel, to determine whether he is liable for publication it is necessary to consider the particular circumstances under which he disseminated the alleged libel. *Vizetelly* v. *Mudies, Ltd.* [1900] 2 Q. B. 170, 180, Romer, L.J.; 69 L. J. (Q. B.) 645. But the burden of proof is on the defendant in such a case. The posting of a sealed letter is not publication; but production of an open letter in the handwriting of the defendant, with the post-mark on it, has been held sufficient evidence of publication. And if the fact of posting is proved, it raises a presumption that the letter was received by the person to whom it was addressed. *Warren* v. *Warren*, 1 Cr. M. & R. 250. As to proof of handwriting, *see ante*, p. 446. Publication in a newspaper is proved by production of a copy of the paper and proof of its purchase from the defendant or at his place of business. Proof should also be given of the ownership of the paper by certificate under 44 & 45 Vict. c. 60, s. 15 (*ante*, p. 1241), or by certificate of the registration of the limited company which own it. (*See* 44 & 45 Vict. c. 60, s. 18, *ante*, p. 1241.) It is also necessary to produce the judge's order for the prosecution (*see ante*, p. 1242); but the fact that it has been obtained need not be averred in the indictment.

2. Position of the prosecutor.]—If the libel reflects on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is almost in all cases either directly or impliedly admitted by the libel itself: *see Berryman* v. *Wise*, 4 T. R. 366: *Smith* v. *Taylor*, 1 B. & P. (N. R.) 196, 208: *Jones* v. *Stevens*, 11 Price, 235: *Pearce* v. *Whale*, 5 B. & C. 38; and if it is not, proof that he was in the habit of acting as such officer or professional man would in that case be sufficient (*see ante*, p. 401). But if the effect of the libel is to charge the prosecutor with having acted as such officer or professional man, without a legal appointment, as, for instance, if a man libels a physician, by calling him a quack, it seems necessary to prove that he is legally qualified to practise medicine. *See Smith* v. *Taylor, supra*: *Collins* v. *Carnegie*, 3 L. J. (N. S.) K. B. 190; 1 A. & E. 695: *Yrisarri* v. *Clement*, 3 Bing. 432; 11 Moore (C. P.) 308; *and see R.* v. *Sutton*, 4 M. & Sel. 532, 548.

3. The libel and the innuendoes.]—The prosecutor must prove the words as laid in the indictment (*see ante*, pp. 351, 1122), that they apply to the prosecutor, and the innuendoes. The question whether the words can bear the innuendoes is for the judge; whether they do bear them, for the jury. 32 G. 3, c. 60, s. 1 (*ante*, p. 1238).

4. Falsity and malice.]—The falsity of the libel is immaterial unless justification is pleaded, and need not be proved, unless a *primâ facie* case of justification is made out. Nor need the prosecutor prove that the libel was maliciously published (*R.* v. *Munslow* [1895] 1 Q. B. 758), unless the defendants show that the occasion was privileged, in which case evidence of express malice is necessary (*see infra*). Evidence of the publication by the defendant of other libels, previously or subsequently to the publication of the libel charged in the indictment, is admissible to prove actual malice or deliberate publication. *Pearson* v. *Lemaitre*, 5 M. & Gr. 700; 6 Scott (N. R.), 607; *Macleod* v. *Wakley*, 3 C. & P. 311: *Plunkett* v. *Cobbett*, 5 Esp. 136: *Hemmings v. Gasson*, E. B. & E. 346; 27 L. J. (Q. B.) 252: *Darby v. Ouseley*, 25 L. J. (N. S.) Ex. 227; 1 H. & N. 1. It seems, however, that evidence of subsequent libels will not be admitted, unless they distinctly refer to the libel set out in the indictment, or at least refer to the same subject-matter. *Finnerty* v. *Tipper*, 2 Camp. 72. It has been long established that the publication of false and defamatory matter concerning any person is itself evidence of malice. *Vizetelly* v. *Mudies, Ltd.* [1900] 2 Q. B. 170, 178; 69 L. J. (Q. B.) 645, Vaughan Williams, L.J.

Evidence for the Defence.

Under the plea of not guilty the defendant may prove (1) that the words are not defamatory; or (2) that they do not bear the innuendoes alleged; or (3) that the publication was accidental (*Emmens* v. *Pottle*, 16 Q. B. D. 354; 55 L. J. (Q. B.) 51: *R.* v. *Munslow* [1895] 1 Q. B. 758, 765; 64 L. J. (M. C.) 138, Wills, J.: *Vizetelly* v. *Mudies, Ltd.*, *supra*); or (4) that the matters complained of are fair comment or criticism on a matter of public interest and concern, including criticism on literary or dramatic works subject to public judgment. *McQuire* v. *Western Morning News* [1903] 2 K. B. 100; 72 L. J. (K. B.) 612: *Parmiter* v. *Coupland*, 9 L. J. (N. S.) Ex. 202; 6 M. & W. 105. The defence in strictness is not that the occasion is privileged, but that the words are not defamatory. *Merivale* v. *Carson*, 20 Q. B. D. 275: *Hunt* v. *Star Newspaper Co.* [1908] 2 K. B. 319; 77 L. J. (K. B.) 732: *Dakhyl* v. *Labouchere* [1908] 2 K. B. 325 n. (H. L.); 77 L. J. (K. B.) 728; (5) Under the plea of not guilty the defence may also be raised that the publication was on an occasion absolutely or otherwise privileged (*R.* v. *Munslow* [1895] 1 Q. B. 758, 761; 55 L. J. (Q. B.) 51; Russell, C.J.); and if the privilege was qualified, the defendant may prove that he published the libel without malice, believing it to be true: *see R.* v. *Fitch*, 61 J. P. 233.

Qualified privilege arises when the defendant has a duty or an interest to make the communication said to be defamatory, as where a master gives what he believes to be a correct character of a servant; *Edmondson* v. *Stevenson*, Bull. (N. P.) 8; 1 B. & P. 527, *cit.*: *R.* v. *Hart*, 1 W. Bl. 386: *Hargrave* v. *Le Breton*, 4 Burr. 2422, 2425: *Weatherston* v. *Hawkins*, 1 T. R. 110: *Taylor* v. *Hawkins*, 16 Q. B. 308; 20 L. J. (N. S.) Q. B. 313: *Manby* v. *Witt*, 18 C. B. 544; where a neighbour gives what he conceives to be a correct character of the credit and solvency of a tradesman; Bull. (N. P.) 8

or where a client makes a confidential representation injurious to a solicitor's professional character in the management of certain concerns, to other persons who are jointly interested in them with the client (1 Camp. 227), or the like. Also, if a writing, although injurious to another's character, is published, not maliciously or with intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the person making it is interested, or, as it seems, in which the person to whom it is made is interested, or in the performance of a duty, it is privileged. *See Fairman* v. *Ives*, 5 B. & Ald. 642 : *Harrison* v. *Bush*, 5 E. & B. 344; 25 L. J. (Q. B.) 25 : *Beatson* v. *Skene*, 29 L. J. (N. S.) Ex. 430; 5 H. & N. 838 : *Dickeson* v. *Hilliard*, 43 L. J. (Ex.) 37 : *Waller* v. *Loch*, 7 Q. B. D. 619; 51 L. J. (Q. B.) 274 : *Laughton* v. *Bishop of Sodor and Man*, 42 L. J. (P. C.) 11; L. R. 4 P. C. 495 : *Hart* v. *Gumpach*, L. R. 4 P. C. 439; 42 L. J. (N. S.) P. C. 25 : *Jenoure* v. *Delmege* [1891] A. C. 73; 60 L. J. (P. C.) 11 : *Stuart* v. *Bell* [1891] 2 Q. B. 341; 60 L. J. (Q. B.) 577 : *Hebditch* v. *M'Ilwaine* [1894] 2 Q. B. 54; 63 L. J. (Q. B.) 587 : *Macintosh* v. *Dun* [1908] A. C. 390; 77 L. J. (P. C.) 113. In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief. *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. (Q. B.) 230 : *Pittard* v. *Oliver* [1891] 1 Q. B. 474; 60 L. J. (Q. B.) 219. The rule is the same in the case of an indictment; *i.e.*, where the defendant can show the occasion to be privileged the prosecution must give evidence of express malice.

Judicial proceedings.]—Defamatory statements made in the course of judicial proceedings are absolutely privileged, whether made by judge, party witness, or counsel. *R.* v. *Skinner*, Lofft. 55 : *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. (Q. B.) 81 : *McCabe* v. *Joynt* [1901] 2 Ir. Rep. 115, 127, Palles, C.B.

Fair report of judicial proceedings.]—The defence of fair and accurate report of judicial proceedings is now available even if the proceedings were *ex parte*. *Kimber* v. *Press Association* [1893] 1 Q. B. 65; 62 L. J. (Q. B.) 152. It is not necessary to prove that all the evidence is published if its effect is fairly stated; *Milissich* v. *Lloyds*, 46 L. J. (C. P.) 404; 13 Cox. 575; and a fair and accurate report of the judgment without the evidence is protected. *Macdougall* v. *Knight*, 17 Q. B. D. 636; 55 L. J. (Q. B.) 464, discussed and approved in *Macdougall* v. *Knight*, 25 Q. B. D. 1; 59 L. J. (Q. B.) 517. But it would seem that such report cannot be deemed fair or accurate if the judgment or summing-up did not give the reader reasonable opportunity of forming his own opinion as to the conclusion to be drawn from the evidence. *Macdougall* v. *Knight*, 14 App. Cas. 194; 58 L. J. (Q. B.) 537 : *and see ante*, pp. 1123, 1125. To be entitled to this privilege the report must be published

contemporaneously; 51 & 52 Vict. c. 64, s. 3 (*ante* p. 1241); and if the publication is in such a form as to be calculated to interfere with the trial on the merits, criminal liability may be incurred. *See R.* v. *Parke* [1903] 2 K. B. 432, 438 : 72 L. J. (K. B.) 839 : *R.* v. *Tibbits and Windust* [1902] 1 K. B. 77; 71 L. J. (K. B.) 4; 20 Cox, 70.

Libels in newspapers.]—Formerly the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants, in the publication of a libel, although it could be shown that such publication was without the privity of the proprietor. *R.* v. *Walker*, 3 Esp. 21 : *R.* v. *Gutch*, M. & M. 433. This rule has, however, been very materially altered by 6 & 7 Vict. c. 96, s. 7 (*ante*, p. 1239). Under this section it has been held that the defendants, the proprietors of a newspaper, who have appointed a competent editor to conduct it, are not criminally responsible for the publication of a libel inserted by the editor in the newspaper, upon proof by them that the publication of the libel was made without their actual authority, consent, or knowledge, and did not arise from want of due care or caution on their part. *R.* v. *Holbrook*, 3 Q. B. D. 60; 47 L. J. (Q. B.) 35 : *R.* v. *Holbrook*, 4 Q. B. D. 42; 48 L. J. (Q B.) 113 : *and see R.* v. *Bradlaugh*, 15 Cox, 217 : *R.* v. *Ramsay and Foote*, 15 Cox, 231 : *R.* v. *Allison*, 16 Cox, 559; 37 W. R. 143 (C. C. R.). As to the qualified protection now afforded to reports published in newspapers of judicial proceedings, *see* 51 & 52 Vict. c. 64, s. 3 (ante, p.); and as to the qualified protection now afforded to newspaper reports of the proceedings of public meetings, and of certain bodies and persons, and notices and reports issued by certain public officers and published in newspapers, *see* 51 & 52 Vict. c. 64, s. 4 (*ante*, p. 1242).

Truth, etc.]—Evidence of the truth of the libel may be given only if a plea of justification is pleaded (*see ante*, p. 1244).

Evidence that the identical charges contained in a libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under 6 & 7 Vict. c. 96, s. 6 (*ante*, p. 1239). *R.* v. *Newman*, 22 L. J. (N. S.) Q. B. 156; Dears. 85; 1 E. & B. 268. Where the libel contains several charges, and the defendant fails in proof of the truth of any of the matters alleged in it, the jury must of necessity find a verdict for the Crown, and the Court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and to form its own conclusion on the whole case. *Id.;* 1 E. & B. 558. In that case the libel contained a number of specific charges, and it was therefore necessary, in order to support the plea of justification, to prove the truth of all the charges. Where the libel is general, it is sufficient to prove so much of the plea as would justify the libel. *R.* v. *Labouchere*, 14 Cox, 419, Cockburn, C.J. Thus where the libel alleged generally that the prosecutor cheated at cards, without stating any specific instances of his doing so, and the plea of justification stated specific instances

of the prosecutor's cheating at cards, the plea was held to be sufficiently proved by proof that in two of such instances the prosecutor did cheat at cards, although other instances alleged in the plea of his cheating were not proved. *Id.*

Costs.

Where a defendant is convicted on indictment or information for defamatory libel the Court may order him to pay the costs incurred in and about the prosecution, including the costs incurred before the examining justices. 8 Edw. 7, c. 15, s. 6 (1), *ante*, p. 284. This order may be alternative to, or additional on, an order to pay the costs out of the local rate (*ante*, pp. 267 *et seq.*).

In the case of an indictment or information for libel by a private prosecutor, if the defendant is acquitted the Court may order a private prosecutor to pay the whole or any part of the costs incurred in or about the defence to be taxed by the officer of the Court, including proceedings before the examining justices (8 Edw. 7, c. 15, s. 6 (2), *ante*, p. 284), and the costs of preparing a justification : *Anon.*, 44 L. J. Newsp. 164.

Orders made for costs under 8 Edw. 7, c. 15, s. 6 (1), (2), are enforced under s. 6, sub-s. 5, *ante*, p. 285 (*a*).

(*a*) On a criminal information for a libel, the defendant, having recovered a verdict and judgment, was held entitled to costs under 6 & 7 Vict. c. 96, s. 8 (*rep.*), though the only plea on the record was "not guilty," and though the judge had certified, under 4 & 5 W. & M. c. 18, s. 2 (*rep.*), that there was reasonable cause for exhibiting the information. *R.* v. *Latimer*, 15 Q. B. 1077; 20 L. J. (Q. B.) 129 (*see ante*, p. 138). And on the trial of such an information, where judgment was given for the defendant, he was held entitled, under 6 & 7 Vict. c. 96, s. 8, to recover from the prosecutor not only costs incurred subsequently to filing the information, but also costs incurred previously to filing the information. *R.* v. *Steel*, 1 Q. B. D. 482; 45 L. J. (Q. B.) 391. Prior to the *Judicature Acts* the taxation, by the clerk of assize, of the costs of an indictment for libel tried on the Crown side at the assizes, was not reviewable in the Court of King's Bench. *R.* v. *Newhouse*, 22 L. J. (Q. B.) 127; 1 Bail Court C. 129. An action lay to recover the costs on an indictment for libel given by 6 & 7 Vict. c. 96, s. 8. *Richardson* v. *Willis* (No. 2), 24 L. J. (Ex.) 68; L. R. 8 Ex. 69.

CHAPTER V.

OFFENCES AGAINST PUBLIC TRADE.

SECT. 1.

OFFENCES AGAINST BANKRUPTCY LAW, AND FRAUDS ON OR BY CREDITORS.

OFFENCES AGAINST BANKRUPTCY LAW.

Statutes.

4 & 5 *Geo.* 5, *c.* 47 (*Deeds of Arrangement Act*, 1914), *Part IV.*, *s.* 17.—*Preferential payment to creditor by trustee.*]—If a trustee under a deed of arrangement pays to any creditor out of the debtor's property a sum larger in proportion to the creditor's claim than that paid to other creditors entitled to the benefit of the deed, then, unless the deed authorises him to do so, or unless such payments are either made to a creditor entitled to enforce his claim by distress or are such as would be lawful in a bankruptcy, he shall be guilty of a misdemeanor.

4 & 5 *Geo.* 5, *c.* 59 (*Bankruptcy Act*, 1914), *Part VII.*, *s.* 154.—*Fraudulent debtors.*]—Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made shall in each of the cases following be guilty of a misdemeanor :—

(1) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud :

(2) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud :

(3) If he does not deliver up to the trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud :

(4) If after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless he proves that he had no intent to defraud :

(5) If after the presentation of a bankruptcy petition by or against him or within six months next before such presentation he fraudulently removes any part of his property to the value of ten pounds or upwards :

(6) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud :

(7) If knowing or believing that a false debt has been proved by any person under the bankruptcy, he fails for the period of a month to inform the trustee thereof :

(8) If after the presentation of a bankruptcy petition by or against him he prevents the production of any book, document, paper or writing affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law :

(9) If after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law :

(10) If after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law :

(11) If after the presentation of a bankruptcy petition by or against him, or within six months next before such presentation, he fraudulently parts with, alters, or makes any omission in, or is privy to the fraudulently parting with, altering, or making any omission in, any document affecting or relating to his property or affairs :

(12) If after the presentation of a bankruptcy petition by or against him, or at any meeting of his creditors within six months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses :

(13) If within six months next before the presentation of a bankruptcy petition by or against him, or, in the case of a receiving order made under section one hundred and seven of this Act, before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving

order, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same :

(14) If within six months next before the presentation of a bankruptcy petition by or against him, or, in the case of a receiving order made under section one hundred and seven of this Act, before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order, he obtains under the false pretence of carrying on business, and, if a trader, of dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud :

(15) If within six months next before the presentation of a bankruptcy petition by or against him, or, in the case of a receiving order made under section one hundred and seven of this Act, before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order, he pawns, pledges, or disposes of any property which he has obtained on credit and has not paid for, unless, in the case of a trader, such pawning, pledging, or disposing is in the ordinary way of his trade, and unless in any case he proves that he had no intent to defraud :

(16) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy.

For the purpose of this section the expression " trustee " means the official receiver of the debtor's estate or trustee administering his estate for the benefit of his creditors. [*This section replaces* 32 & 33 Vict. c. 62, s. 11, *as amended by* 46 & 47 Vict. c. 52, s. 163; 53 & 54 Vict. c. 71, s. 26; 56 & 57 Vict. c. 54; *and* 3 & 4 Geo. 5, c. 34, s. 2; *all of which are in substance repealed and re-enacted by the present consolidating Act.*]

Sect. 107.—(4) Where, under section five of the Debtors Act, 1869, application is made by a judgment creditor to a court having bankruptcy jurisdiction for the committal of a judgment debtor, the court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made, and the provisions of this Act except Part VII. thereof shall apply as if for references to the presentation of a petition by or against a person there were substituted references to the making of such a receiving order. [*This section replaces* 46 & 47 Vict. c. 52, s. 103.]

Sect. 155.—*Undischarged bankrupt obtaining credit.*]—Where an undischarged bankrupt (*a*) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt; or (*b*) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt; he shall be guilty of a misdemeanor. [*This section replaces* 3 & 4 Geo. 5, c. 34, s. 5, *which had previously replaced* 46 & 47 Vict. c. 52, s. 31.]

Sect. 156.—*Frauds by bankrupts, etc.*]—If any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made—(*a*) in incurring any debt or liability has obtained credit under false pretences or by means of any other fraud; (*b*) with intent to defraud his creditors or any of them, has made or caused to be made any gift or transfer of, or charge on, his property; (*c*) with intent to defraud his creditors, has concealed or removed any part of his property since, or within two months before, the date of any unsatisfied judgment or order for payment of money obtained against him; he shall be guilty of a misdemeanor. [*This section applies particularly to bankrupts, etc., the provisions of* 32 & 33 Vict. c. 62, s. 13 (post, p. 1267). *That section, which has not been repealed, applies to any person, whether bankrupt or not:* R. *v.* Rowlands, 8 Q. B. D. 530; 51 L. J. (M. C.) 51; 15 Cox, 31; 46 L. T. 286; 46 J. P. 437; *and accordingly the present section appears to be superfluous, especially as the punishment in the case of a bankrupt is still limited to one year's imprisonment by the proviso to s.* 164 (1), post, p. 1260.]

Sect. 157.—*Bankrupt guilty of gambling, etc.*]—(1) Any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, shall be guilty of a misdemeanor, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business, —(*a*) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business; or (*b*) he has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid; or (*c*) on being required by the Official Receiver at any time, or in the course of his public examination by the court, to account for the loss of any substantial part of his estate incurred within a period of a year next preceding the date of the presentation of the bankruptcy petition, or between that date and the date of the receiving order, he fails to give a satisfactory explanation of the manner in which such loss was incurred: Provided that, in determining for the purposes of this section whether any speculations were rash and hazardous, the financial position of the accused person at the time when he entered into the speculations shall be taken into consideration.

[*In cases under sub-section* (*c*) *the jury should consider whether there is an intent to deceive or to evade the provisions of the Act in the failure to give a satisfactory explanation or whether the failure was due to inadvertence.* R. *v.* Phillips, 85 J. P. 120—Dickens, C. S.]

(2) A prosecution shall not be instituted against any person under this section except by order of the court, nor where the receiving order in the bankruptcy is made within two years from the first day of April nineteen hundred and fourteen.

(3) Where a receiving order is made against a person under section one hundred and seven of this Act, this section shall apply as if for references to the presentation of a petition there were substituted references to the making

of the receiving order. [*This section replaces, with the addition of the words in sub-s.* (3), 3 & 4 Geo. 5, c. 34, s. 4.]

Sect. 158.—*Bankrupt failing to keep proper accounts.*]—(1) If any person who has on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors is adjudged bankrupt, or if a receiving order is made in respect of his estate, he shall be guilty of a misdemeanor, if, having during the whole or any part of the two years immediately preceding the date of the presentation of the bankruptcy petition been engaged in any trade or business, he has not kept proper books of account throughout those two years or such part thereof as aforesaid, and, if so engaged at the date of presentation of the petition, thereafter, whilst so engaged, up to the date of the receiving order, or has not preserved all books of account so kept : Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section if his unsecured liabilities at the date of the receiving order did not exceed one hundred pounds, or if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable.

(2) A prosecution shall not be instituted against any person under this section except by order of the court, nor where the receiving order in the bankruptcy is made within two years from the first day of April nineteen hundred and fourteen.

(3) For the purposes of this section, a person shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual stocktakings.

(4) Paragraphs (9), (10), and (11) of section one hundred and fifty-four of this Act (which relate to the destruction, mutilation, and falsification and other fraudulent dealing with books and documents), [*ante*, p. 1255] shall, in their application to such books as aforesaid, have effect as if "two years next before the presentation of the bankruptcy petition" were substituted for the time mentioned in those paragraphs as the time prior to the presentation within which the acts or omissions specified in those paragraphs constitute an offence.

(5) Where a receiving order is made against a person under section one hundred and seven of this Act this section shall apply as if for references to the presentation of a petition there were substituted references to the making of the receiving order. [*This section replaces, with the addition of the words in sub-s.* (5), 3 & 4 Geo. 5, c. 34, s. 3.]

Sect. 159.—*Bankrupt absconding with property.*]—If any person who is adjudged bankrupt, or in respect of whose estate a receiving order has been made, after the presentation of a bankruptcy petition by or against him, or within six months before such presentation, quits England and takes with him, or attempts or makes preparation to quit England and take with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless he proves that he

had no intent to defraud) be guilty of felony. [*This section replaces* 32 & 33 Vict. c. 62, s. 12, *as amended by* 46 & 47 Vict. c. 52, s. 163 (2), *and* 3 & 4 Geo. 5, c. 34, s. 2 (1), (2). *Where a debtor, after executing a deed of assignment of all his property to a trustee for the benefit of his creditors, left England, taking with him a sum of money which had never come into the possession of the trustee, a conviction under* 32 & 33 Vict. c. 62, s. 12, *was upheld.* R. *v.* Humphris [1904] 2 K. B. 89; 73 L. J. (K. B.) 464; 20 Cox, 620; 90 L. T. 555; 68 J. P. 325; 20 T. L. R. 425.]

Sect. 160.—*False claim, etc.*]—If any creditor, or any person claiming to be a creditor, in any bankruptcy, wilfully and with intent to defraud makes any false claim, or any proof declaration or statement of account, which is untrue in any material particular, he shall be guilty of a misdemeanor, and shall on conviction on indictment be liable to imprisonment with or without hard labour for a term not exceeding one year. [*This section replaces* 32 & 33 Vict. c. 62, s. 14, *as amended by* 3 & 4 Geo. 5, c. 34, s. 2 (6).

Sect. 161.—*Order by court for prosecution on report of trustee.*]—Where an official receiver or a trustee in a bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a debtor who has been adjudged bankrupt or in respect of whose estate a receiving order has been made has been guilty of any offence under this Act or any enactment repealed by this Act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the debtor has been guilty of any such offence, the court shall, if it appears to the court that there is a reasonable probability that the debtor will be convicted, order the official receiver or trustee to prosecute the debtor for such offence. Provided that it shall not be obligatory on the court in the absence of any application by the official receiver for such an order to make an order under this section for the prosecution of an offence unless it appears to the court that the circumstances are such as to render a prosecution desirable. [*This section replaces* 32 & 33 Vict. c. 62, s. 16, as amended by 46 & 47 Vict. c. 52, ss. 163, 164 and 3 & 4 Geo. 5, c. 34, s. 2 (7). See Ex parte Marsden, 2 Ch. D. 786. *The costs of a prosecution by the trustee without first getting an order of the Court will not, as a general rule, be allowed out of the estate even where the sanction of the committee of inspection has been given.* In re Howes [1902] 2 K. B. 290; 71 L. J. (K. B.) 705.]

Sect. 162.—*Criminal liability after discharge or composition.*]—Where a debtor has been guilty of any criminal offence he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved. [*This section replaces* 46 & 47 Vict. c. 52, s. 167.]

Sect. 163.—*Power for court to commit for trial.*]—(1) Where there is, in the opinion of the court, ground to believe that the bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanor in cases of bankruptcy, the court may commit the bankrupt or such other person for trial.

(2) For the purpose of committing the bankrupt or such other person for

trial the court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail, or otherwise.

Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court. [*This section replaces* 46 & 47 Vict. c. 52, s. 165.]

Sect. 164.—*Trial and punishment of offences.*]—(1) A person guilty of an offence declared to be a felony or a misdemeanor under this Act in respect of which no special penalty is imposed by this Act shall be liable, on conviction on indictment, to imprisonment with or without hard labour for a term not exceeding two years, or, on summary conviction, to imprisonment with or without hard labour for a term not exceeding six months. Provided that the maximum term of imprisonment with or without hard labour which may be awarded on conviction on indictment of a misdemeanor under section one hundred and fifty-six of this Act shall be one year. [*See ante*, p. 1257.]

(2) Summary proceedings in respect of any such offence shall not be instituted after one year from the first discovery thereof either by the official receiver or by the trustee in the bankruptcy, or, in the case of proceedings instituted by a creditor, by the creditor, nor in any case shall they be instituted after three years from the commission of the offence.

(3) Every misdemeanor under this Act shall be deemed to be an offence under and subject to the provisions of the Vexatious Indictments Act, 1859, and any Act amending that Act [*ante*, pp. 67 *et seq.*] and when any person is charged with any such misdemeanor before a court of summary jurisdiction the court shall take into consideration any evidence adduced before them tending to show that the act charged was not committed with a guilty intent.

(4) In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of, any court acting under this Act or any Act rpealed by this Act. [*See post*, p. 1261.]

Sect. 165.—*Public Prosecutor to act in certain cases.*]—Where the court orders the prosecution of any person for any offence under this Act or any enactment repealed by this Act, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution : Provided that, where the order of the court is made on the application of the official receiver and based on his report, the Board of Trade may themselves, or through the official receiver, institute the prosecution and carry on the proceedings, if or so long as those proceedings are conducted before a court of summary jurisdiction, unless in the course thereof circumstances arise which, in the opinion of such court or of the Board, render it desirable that the remainder of the proceedings should be carried on by the Director of Public Prosecutions. [*This section replaces* 46 & 47 Vict. c. 52, s. 166, *as amended by* 3 & 4 G. 5, c. 34, s. 1 (2).]

Sect. 166.—*Evidence as to frauds by agents.*]—See ante, p. 625.

Sect. 96.—*Jurisdiction in Bankruptcy.*]—(1) The courts having jurisdiction in bankruptcy shall be the High Court and the county courts. [*Sub-ss.* 2-5 *deal with the exclusion of certain county courts from bankruptcy jurisdiction, and the regulation of the exercise of bankruptcy jurisdiction by those county courts which have it. Bankruptcy business in the High Court was assigned to the King's Bench Division by order of January* 1*st*, 1884, *under* 46 & 47 Vict. c. 52, s. 94 (*now replaced by* 4 & 5 G. 5, c. 59, s. 97).]

Sect. 167.—*Interpretation.*]—In this Act, unless the context otherwise requires,—

"The court" means the court having jurisdiction in bankruptcy under this Act;

"Property" includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined:

Sect. 169.—*Short title, etc.*]—(1) This Act may be cited as the *Bankruptcy Act*, 1914.

(2) This Act shall not, except so far as is expressly provided, extend to Scotland or Ireland.

Indictment against a bankrupt for not discovering his property to the trustee, not delivering up to the trustee part of his property, and fraudulently removing part of his property. (4 & 5 G. 5, c. 59, s. 154 (1), (3), (5), ante, pp. 1254, 1255.)

THE KING *v.* A. B.

County of London Quarter Sessions.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offences:—

STATEMENT OF OFFENCE.

First Count:

Bankruptcy offence, contrary to section 154 (1) of Bankruptcy Act, 1914.

PARTICULARS OF OFFENCE.

A. B. has been adjudged bankrupt, and on the —— day of ——, in the county of ——, did not fully and truly discover to the trustee all his property, and how and to whom and for what consideration and when he had disposed of a piano, part thereof.

STATEMENT OF OFFENCE.

Second Count :

Bankruptcy offence, contrary to section 154 (3) of Bankruptcy Act, 1914.

PARTICULARS OF OFFENCE.

A. B. has been adjudged bankrupt, and on the —— day of ——, in the county of ——, did not deliver up to the trustee a book called a ledger, relating to his property or affairs.

STATEMENT OF OFFENCE.

Third Count :

Bankruptcy offence, contrary to section 154 (5) of Bankruptcy Act, 1914.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and within six months next before the presentation of a bankruptcy petition against him upon which he was adjudged bankrupt, in the county of ——, fraudulently removed a piano, value £20, part of his property.

Misdemeanor : imprisonment for not more than two years, with or without hard labour. 4 & 5 G. 5, c. 59, s. 164 (1) (ante, p. 1260).

Offences against the bankruptcy laws are triable at quarter sessions. 32 & 33 Vict. c. 62, s. 20 (*post*, p. 1268).

The Vexatious Indictments Act (ante, p. 67) *applies to misdemeanors under* 4 & 5 G. 5, c. 59 : see s. 164 (3) (ante, p. 1260). *As to costs*, see ante, p. 267.

Evidence.

Petition.]—Prove the bankruptcy petition by producing the petition itself, or a copy thereof, verified as required by 4 & 5 G. 5, c. 59, s. 139 (*ante*, p. 428).

Adjudication.]—Prove also the adjudication of bankruptcy by producing the adjudication under the seal of the Court (*R.* v. *Thomas*, 11 Cox, 535, Lush, J.), or a copy thereof verified as required by 4 & 5 G. 5, c. 59, s. 139 (*ante*, p. 428), or a copy of the London Gazette containing notice of the order of adjudication, which is conclusive evidence of the order having been made. *Cf. R.* v. *Levi*, L. & C. 597 ; 34 L. J. (M. C.) 174. *Id.* s. 137, sub-s. 2 (*ante*, p. 428).

Appointment of trustee.]—Prove the appointment of the trustee, which is done by putting in the certificate of the Board of Trade of his appointment. 4 & 5 G. 5, c. 59, s. 143 (*ante*, p. 428). For the purpose of this section the expression "trustee" means the official receiver of the debtor's estate or trustee administering his estate for the benefit of his creditors (s. 154).

Non-discovery to trustee.]—Prove also that the defendant did not fully and truly discover to the trustee the property, or some part thereof, and how

he disposed of the property, and that it was not disposed of in the ordinary way of his trade, nor laid out in the ordinary expense of his family. The discovery mentioned in 4 & 5 G. 5, c. 59, s. 154 (1), is not restricted to property in possession of the bankrupt at the time of his bankruptcy, but refers also to property which may have been disposed of by him previous to his bankruptcy, unless it has been disposed of in the ordinary way of his trade, or laid out in the ordinary expense of his family. *R.* v. *Michell*, 50 L. J. (M. C.) 76; 14 Cox, 490.

Locus pœnitentiæ.]—It had been ruled, that, up to and until his last examination, the bankrupt had a *locus pœnitentiæ*, and could not therefore, until that were passed, be indicted for concealing property which he might, upon his last examination, give up; *R.* v. *Walters*, 5 C. & P. 138; but that decision was overruled by the case of *Courtiveron* v. *Meunier*, 6 Ex. 74; 20 L. J. (N. S.) Ex. 104, in which it was held that a secreting by a bankrupt of his goods, with intent to cheat his creditors, was a concealment sufficient to avoid his certificate under 5 & 6 Vict. c. 122, s. 38 (*rep.*), although a full disclosure was made by him to the commissioners in bankruptcy before his last examination.

Intent to defraud.]—Upon proof of such non-discovery and concealment as is charged in the first and second counts the jury are to convict, unless the defendant proves that he had no intent to defraud (4 & 5 G. 5, c. 59, s. 154 (1), (3), *ante*, pp. 1254, 1255). This provision makes no change in the law, but merely gives statutory sanction to judicial interpretation of 32 & 33 Vict. c. 62, s. 11. *R.* v. *Thomas*, 11 Cox, 535; 22 L. T. (N. S.) 138. Lush, J.: *R.* v. *Bolus*, 23 L. T. (N. S.) 339. Evidence that the defendant called a meeting of his creditors and disclosed to them and the trustee the transaction for the concealment of which he was indicted, is admissible on his behalf, as tending to negative his intent to defraud. *R.* v. *Wiseman*, 20 Cox, 144; 71 L. J. (K. B.) 128; 66 J. P. 40. As to the third count, the case is different. The prosecutor to support it must prove not merely a removal, but a *fraudulent* removal (4 & 5 G. 5, c. 59, s. 154 (5)). That the removal was fraudulent will generally be a matter of inference from the circumstances under which it took place.

The formal proof as to the second and third counts is the same as that on the first count. Prove also, as to the third count, that the defendant, after the presentation of the petition, *fraudulently* removed the property mentioned in the indictment, or some part thereof, and that the value of the property so removed is 10*l*. Where an indictment specified various articles, without stating the value, and added "one hundred other articles of furniture, and a certain debt due from J. T. to the prisoner, of the value of 20*l*. and upwards," the judges held that the indictment was bad on the ground of the property concealed not being all specified, and no distinct value having been put upon the articles enumerated; for it did not appear that those articles were of the value required by the statute. *R.* v. *Forsyth*, R. & R. 274. Chattels which have been assigned by a non-registered bill of sale, and which are left in the possession of the assignor, are not the chattels of the assignor, and a fraudulent removal by him of such chattels within four months next

before the commencement of the liquidation of his affairs in bankruptcy, was held not to fall within sub-s. 5 of 32 & 33 Vict. c. 62, s. 11, although the bill of sale, not having been registered, is void as against the trustee in liquidation. *R* v. *Creese*, L. R. 2 C. C. R. 105; 43 L. J. (M. C.) 51; 12 Cox, 539. This case must be carefully distinguished from *R.* v. *Humphris* [1904] 2 K. B. 89 (*ante*, p. 1259). *See* Roome on Criminal Offences in Bankruptcy, pp. 41, 42.

Married women.]—By the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59), s. 125 (1), every married woman who carries on a trade or business, whether separately from her husband or not, is made subject to the bankruptcy laws as if she were a *feme sole*. For the former law, *see* the 24th edition of this work, p. 1263.

Infants.]—The prisoner was convicted under s. 12 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62). At the time when he quitted England and when he was adjudged bankrupt, he was an infant. The debts proved against his estate in the bankruptcy were trade debts, contracted since the passing of the *Infants' Relief Act*, 1874 (37 & 38 Vict. c. 62), and therefore void, and it did not appear that any debts for necessaries supplied to him existed. It was held that the conviction could not be upheld because the prisoner had no creditors amongst whom the property which he had taken with him ought by law to have been divided. *R.* v. *Wilson*, 5 Q. B. D. 28; 49 L. J. (M. C.) 13: *and see Lovell* v. *Beauchamp* [1894] A. C. 607; 63 L. J. (Q. B.) 802; *and ante*, p. 12.

Ordinary way of trade.]—Where the defendant was indicted for an offence against 32 & 33 Vict. c. 62, s. 11, sub-s. 15, and the facts proved were that he was a grocer who had obtained goods used in his trade upon credit, and that soon after receiving them and before they were paid for and within four months next before the presentation of a bankruptcy petition against him, he executed a bill of sale to a creditor in consideration of a pre-existing debt, which bill of sale included all his stock in trade and effects whatsoever, including the before-mentioned unpaid-for goods, it was held by Lush, J. (after conferring with Martin, B.), that disposing of the goods by bill of sale was not disposing of them in the "ordinary way of trade;" and, therefore, that as property which the defendant had obtained on credit, and had not paid for, had passed by the bill of sale, he same within sub-s. 15, unless he had no intent to defraud, but that the assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud, even although it appeared that the bill of sale had been given in pursuance of a long antecedent promise to execute it when requested. *R.* v. *Thomas*, 11 Cox, 535; 22 L. T. (N. S.) 138. Where a trader being in insolvent circumstances purchased goods on credit and shipped them to Australia, and obtained advances by pledging the bills of lading, and within four months afterwards became bankrupt, stating in his examination that he could give no account of what had become of the purchase-money, it was held that there was no evidence that the goods were obtained (sub-s. 14), or disposed of (sub-s. 15), otherwise than in the

ordinary way of his trade. *Ex parte Brett*, 1 Ch. D. 151; 45 L. J. (Bank.) 17; 13 Cox, 128 (C. A.). "The thing aimed at (in the repealed statute) was the obtaining of goods on credit, and then immediately selling them again at a loss; that is not in the ordinary course of business." *Id.*, *per* Mellish, L.J., 1 Ch. D., at p. 153; *see also Ex parte Stallard*, L. R. 3 Ch. App. 408: *Ex parte Marsden*, 2 Ch. D. 786; 45 L. J. (Bank.) 141.

Any false representation or other fraud.]—The facts in *Ex parte Brett* (*supra*) were there held not to constitute evidence of an offence against 32 & 33 Vict. c. 62, s. 11, sub-s. 13. "To satisfy the words of that sub-section, I think there must be some active fraud on the part of the bankrupt similar to the making of a false representation, not simply the purchase of goods when he knows that he is not able to pay for them." *Id.*, *per* Mellish, L.J. A false representation, to be within this section, must be fraudulent, and must be proved to have been knowingly made by the defendant. *R.* v. *Cherry*, 12 Cox, 32, Martin, B. In that case the indictment was drawn on the lines of an indictment under s. 88 of the *Larceny Act*, 1861; *sed quære*, whether it is not sufficient to follow the words of the statute, charging the representation as "false and fraudulent"; *see* 4 & 5 G. 5, c. 59, s. 164 (4) (*ante*, p. 1260); *R.* v. *Pierce*, 16 Cox, 213; 56 L. J. (M. C.) 85. An indictment so drawn is good after verdict. *R.* v. *Watkinson*, 12 Cox, 271 (C. C. R.).

Examination of debtor.]—By 4 & 5 Geo. 5, c. 59 (*Bankruptcy Act*, 1914), s. 15, sub-s. 8, "The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court (i.e., *the Court having jurisdiction in bankruptcy*) may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to or by the debtor and signed by him, and may thereafter, save as in this Act provided, be used in evidence against him. . . ." The ordinary way of "using in evidence" the debtor's admissions on these notes is to call the shorthand writer who took the notes to prove the correctness of his transcript, or to produce the bankruptcy file containing such transcript, and then to prove the fact that the notes were read over to or by and signed by the debtor; but if they were in fact not so read over and signed, parol evidence of the person who took them may be given. *R.* v. *Erdheim* [1896] 2 Q. B. 260; 65 L. J. (M. C.) 176 (*ante*, p. 383); *and see R.* v. *Pike* [1902] 1 K. B. 552; 71 L. J. (K. B.) 287 (*ante*, pp. 384, 635).

Indictment against an undischarged bankrupt for obtaining credit to the extent of ten pounds or upwards without disclosing that he is an undischarged bankrupt. (4 & 5 G. 5, c. 59, s. 155 (*a*), ante, p. 1256.)

Commencement as ante, p. 1261

STATEMENT OF OFFENCE.

First Count :

Bankrupt obtaining credit, contrary to section 155 (*a*) of the Bankruptcy Act 1914.

PARTICULARS OF OFFENCE.

A. B., being an undischarged bankrupt, on the —— day of ——, in the county of ——, obtained credit from C. D. to the extent of £20 [*ten pounds or upwards*] without informing the said C. D. that he then was an undischarged bankrupt.

STATEMENT OF OFFENCE.

Second Count :

Bankrupt engaging in trade, contrary to section 155 (*b*) of the Bankruptcy Act, 1914.

PARTICULARS OF OFFENCE.

A. B. has been adjudged bankrupt in the name of A. B., and on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, engaged in trade or business under the name of C. D., and entered into business transactions with E. F. without disclosing the name of A. B.

Misdemeanor : *imprisonment with or without hard labour for not more than two years* (4 & 5 G. 5, c. 59, s. 164 (1)), *formerly one year, under* 32 & 33 Vict. c. 62, s. 13 (post, p. 1267). R. *v.* Turner [1904] 1 K. B. 181; 73 L. J. (K. B.) 46; 68 J. P. 15; 20 Cox, 590.

Venue.]—*Where the defendant ordered goods by letter, he may be indicted in the county from which he wrote the letter and to which the goods were sent.* R. *v.* Peters, 16 Q. B. D. 636; 55 L. J. (M. C.) 173; see R. *v.* Ellis [1899] 1 Q. B. 230; 68 L. J. (Q. B.) 103; and ante, p. 37.

Evidence.

Prove that the defendant was adjudged bankrupt, *ante*, p. 1262, and that there is no order of discharge upon the file, and that he did not inform the person from whom he obtained credit that he was an undischarged bankrupt. An intent to defraud is immaterial. *R.* v. *Dyson* [1894] 2 Q. B. 176; 63 L. J. (M. C.) 124; 18 Cox, 1; 70 L. T. 877; 58 J. P. 528 : *R.* v. *Brownlow*, 74 J. P. 240; 26 T. L. R. 345; 4 Cr. App. R. 131.

Obtain credit.]—The prisoner, an undischarged bankrupt, living at Newcastle-on-Tyne, bought a horse from the prosecutor, a farmer in Ireland, for 22*l.*, free of expenses to the vendor, who, by the prisoner's direction, delivered the horse on board a steamer at Larne; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. He paid for the carriage of the horse on its delivery to him at Newcastle, and immediately sold it, and refused to pay the price to the prosecutor; it was held that he was guilty of "obtaining credit" within the 46 & 47 Vict. c. 52, s. 31 (*rep.*). *R.* v. *Peters*, 16 Q. B. D. 636; 54 L. J. (M. C.) 173. So also where the prisoner had ordered goods, the price of which would not amount to 20*l.*, and the vendor in execution of the order sent to him goods, the price of which amounted to 20*l.* and upwards, and the purchaser kept them without paying for them or informing the vendor that he was an undischarged bankrupt. *R.* v. *Juby*, 16 Cox, 160. It is not necessary, in order to support a charge under this section, that the goods in respect of which credit is obtained should all be supplied or ordered at the same time, provided that the total amount of credit obtained is 10*l.* or upwards, as appears from *R.* v. *Juby* (*supra*). Where the defendant induced persons to pay him cash by way of premiums for apprenticeship, which was not returnable, it was held that he had obtained money and not credit. *R.* v. *Coyne*, 69 J. P. 151, Fulton, Recorder. For cases decided under 32 & 33 Vict. c. 62, s. 13, *see post*, p. 1269.

FRAUDS UPON CREDITORS, WHETHER COMMITTED BY BANKRUPTS OR NOT.

(a) *Obtaining Credit under False Pretences or by other Fraud.*
(b) *Fraudulent Conveyances and Transfers of Property.*

(a) *Obtaining Credit under False Pretences, etc.*

Statute.

32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 13.]—Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour; that is to say:

(1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

(2) *Transfer of property with intent to defraud creditors.*]—Post, p. 1271.

(3) *Concealments of property within two months of date of unsatisfied judgment, with like intent.*]—Post, p. 1271.

Sect. 18.—*Vexatious Indictments Act to apply: guilty intent.*]—Every misdemeanor under the second part of this Act shall be deemed to be an offence within and subject to the provisions of the *Vexatious Indictments Act*, 1859

(*ante*, pp. 67 *et seq.*); and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent. (*See R.* v. *Muirhead*, 73 J. P. 31; 25 T. L. R. 88; 1 Cr. App. R. 189; *R.* v. *Brownlow*, 4 Cr. App. R. 131 (*post*, p. 1269)].

Sect. 20.—*Jurisdiction of quarter sessions.*]—[So much of the *Quarter Sessions Act*, 1842 (5 & 6 Vict. c. 38, *ante*, p. 106), as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this Act; and any offence under this Act shall be deemed to be within the jurisdiction of such justices and recorders. [*The words between square brackets having been repealed by* 56 & 57 Vict. c. 54 (Statute Law Revision Act, 1893), *the remaining part of the section by itself is meaningless; but it is evident from the context that bankruptcy offences are still to be triable at quarter sessions.*]

Sect. 23.—*Remedies under the Act alternative to other criminal remedies.*]—Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence. (*Cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160.)

Indictment for obtaining Credit under False Pretences.
(32 & 33 *Vict. c.* 62, *s.* 13, *sub-s.* 1.)

Commencement as ante, p. 1261.

STATEMENT OF OFFENCE.

Obtaining credit, contrary to section 13 (1) of the Debtors Act, 1869.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, in incurring a debt or liability to C. D., obtained credit to the amount of £25 from the said C. D. under false pretences or by means of fraud other than false pretences.

An indictment under 4 & 5 G. 5, c. 59, s. 156 (ante, p. 1257), *can be framed from the above precedent, adding an averment that the defendant has been adjudged bankrupt or that a receiving order has been made in respect of his estate. If such averment be omitted, the indictment would still be good under* 32 & 33 Vict. c. 62, s. 13 (supra), *which applies to any person, whether bankrupt or not.* R. *v.* Rowlands, 8 Q. B. D. 530; 51 L. J. (M. C.) 51.

Venue.]—*The defendant, who carried on business in the county of Durham, obtained goods on credit in that county from a traveller of the prosecutors by*

means of false representations made by the defendant to the prosecutors in Glasgow, where they carried on business. An indictment against him for an offence under 32 & 33 Vict. c. 62, s. 13, sub-s. 1, *was held to be properly triable in the county of Durham.* R. *v.* Ellis [1899] 1 Q. B. 230; 68 L. J. (Q. B.) 103; and see ante, p. 38.

Misdemeanor: imprisonment for not more than one year, with or without hard labour. 32 & 33 Vict. c. 62, s. 13, ante, p. 1267.

Evidence.

It is not necessary, in order to render a person liable under this section that he should be either a bankrupt or have liquidated his affairs by arrangement. *R.* v. *Rowlands*, 8 Q. B. D. 530; 51 L. J. (M. C.) 51. There are three elements which have to be considered in the construction of s. 13 (1). First, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud: the conjunction of these three ingredients makes the offence. *R.* v. *Jones* [1898] 1 Q. B. 119, 124; 67 L. J. (Q. B.) 41, Russell, C.J. In *R.* v. *Muirhead*, 73 J. P. 31; 25 T. L. R. 88; 1 Cr. App. R. 189, where the jury found that M. obtained credit by false pretences, but without an intention to defraud, the findings were held to amount to a verdict of not guilty. The Court held that to warrant a conviction an intention to defraud must be proved. The section differs from 6 & 7 G. 5, c. 50, s. 32 (*ante*, p. 691), by not containing the words "with intent to defraud," and closely follows the words of 4 & 5 G. 5, c. 59, s. 154 (13), in which the words "intent to defraud" are not used. In *R.* v. *Brownlow* 26 T. L. R. 345; 4 Cr. App. R. 131, it was held misdirection to tell the jury that there were only two ingredients in the offence, viz., the obtaining credit and the false pretences knowingly made, and that they need not take into account the existence or absence of an intent to defraud.

As to obtaining credit, *see R.* v. *Peters*, 16 Q. B. D. 636; 55 L. J. (M. C.) 173: *R.* v. *Juby*, 16 Cox, 160, *ante*, p. 1267.

Where an authorized clerk in the Stock Exchange induced stock jobbers to make bargains for sale of shares for the next account, and gave the names of members of the Stock Exchange not his employers as the purchasers, it was held that credit was given to them and not to the defendant, and that he was not guilty of an offence under this section. *R.* v. *Bryant*, 63 J. P. 376, Fulton, Common Serjeant. *See also R.* v. *Steel*, 5 Cr. App. R. 289. Obtaining a loan is obtaining credit within this section. *Ex parte Salomons*, Q. B. D. 28 L. J. Newsp. 879: *R.* v. *Carpenter*, 22 Cox, 618; 76 J. P. 158. Credit may be obtained, even though security for the debt is given. *R.* v. *Fryer*, 7 Cr. App. R. 183. To obtain goods in exchange for a cheque which it is falsely represented will be honoured on presentation, is obtaining goods, and is not obtaining credit under this section. *R.* v. *Cosnett*, 20 Cox, 6; 65 J. P. 472. The defendant, in pursuance of a fraudulent scheme, sold horses which he knew to be unsatisfactory, agreeing in each case to refund the purchase money if the horses were returned within a month. When the horses were returned he declined to refund the money. This was held not to be obtain-

ing credit within s. 13, sub-s. 1 (*ante*, p. 1267). *R.* v. *Green*, 9 Cr. App. R. 127.

A person without means who orders a meal in a restaurant [though he makes no verbal representation at the time as to his ability to pay for the same], is liable to be convicted of "obtaining credit by means of fraud other than false pretences" under the latter part of the above sub-section (*R.* v. *Jones*, *ante*, p. 1269); but not of obtaining goods by means of false pretences under s. 32 of the *Larceny Act*, 1916. (*See ante*, pp. 705, 714.) Buying goods without any intention of paying may be evidence of "fraud other than false pretences." *R.* v. *Thompson*, 5 Cr. App. R. 9. To establish the offence of obtaining either money or credit by false pretences, there must be a misstatement of an existing fact, either by stating that a fact exists which does not exist, or by stating that a fact does not exist which does exist. It must be a statement of existing fact as distinguished from mere promise or statements about the future, expectations, and things of that sort. That is the main point which distinguishes the obtaining of money or credit by false pretences from obtaining credit by fraud other than false pretences. *R.* v. *Carpenter*, 22 Cox, 618; 76 J. P. 158, Channell, J.

Evidence of similar acts committed by the defendant at a period immediately preceding the commission of that charged in the indictment is admissible for the prosecution, in order to prove intent or to negative mistake. *R.* v. *Wyatt* [1904] 1 K. B. 88; 73 L. J. (K. B.) 15; 20 Cox, 462; 68 J. P. 31; *and see ante*, p. 361. But such evidence should be confined to similar transactions. *R.* v. *Baird*, 11 Cr. App. R. 186.

(b) *Fraudulent Conveyances, Gifts, or Transfers of Property.*

13 *Eliz. c.* 5 (*Fraudulent Conveyances*), *s.* 1.—*Feigned conveyances to defraud creditors to be void.*

Sect. 2.—*Punishment of parties making them.*]—. . . "And all and every the pties to such faygned covenous or fraudulent feoffement gyfte graunte alienation bargayne conveyaunce bondes suites judgementes executions and other thynges before expressed, or beinge privy and knowynge of the same or any of them, wch at any tyme after the tenthe daye of June next cōmyng, shall wittingly and willingly put in ure avowe mayntaine justefie or defend the same or any of them, as true simple and done had or made *bonâ fide* and upon good consyderation, or shall alien or assigne any the landes tenementes goodes leases or other thinges before mentioned to hym or them conveyed as is aforesaid, or anye parte thereof, shall incurre the penaltie and forfayture of one yeres value of the said landes tenementes & heredytamentes leases rentes comons or other pfytes of or oute of the same, and the whole value of the said goodes and cattalls, and allso so muche monye as are or shall be conteyned in any suche covenous and fayned bonde; the one moitie whereof to be to the Queenes Matie, her heyres and successors, and thother moitye to the ptye or pties greeved by suche fayned and fraudulent feoffement gyfte graunte alyenation bargayne conveyaunce bonde suites judgementes executions leases rentes cōmunes pfytes charges and other thynges aforesaide; to be

recovered in any of the Queenes courtes of record by action of debt byll playnt or information wherein none essoyne protection or wager of lawe shall be admitted for the defendaunt or defendauntes; and also beinge thereof lawfully convycted, shall suffer imprysonment for one halfe yere wthoute baile or maynepryse."

(*For a precedent of an indictment for this offence*, see R. *v.* Smith, 6 Cox, 31; and see Mayne, Ind. Cr. Law (1896), pp. 529, 533. *In* R. *v.* Cox and Railton, 15 Cox, 611, *the indictment contained counts for conspiracy to commit this offence*, and see R. *v.* Garrett and Davis, 4 Cr. App. R. 21, *for indictment for conspiracy to defeat the cause of justice by the manufacture of a false deed.*)

32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 13.—*Fraudulent transfer or concealment of property.*]—Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say:

(1) . . . (*see ante*, p. 1267):

(2) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

(3) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

Indictment and Evidence. (32 & 33 *Vict. c.* 62, s. 13 (2), (3).)

It is not necessary in order to render a person liable under these sub-sections that he should be a bankrupt; *R.* v. *Rowlands*, 8 Q. B. D. 530; 51 L. J. (M. C.) 51; 15 Cox, 31; but to fall within the section it would seem that the transfer, etc., must be fraudulent within the bankruptcy laws or the statute of Elizabeth. *Re Cranston*, 9 Morrell, 160. A fictitious transfer seems to be within sub-s. (2). *R.* v. *Richman*, 4 Cr. App. R. 233. Where A., the defendant to an action for unliquidated damages, during the pendency of the action, but before judgment, gave a bill of sale over his furniture with intent to defeat any judgment which B. might obtain, it was held that B. was not, at the time of the execution of such bill of sale, a "creditor" within sub-s. 2 of this section, and that A. could not therefore be convicted thereunder. *R.* v. *Hopkins* [1896] 1 Q. B. 652; 65 L. J. (M. C.) 125.

SECT. 2.

COUNTERFEITING TRADE MARKS, OR USING FALSE TRADE DESCRIPTIONS.

Statutes.

50 & 51 *Vict. c.* 28 (*Merchandise Marks Act*, 1887), *s.* 2.—*Offences as to trade marks and trade descriptions.—Punishment of such offences.*]—(1) Every person who—

(*a*) forges any trade mark (*see post*, ss. 3, 4); or

(*b*) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or

(*d*) applies any false trade description to goods; or

(*e*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or

(*f*) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act. [" *Intent to defraud*" *in this sub-section means intent to induce the purchaser to take something which he does not know he is taking.* Starey *v.* Chilworth Gunpowder Co., 24 Q. B. D. 90; 59 L. J. (M. C.) 13; 17 Cox, 55; 54 J. P. 436. *Delivery of an invoice with goods is an application of a trade description to goods within clause* (*d*) *of this sub-section.* Budd *v.* Lucas [1891] 1 Q. B. 408; 60 L. J. (M. C.) 95. *Whether the appearance of an article sold amounts to a false trade description is a question for the jury.* R. *v.* Phillips, 73 J. P. 458; 2 Cr. App. R. 295.]

(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description (*see post*, ss. 3, 5) is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) that otherwise he had acted innocently;

be guilty of an offence against this Act. [*A false invoice is within this sub-section, but a false oral description is not.* Coppen *v.* Moore (No. 1) [1898] 2 Q. B. 300; 67 L. J. (Q. B.) 689. *As to what constitutes "application,"* see

Langley *v.* Bombay Tea Co. [1900] 2 Q. B. 460; 69 L. J. (Q. B.) 752; 19 Cox, 551. *An intent to defraud purchasers is not a necessary ingredient of an offence under this sub-section.* Wood *v.* Burgess, 24 Q. B. D. 162; 59 L. J. (M. C.) 11. *The gist of the offence under this section is not that the purchaser should be misled, but the putting on the market goods to which the false description is applied.* R. *v.* Butcher, 99 L. T. 622; 1 Cr. App. R. 54 (*a case relating to British-made "Havana" cigars*). *If a "false trade description"* (see infra, s. 3, sub-s. 3) *is knowingly applied, the defence of "acting innocently" is negatived.* Kirschenboim *v.* Salmon and Gluckstein [1898] 2 Q. B. D. 19; 67 L. J. (Q. B.) 601. *The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament.* Christie *v.* Cooper [1900] 2 Q. B. 522, 526; 69 L. J. (Q. B.) 708, Channell, J. *The onus is on the defendant to satisfy the magistrate or jury that "otherwise he had acted innocently."* R. *v.* Phillips, ante, p. 1272. *The sub-section renders a master criminally liable for acts done in contravention of it by his servants within the general scope of their employment, although contrary to their master's orders, unless he can show that he acted in good faith, and did all he could to prevent the commission of offences by his servants.* Coppen *v.* Moore (No. 2) [1898] 2 Q. B. 306; 67 L. J. (Q. B.) 689; and see ante, pp. 25, 26.]

(3) Every person guilty of an offence against this Act shall be liable—

(i.) on conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii.) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii.) in any case, to forfeit to his Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4) The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit.

(5) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires, be so tried accordingly. (Cf. 42 & 43 Vict. c. 49, s. 17 (ante, p. 7). [*The justices must inform the defendant of his right to be tried on indictment.* R. *v.* Cockshott [1898] 1 Q. B. 582; 67 L. J. (Q. B.) 467. *As to costs*, see ante, pp. 267, 284. *For precedents*

of indictment, see R. *v.* Phillips, 65 J. P. 41. *That indictment contained an averment that the defendant elected to be tried by a jury; but such an averment is unnecessary.* R. *v.* Chambers, 18 Cox, 401; 65 L. J. (M. C.) 214.]

Sect. 3.—*Definitions of expressions used in this Act.*]—(1) For the purposes of this Act the expression "*trade mark*" means a trade mark registered in the register of trade marks kept under the *Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 Vict. c. 57), and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of the one hundred and third section of the *Patents, Designs, and Trade Marks Act*, 1883, are, under order in council, for the time being applicable : [*These orders in council are collected in the* Statutory Rules and Orders Revised (ed. 1904), vol. 8, tit. Merchandise Marks, *and in the subsequent annual volumes of* Statutory Rules and Orders.]

The expression "trade description" means any description, statement, or other indication, direct or indirect,

(*a*) as to the number, quantity, measure, gauge, or weight of any goods, or

(*b*) as to the place or country in which any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act.

The expression "*false trade description*" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act.

The expression "*goods*" means anything which is the subject of trade, manufacture, or merchandise.

The expressions "*person*," "*manufacturer, dealer, or trader*," and "*proprietor*" include any body of persons corporate or unincorporate.

The expression "*name*" includes any abbreviation of a name. [*The definition of* "*trade description*" *is extended to the customs entry of imported goods by* 54 & 55 Vict. c. 15, s. 1, post, p. 1278; *and includes a description in an invoice.* Coppen *v.* Moore (No. 1) [1898] 2 Q. B. 300; 67 L. J. (Q. B.) 689; and see Cameron *v.* Wiggins [1901] 1 K. B. 1; 70 L. J. (K. B.) 15; 19 Cox, 580.]

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression "false name or initials" means as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark, or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods.

Sect. 4.—*Meaning of "forge a trade mark."*]—A person shall be deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Sect. 5.—*Meaning of the expression "apply a trade mark or mark or trade description to goods."*]—(1) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c*) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description.

(2) The expression "*covering*" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "*label*" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3) A person shall be deemed to falsely apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

Sect. 6.—*Defences to charges under the Act where the defendant did the act complained of innocently in the ordinary course of his business.*]—Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section to be done, and proves—

(*a*) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precautions against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Sect. 7.—*Application of the Act to watches.*]—Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *primâ facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "*watch*" means all that portion of a watch which is not the watch case.

Sect. 8.—*False declaration at assay office of country or place where watch case was made.*]—[*Punishable on summary conviction only, since* 1 & 2 Geo. 5, c. 6.]

Sect. 9.—*Pleading.—Trade mark how described in.—Copy or facsimile not necessary.*]—In any indictment, pleading, proceeding, or document, in which

any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Sect. 10.—*Evidence.—Defendant and wife or husband of defendant may be witnesses for defence.—Evidence in case of imported goods.*]—In any prosecution for an offence against this Act—

(1) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness. (*See* 61 & 62 Vict. c. 36, *ante*, pp. 458 *et seq.*)

(2) In the case of imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced.

Sect. 11.—*Accessories liable as principals.—Place of trial of.*]—Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanor, shall be guilty of that misdemeanor as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom, in which he may be, as if the misdemeanor had been there committed. (*See post*, tit. Accessories before the fact to Felony.)

Sect. 12.—*Search warrants.*

Sect. 13.—*Vexatious Indictments Acts applicable to offences under this Act.*]—The *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17, extended by 30 & 31 Vict. c. 35, s. 1), shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in s. 1 of that Act, but this section shall not apply to Scotland. (*See ante*, pp. 67 *et seq.*)

Sect. 14.—*Costs.*]—*Repealed as to England*, 8 Edw. 7, c. 15, s. 10. *For substituted provisions*, see ante, pp. 267 *et seq.*

Sect. 15.—*Limitation of time for prosecutions.*]—No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens. (*See ante*, p. 65.)

Sect. 18.—*Certain trade descriptions lawfully used at the passing of this Act exempted from its operation.—Proviso.*]—Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied (*see Gridley* v. *Swinborne*, 52 J. P. 739, 791): Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or

country, in an equally conspicuous manner with that name, the name of the place or county in which the goods were actually made or produced, with a statement that they were made or produced there. [*This section only applies to goods which in the course of time have obtained a secondary name.* Gridley *v.* Swinborne, 52 J. P. 791; 5 T. L. R. 71 : R. *v.* Butcher, 99 L. T. 622; 1 Cr. App. R. 54.]

Sect. 19.—*Act not to exempt persons from civil proceedings,—nor to exempt persons from refusing to answer interrogatories in action, but answers not admissible in evidence in prosecution. Act not to render liable servant acting* bonâ fide.]—(1) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom, who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

54 & 55 *Vict. c.* 15 (*Merchandise Marks Act*, 1891), *s.* 1.—*Customs entry to be trade descriptions.*]—The customs entry relating to imported goods shall for the purpose of the *Merchandise Marks Act*, 1887, be deemed to be a trade description applied to the goods.

Sect. 2.—*Prosecution of offences by Board of Trade.*]—(1) The Board of Trade may, with the concurrence of the lord chancellor, make regulations providing that in cases appearing to the Board to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution of offences under the *Merchandise Marks Act*, 1887, shall be undertaken by the Board of Trade, and prescribing the conditions on which such prosecutions are to be so undertaken. The expenses of prosecutions so undertaken shall be paid out of moneys provided by parliament.

(2) All regulations made under this section shall be laid before parliament within three weeks after they are made if parliament is then sitting, and if parliament is not then sitting, within three weeks after the beginning of the next session of parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act, and shall be published under the authority of his Majesty's stationery office. [*The regulations in force, made May* 21, 1892, *are printed in the* Statutory Rules and Orders Revised (ed. 1904), vol. 8, tit. Merchandise Marks, p. 13.]

(3) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations.

57 & 58 *Vict. c.* 19 (*Merchandise Marks Prosecution Act*, 1894), *s.* 1.—*Prosecution of certain offences by Board of Agriculture.*]—The power exercisable by the

Board of Trade under the *Merchandise Marks Act*, 1891 (*supra*), with respect to the prosecution of offences under the *Merchandise Marks Act*, 1887 (*supra*), may in cases which appear to the Board of Agriculture to relate to agricultural or horticultural produce [and the produce of any fishing industry (*a*)] be exercised by that board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of Trade. [*The regulations in force, made October* 27, 1894, *are printed in* Statutory Rules and Orders Revised (ed. 1904), vol. 8, tit. Merchandise Marks, p. 14.]

Sect. 2.]—This Act shall not extend to Ireland.

5 *Edw.* 7, *c.* 15 (*Trade Marks Act*, 1905), *s.* 66.]—*Making or causing to be made a false entry in the register of trade marks kept under the Act, or a writing falsely purporting to be a copy of an entry in any such register, or producing or causing to be produced or tendered in evidence any such writing knowing the entry or writing to be false, misdemeanor.*

9 *Edw.* 7, *c.* 24 (*Merchandise Marks (Ireland) Act*, 1909), *s.* 1.]—*Provision for official prosecutions under the Act of* 1887 *in Ireland by the Department of Agricultural and Technical Instruction for Ireland.*

62 *& 63 Vict. c.* 51 (*Sale of Food and Drugs Act*, 1899), *s.* 1.]—*Precautions against importation of margarine, margarine cheese, adulterated or impoverished butter, condensed separated or skimmed milk, or any adulterated or impoverished food, unless sufficiently marked with a name or description indicating the nature of the article, or that it has been adulterated or impoverished.*

7 *Edw.* 7, *c.* 21 (*Butter and Margarine Act*, 1907), *s.* 5 (1)].—*Extends* 62 *& 63 Vict. c.* 51, *s.* 1, *to other forms of pretended or adulterated butter, etc., and alters the maximum penalties and the rules of evidence.*

SECT. 3.

OFFENCES ARISING OUT OF RELATION BETWEEN EMPLOYERS AND WORKMEN.

Former Law.

The law relating to combinations by workmen for the purpose of raising wages, shortening the hours of labour, dictating to masters what workmen they shall employ, and for other purposes, interfering with the free course of trade, was formerly regulated by the common law relating to conspiracy, and

(*a*) Added by 3 Edw. 7, c. 31, s. 1 (8).

by the repealed statutes 6 G. 4, c. 129; 22 Vict. c. 34; 24 & 25 Vict. c. 100, s. 41; and 34 & 35 Vict. c. 32, s. 1. As to that law, *see* the following cases, viz.: *R.* v. *Bykerdyke*, 1 M. & Rob. 179: *R.* v. *Rowlands*, 17 Q. B. 671; 2 Den. 364; 21 L. J. (M. C.) 81: *R.* v. *Duffield*, 5 Cox, 404: *Walsby* v. *Anley*, 30 L. J. (M. C.) 121: *O'Neill* v. *Longman*, 32 L. J. (N. S.) M. C. 259; 4 B. & S. 376: *O'Neill* v. *Kruger*, 4 B. & S. 389: *Wood* v. *Bowron*, L. R. 2 Q. B. 21; 36 L. J. (M. C.) 5: *R.* v. *Druitt*, 10 Cox, 592, 601, 602 (dissented from in *Gibson* v. *Lawson* [1891] 2 Q. B. 545; 61 L. J. (M. C.) 9): *R.* v. *Shepherd*, 11 Cox, 325. The history of the law is fully dealt with in Wright on Conspiracy; *and see* Encycl. Eng. Law. (2nd ed.), tits. Conspiracy and Trade Union. Complaints as to the unfairness of the law led to the appointment of a Royal Commission in 1867; on its report in 1869 were passed the *Trade Union Act*, 1871 (34 & 35 Vict. c. 31, *infra*), and 34 & 35 Vict. c. 32. Sect. 7 of the latter Act repealed 6 G. 4, c. 129; 22 & 23 Vict. c. 34; and 24 & 25 Vict. c. 100, s. 41, as to assaults in pursuance of an unlawful conspiracy to raise the rate of wages, but did not affect 24 & 25 Vict. c. 100, ss. 39, 40, as to assaults with intent to obstruct sale or transit of grain, or assaults on seamen to prevent their exercise of their lawful trade. 34 & 35 Vict. c. 32 was repealed by 38 & 39 Vict. c. 86, s. 17, in consequence of the decision of Brett, J., in *R.* v. *Bunn*, 12 Cox, 316 (*the Gas-stokers' case*), that an improper combination to control a master was still a common law offence; and 38 & 39 Vict. c. 86 (*infra*), was passed on the recommendation of a Royal Commission appointed in 1874. Another Royal Commission reported on the subject in 1906 (Parl. Pap. 1906, C. 2825).

Statutes.

34 & 35 *Vict. c.* 31 (*Trade Union Act*, 1871), *s.* 2.—*Trade union not criminal.*] —The purposes of any trade union [*defined* 39 & 40 Vict. c. 22, s. 16, infra] shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

39 & 40 *Vict. c.* 22 (*Trade Union Act*, 1876), *s.* 16.—*Definition of trade union*].—So much of s. 23 of the principal Act (34 & 35 Vict. c. 31) as defines the term "trade union," except the proviso qualifying such definition (*see infra*), is hereby repealed, and in lieu thereof be it enacted as follows:—The term "trade union" means any combination, whether temporary or permanent, for regulating the relations between workmen and master, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act (34 & 35 Vict. c. 31) had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

34 & 35 *Vict. c.* 31, *s.* 23.]— . . . [*Proviso referred to in* 39 & 40 Vict. c. 22, s. 16, supra]—Provided that this Act shall not affect—1. Any agreement between partners as to their own business; 2. Any agreement between an

employer and those employed by him as to such employment; 3. Any agreement in consideration of the sale of the goodwill of a business, or of instruction in any profession, trade, or handicraft.

38 & 39 *Vict. c.* 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 3.—*Amendment of law as to conspiracy in trade disputes.*]—An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute [between employers and workmen] shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. [*The words between brackets were repealed by* 6 Edw. 7, c. 47, s. 5 (3).]

An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable. [*This paragraph was added here by* 6 Edw. 7, c. 47, s. 1, infra.]

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot (*ante*, p. 1221), unlawful assembly (*ante*, p. 1218), breach of the peace, or sedition (*ante*, p. 1114), or any offence against the state or the sovereign (*ante*, p. 1053 *et seq.*).

A *crime* for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the Court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

[*This section has been said to include all the existing law against combination in reference to trade disputes.* Gibson *v.* Lawson [1891] 2 Q. B. 545, 560; 61 L. J. (M. C.) 9, per Coleridge, C.J., *where* R. *v.* Bunn, 12 Cox, 316 : R. *v.* Druitt, 10 Cox, 592, *were disapproved : but it has nothing to do with civil remedies.* Quinn *v.* Leathem [1901] A. C. 495; 70 L. J. (P. C.) 76, *where the observations of* Bramwell, B., *in* R. *v.* Druitt (supra), *to the effect that the liberty of a man's mind and will was as much the subject of the law's protection as that of his body, were approved. In* Quinn *v.* Leathem (supra) *the effect of* Mogul SS. Co. *v.* Macgregor, Gow. & Co. [1892] A. C. 25; 61 L. J. (Q. B.) 295 : Allen *v.* Flood [1898] A. C. 1; 67 L. J. (Q. B.) 119, *and numerous other cases bearing on this subject was considered; and see* Read *v.* Operative Soc. of Stonemasons [1902] 2 K. B. 732; 71 L. J. (K. B.) 994; affirmed in Glamorgan Coal Co. *v.* South Wales Miners' Federation [1903] 2 K. B. 545; [1905] A. C. 239; 74 L. J. (K. B.) 525. *See also* Hodges *v.* Webb [1920] 2 Ch. 70.

6 *Edw.* 7, *c.* 47 (*Trade Disputes Act*, 1906), *s.* 5 (3).—*Construction.*]—In this Act and in the *Conspiracy and Protection of Property Act*, 1875, the expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . .

38 & 39 *Vict. c.* 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 4.—*Breach of contract of service by persons employed by municipal authority, etc., in supply of gas or water.*]—Where a person employed by a municipal authority [*defined s.* 14, post, p. 1286], or by any company or contractor upon whom is imposed by Act of Parliament the duty [*interpreted s.* 14, post. p. 1286], or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously [*defined s.* 15, post, p. 1286] breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned [*s.* 9, post, p. 1285], be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Every such municipal authority, company, or contractor as is mentioned in this section, shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority, or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur, on summary conviction, a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.

Sect. 5.—*Breach of contract of service involving serious injury to person or property.*]—Where any person wilfully and maliciously [*defined s.* 15, post, p. 1286] breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned [*s.* 9, post,

p. 1285], be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Sect. 6.—*Neglect by master to provide food, clothing, etc., for servant or apprentice.*]—Ante, p. 972.

Sect. 7.—*Intimidation, etc., to compel any person to abstain from doing or to do any act which he has a right to do or abstain from doing.*]—Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or
2. Persistently follows such other person about from place to place;
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned [*s.* 9, *post*, p. 1285], be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

[Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.] (*These words are repealed by* 6 Edw. 7, c. 47, s. 2 (2); see post, p. 1285.)

"*Compel.*"]—See Lyons *v.* Wilkins (No. 2) [1899] 1 Ch. 255.

"*Intimidates.*"]—*The decisions on intimidation in trade disputes prior to this Act are collected in* Wright on Conspiracy (1873), pp. 45-67. *A threat made to a workman that his fellow workmen will strike unless such workman joins a union, or a threat made to an employer that the union men in his employ will strike if he continues to employ non-union men, is not intimidation within the meaning of this section.* Gibson *v.* Lawson, Curran *v.* Treleaven [1891] 2 Q. B. 545; 61 L. J. (M. C.) 9, *the ground of decision apparently being that, as strikes are now lawful, the mere threat to do a lawful act cannot amount to intimidation. A threat to picket has been held to be intimidation, picketing being expressly forbidden by sub-s.* 4. Judge *v.* Bennett, 36 W. R. 103; 52 J. P. 247, *cited in* Gibson *v.* Lawson (supra); and cf. R. *v.* McCarthy [1903] 2 Ir. Rep. 146. Cave, J., *in* R. *v.* McKeevit, Liverpool Assizes Dec. 16, 1890, *ruled that to constitute intimidation within the meaning of this section personal violence must be threatened. In* Curran *v.* Treleaven *the Court expressed an opinion* obiter *that there was much to be said for the view entertained by* Cave, J. *Where a number of persons assembled, some of them hurling opprobrious epithets and others eggs at A., who was on his*

way to work, with a view to compel him to abstain from work which he had a legal right to do, it was held that thirteen of them were rightly convicted of intimidation, although only two were actually proved to have thrown eggs. Young v. Peck, 23 Cox, 270; 29 T. L. R. 31. *As to black lists,* see Trollope *v.* London Building Trades Federation, 72 L. T. 342; 11 T. L. R. 228, 280.

"*Persistently follows.*"]—See Smith *v.* Thomasson, 16 Cox, 740, Pollock, B. *All the English cases up to* 1896 *are discussed in the American case* Vegelahn *v.* Guntner, 167 Mass. 92.

"*Watches or besets.*"—*Picketing.*]—*Where the defendants, officers of a trade union, ordered a strike against the plaintiffs, and also against S., a person who made goods for the plaintiffs only, and their pickets, by their direction, watched and beset the works of the plaintiffs and of S. for the purpose of persuading workpeople to abstain from working for the plaintiffs, the Court of Appeal held that the defendants in so directing their pickets were guilty of an offence against s.* 7, *sub-s.* 4, *of this Act, and granted an interlocutory injunction to restrain the defendants and their agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information; and also to restrain the defendants from preventing S. or any other persons from working for the plaintiffs by withdrawing his or their workmen from their employment.* Lyons *v.* Wilkins (No. 1) [1896] 1 Ch. 811; 65 L. J. (Ch.) 601: cf. R. *v.* Bauld, 13 Cox, 282. *And the decision in* Lyons *v.* Wilkins (No. 1) *has been in no way affected by* Allen *v.* Flood [1898] A. C. 1; 67 L. J. (Q. B.) 119: Lyons *v.* Wilkins (No. 2) [1899] 1 Ch. 255; 68 L. J. (Ch.) 146; *and was approved by* Lord Lindley, *in* Quinn *v.* Leathem [1901] A. C. 495, 541; 70 L. J. (P. C.) 76. "*Such other*" *means* "*any other.*" Id. Cf. Charnock *v.* Court [1899] 2 Ch. 35; 68 L. J. (Ch.) 550: Walters *v.* Green [1899] 2 Ch. 696; 68 L. J. (Ch.) 730. [*The law as laid down by the Recorder of London* (Russell Gurney), *in his charge to the grand jury, at the Central Criminal Court, in* R. *v.* Hibbert (5 April, 1875, *printed in return to an address of the House of Commons, dated* 22*nd June,* 1875), *was to the effect that if the defendants merely watched the employer's premises for the purpose of informing all comers of the existence of a strike, and endeavouring to persuade them to join the men on strike, that would be lawful so long as it was done peaceably, and without anything being done to interfere with the perfect exercise of free-will on the part of those who were otherwise willing to work on the terms proposed by the employer. The Recorder mentioned also, in support of this view, that the law had been previously so laid down by* Lush, J., *in two cases tried before him.* But see *the rulings of* Cleasby, B., *in* R. *v.* Hibbert, 13 Cox, 82. *Besetting a person who has a legal right to be in a ship is within the section.* Farmer *v.* Wilson, 69 L. J. (Q. B.) 496; 64 J. P. 486; 19 Cox, 502. *Where the defendants and others had continually watched and walked up and down before the prosecutor's business premises, and had followed him through the streets to his private residence, it was held that if the acts of "watching" and "persistently following" were done with the intention of coercing the prosecutor to take*

back a dismissed employee, the defendants ought to be found guilty. R. *v.* Wall, 21 Cox (Ir.), 401.]

6 *Edw.* 7, *c.* 47 (*Trade Disputes Act*, 1906), *s.* 2 (1).—*Peaceful Picketing.*]—It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peaceably obtaining or communicating information, or of peacefully persuading any person to work or abstain from working. [*This section has been held not to apply as regards the "watching" of the private residence of an employer.* R. *v.* Wall, 21 Cox (Ir.), 401, supra.]

Sect. 3.—*Removal of liability for interfering with another person's business, etc.*]—An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

Sect. 5 (2).—In this Act the expression "trade union" has the same meaning as in the *Trade Union Acts*, 1871 and 1876, and shall include any combination as therein defined, notwithstanding that such combination may be the branch of a trade union.

38 *&* 39 *Vict. c.* 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 9.—*Person accused before court of summary jurisdiction of offence against this Act may elect to be tried on indictment.*]—Where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly. (*See* 42 & 43 Vict. c. 49, s. 17 (*ante*, p. 7).) [*This section gives an accused person an absolute right to be tried by a jury if he demands it.* R. *v.* Mitchell, ex parte Livesey [1913] 1 K. B. 561; 82 L. J. (K. B.) 153; 23 Cox, 273; 108 L. T. 76; 77 J. P. 148; 29 T. L. R. 157. *It is not necessary to aver in the indictment that the defendant elected to be tried by a jury.* R. *v.* Chambers, 65 L. J. (M. C.) 214; 18 Cox, 401. *The acts which the persons interfered with had a legal right to do should be specifically described.* R. *v.* Mackenzie [1892] 2 Q. B. 519; 61 L. J. (M. C.) 224; 17 Cox, 542. *In* Ex parte Wilkins, 64 L. J. (M. C.) 221; 18 Cox, 161, "*working as a shoe finisher*" *was held to be a sufficient description of such an act. An indictment which sets out the acts, but omits to allege that the person molested had a legal right to do them, is not necessarily bad.* R. *v.* Hulme, 9 Cr. App. R. 77. *In an indictment under s.* 7, *sub-s.* 1, *for "injuring property," the property*

injured must be specified. Smith *v.* Moody [1903] 1 K. B. 56; 72 L. J. (K. B.) 43; 20 Cox, 369; 67 J. P. 69.]

Sect. 11.—*Evidence.*]—Provided, that upon the hearing and determining of any indictment or information under ss. 4, 5 and 6 of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses. (*As to England* see 61 & 62 Vict. c. 36, ante, pp. 458 et seq.)

Sect. 12.—*Appeal to quarter sessions.*

Sect. 14.—*Meaning of "municipal authority," "company," and "contractor."*]—The expression "municipal authority" in this Act means any of the following authorities, that is to say, the Metropolitan Board of Works, the Common Council of the City of London, the Commissioners of Sewers of the City of London, the town council of any borough for the time being subject to the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), and any Act amending the same, any commissioners, trustees, or other persons invested by any local Act of Parliament with powers of improving, cleansing, lighting, or paving any town, and any local board. [*The* Municipal Corporations Act, 1882, *was substituted for* 5 & 6 W. 4, c. 76 (45 & 46 Vict. c. 50, s. 242 (3)).]

Any municipal authority or company or contractor who has obtained authority by or in pursuance of any general or local Act of Parliament to supply the streets of any city, borough, town, or place, or of any part thereof, with gas, or which is required by or in pursuance of any general or local Act of Parliament to supply water on demand to the inhabitants of any city, borough, town, or place, or any part thereof, shall for the purposes of this Act be deemed to be a municipal authority or company or contractor upon whom is imposed by Act of Parliament the duty of supplying such city, borough, town, or place, or part thereof, with gas or water.

Sect. 15.—*Construction of word "maliciously."*]—The word "maliciously" used in reference to any offence under this Act shall be construed in the same manner as it is required by the 58th section (*ante*, p. 738) of the *Malicious Damage Act*, 1861 (24 & 25 Vict. c. 97), to be construed in reference to any offence committed under such last-mentioned Act. (*See ante*, pp. 741, 800.)

Sect. 16.]—Nothing in this Act shall apply to seamen or to apprentices to the sea service. [*This section does not exempt a person who is not a seaman from being charged with and being liable to punishment under the Act for an offence committed by him against a seaman.* Kennedy *v.* Cowie [1891] 1 Q. B. 771; 60 L. J. (M. C.) 170. "*Seamen*" *in this section has the same meaning as in the* Merchant Shipping Acts, i.e., *persons actually employed or engaged on a ship, and not merely persons whose calling or occupation is the sea, but who are not actually employed or engaged on a ship.* R. *v.* Lynch [1898] 1 Q. B. 61; 67 L. J. (Q. B.) 59.

SECT. 4.

OFFENCES AS TO THE SALE OF FOOD AND DRUGS.

Common Law.

It is a misdemeanor at common law to sell food or drink with knowledge that it is dangerous or unfit for human consumption. *R.* v. *Dixon*, 3 M. & Sel. 11; 4 Camp. 12: *R.* v. *Mackarty*, 2 Ld. Raym. 1179; 3 Id. 487; cited *arguendo* 6 East, 126, 133, 141, criticized 2 East, P. C., ch. 18, s. 5: *R.* v. *Southerton*, 6 East, 126, 133, 141, explaining *R.* v. *Mackarty*: *R.* v. *Haynes* 4 M. & Sel. 214: *Shillito* v. *Thompson*, 1 Q. B. D. 12; 45 L. J. (M. C.) 18; *and see post, tit. Nuisance*, p. 1308. If death ensues from eating such food, the seller is indictable for manslaughter. *R.* v. *Stevenson*, 3 F. & F. 106: *R.* v. *Kempson*, Oxford Circuit, 1893; 28 L. J. Newsp. 477. Sale by a false description is indictable as a common law cheat (*ante*, p. 720), or under the *Merchandise Marks Act*, 1887 (*ante*, p. 1272), or as obtaining money by false pretences. *See ante*, pp. 691, 701. These common law offences are not abolished by the statutes set out below. *See* 38 & 39 Vict. c. 63, s. 28 (*post*, p. 1288).

Statutes.

NOTE.—*The ordinary procedure under the Acts relating to the sale of bread, food, and drugs is before a court of summary jurisdiction. Only those sections under which an indictment may be preferred are given below. As to the cases on the Acts*, see Bell, on Sale of Food and Drugs Acts (6th ed.).

38 & 39 *Vict. c.* 63 (*Sale of Food and Drugs Act*, 1875), *s.* 2.—*Definition of "drug."*]—. . . The term "drug" shall include medicine for internal or external use. . . . (*As to what is or is not a drug, see* Fowle *v.* Fowle, 18 Cox, 462; 60 J. P. 278: Houghton *v.* Taplin, 13 T. L. R. 386.)

62 & 63 *Vict. c.* 51 (*Sale of Food and Drugs Act*, 1899), *s.* 26.—*Definition of "food."*]—For the purposes of the *Sale of Food and Drugs Acts*, the expression "food" shall include every article used for food or drink by man other than drugs or water, and any article which ordinarily enters into or is used in the composition or preparation of human food, and shall also include flavouring matters and condiments.

38 & 39 *Vict. c.* 63, *s.* 3.—*Mixing food with ingredient injurious to health or selling food so mixed.—Second offence a misdemeanor.*]—No person shall mix, colour, stain or powder, or order or permit any other person to mix, colour, stain, or powder, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed,

coloured, stained, or powdered, under a penalty in each case not exceeding fifty pounds for the first offence. Every offence, after a conviction for a first offence, shall be a misdemeanor, for which the person, on conviction, shall be imprisoned for a period not exceeding six months with hard labour.

Sect. 4.—*Mixing drug with injurious ingredient or selling drug so mixed.—Second offence a misdemeanor.*]—No person shall, except for the purpose of compounding as hereinafter described, mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any drug with any ingredient or material so as to affect injuriously the quality or potency of such drug, with intent that the same may be sold in that state, and no person shall sell any such drug so mixed, coloured, stained, or powdered, under the same penalty in each case respectively as in the preceding section for a first and subsequent offence.

Sect. 5.—*Exemptions.*]—Provided that no person shall be liable to be convicted under either of the two last foregoing sections of this Act in respect of the sale of any article of food, or of any drug, if he shows to the satisfaction of the justice or court before whom he is charged that he did not know of the article of food or drug sold by him being so mixed, coloured, stained, or powdered as in either of those sections mentioned, and that he could not with reasonable diligence have obtained that knowledge.

Sect. 8.—*Further exemptions.—Labels.*]—Provided that no person shall be guilty of any such offence as aforesaid (*see* s. 3) in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed. [*See Batchelour* v. *Gee*, 30 T. L. R. 506.]

62 & 63 *Vict. c.* 51, *s.* 12.—*Labels.*]—The label referred to in s. 8 of the *Sale of Food and Drugs Act*, 1875 (*supra*), shall not be deemed to be distinctly and legibly written or printed within the meaning of that section unless it is so written or printed that the notice of mixture given by the label is not obscured by other matter on the label: Provided that nothing in this enactment shall hinder or affect the use of any registered trade mark, or of any label which has been continuously in use for at least seven years before the commencement of this Act (1*st Jan.*, 1900): but the Controller-General of Patents, Designs, and Trade Marks shall not register any trade mark purporting to describe a mixture unless it complies with the requirements of this enactment.

38 & 39 *Vict. c.* 63, *s.* 28.]—Nothing in this Act contained shall affect the power of proceeding by indictment or take away any other remedy against any offender under this Act, or in any way interfere with contracts and bargains between individuals, and the rights and remedies belonging thereto. . . . (*Cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160.)

38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *ss.* 116-119.—*Summary proceedings for sale of unsound meat, etc., intended for food of man.*

54 & 55 *Vict. c.* 76 (*Public Health (London) Act*, 1891), *s.* 47.—*Similar provisions as to the sale of unsound food in London.*]—See R. *v.* Dennis [1894] 2 Q. B. 458; 63 L. J. (M. C.) 153 (*where the defendant had elected to be tried on indictment*). R. *v.* Dennis was *criticized* in Grivell *v.* Malpas [1906] 2 K. B. 32; 75 L. J. (K. B.) 647. And see R. *v.* Puck & Co., 76 J. P. 487; 29 T. L. R. 11; Hewitt *v.* Hattersley [1912] 3 K. B. 35; 81 L. J. (K. B.) 878; 23 Cox, 121; 107 L. T. 228; 76 J. P. 369; 28 T. L. R. 433.

62 & 63 *Vict. c.* 51, *s.* 19.—*Time for proceedings and regulations as to summons.*]—(1) When any article of food or drug has been purchased from any person for test purposes, any prosecution under the *Sale of Food and Drugs Act* in respect of the sale thereof, notwithstanding anything contained in s. 20 of the *Sale of Food and Drugs Act*, 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase. [*The prosecution is instituted when the information is laid.* Brooks *v.* Bagshaw [1904] 2 K. B. 798; 73 L. J. (K. B.) 839; 68 J. P. 514.]

(2) In any prosecution under the *Sale of Food and Drugs Acts* the summons shall state particulars of the offence or offences alleged, and also the name of the prosecutor, and shall not be made returnable in less time than fourteen days from the day on which it is served, and there must be served therewith a copy of any analyst's certificate obtained on behalf of the prosecutor. (*See McQueen* v. *Jackson* [1903] 2 K. B. 163; 72 L. J. (K. B.) 606.)

62 & 63 *Vict. c.* 51, *s.* 20.—*Defence of warranty.*]—(1) A warranty or invoice shall not be available as a defence to any proceeding under the *Sale of Food and Drugs Acts* unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person. (2) The person by whom such warranty or invoice is alleged to have been given shall be entitled to appear at the hearing and to give evidence, and the Court may, if it think fit, adjourn the hearing to enable him to do so. (3) A warranty or invoice given by a person resident outside the United Kingdom shall not be available as a defence in any proceeding under the *Sale of Food and Drugs Acts* unless the defendant proves that he had taken reasonable steps to ascertain and did in fact believe in the accuracy of the statement contained in the warranty or invoice. (4) Where the defendant is a servant of the person who purchased the article under a warranty or invoice, he shall, subject to the provisions of this section, be entitled to rely on s. 25 of the *Sale of Food and Drugs Act*, 1875, and s. 7 of the *Margarine Act*, 1887 (50 & 51 Vict. c. 29), in the same way as his employer or master would have been entitled to do if he had been the defendant, provided that the servant further proves that

he had no reason to believe that the article was otherwise than that demanded by the prosecutor. (5) Where the defendant in a prosecution under the *Sale of Food and Drugs Acts* has been discharged under the provisions of s. 25 of the *Sale of Food and Drugs Act*, 1875, as amended by this Act, any proceedings under the *Sale of Food and Drugs Act* for giving the warranty relied on by the defendant in such prosecution may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given. (6) Every person who, in respect of any article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true. (*For the effect of the section*, see Manners *v.* Tyler [1902] 1 K. B. 585; 71 L. J. (K. B.) 385 : Whitaker *v.* Pomfret [1902] 1 K. B. 661; 71 L. J. (K. B.) 353 : Irving *v.* Callow Park Dairy Co., Ltd., 66 J. P. 804 : Oatley *v.* Lemon, 92 L. T. 200; 69 J. P. 163; 20 Cox, 791 : Thomas *v.* Houghton [1911] 2 K. B. 959; 81 L. J. (K. B.) 21; 22 Cox, 628; 75 J. P. 523; Chuter *v.* Freeth & Pocock [1911] 2 K. B. 832; 80 L. J. (K. B.) 1322; 105 L. T. 238; 22 Cox, 573; 75 J. P. 430; 27 T. L. R. 467 : Retail Dairy Co. *v.* Clarke [1912] 2 K. B. 388; 81 L. J. (K. B.) 845; 23 Cox, 6; 106 L. T. 848; 76 J. P. 282; 28 T. L. R. 361; Jackling *v.* Carter, 23 Cox, 54; 107 L. T. 24; 76 J. P. 292 : Marcus *v.* Crook [1914] 3 K. B. 173; 30 T. L. R. 538.)

CHAPTER VI.

OFFENCES AGAINST PUBLIC MORALS AND POLICE.

SECT. 1.

(i.) BIGAMY.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 57.—*Definition and punishment of bigamy.*]—"Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere (*a*), shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years;"

[The words "or elsewhere" mean "in any other part of the world," and are not confined to the King's dominions. *Earl Russell's case* [1901] A. C. 446; 70 L. J. (K. B.) 998; 20 Cox, 51. A British subject resident in England was held to be liable to be indicted and convicted of bigamy in England though both marriages were solemnized in Scotland. *R.* v. *Topping*, Dears. 647; 25 L. J. (M. C.) 72, decided under 9 Geo 4, c. 31, s. 22, of which this section is a re-enactment.]

Venue.]—"And any such offence may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place;

"Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of his Majesty or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." [*Bigamy was first made felony* by 1 Jac. 1, c. 11, *repealed and re-enacted by* 9 G. 4, c. 31, s. 22, *which is reproduced in the above enactment. The Act of James applied only to second marriages within England and Wales.* Kel. (J.) 79, 80 : 1 Hawk. c. 42, s. 5. *It excepted marriage after divorce* a mensâ et thoro; 1 Hale, 694; *and marriages within the age of consent.* 3 Co. Inst. 59. See post, p. 1298.]

4 & 5 *Geo.* 5, *c.* 58 (*Criminal Justice Administration Act*, 1914), *s.* 28 (3).]—The wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence and without the consent of the person charged.

(*a*) As to the powers of colonial legislatures to punish extra-territorial bigamy, *see McLeod* v. *Att.-Gen. for N. S. W.* [1891] A. C. 453: *Re Bigamy Laws of Canada*, 26 Canada, 461; *R.* v. *Hilaire* [1903] 3 N. S. W. State Rep. 228: *R.* v. *Brinkley* [1907] 12 Canada Cr. Cas. 454.

Indictment.

THE KING *v.* A. B.

Central Criminal Court.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Bigamy, contrary to section 57 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, married C. D. during the life of his wife, E. F.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 Vict. c. 100, s. 57; 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *As to recognizances and sureties for keeping the peace*, 24 & 25 Vict. c. 100, s. 71 (ante, p. 865).

This offence is not triable at quarter sessions. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence for the Prosecution.

The following matters must be proved on the part of the prosecution :— 1. *Celebration of the first marriage and identity of the parties.* 2. *Validity of the first marriage.* 3. *That it subsisted at the date of the second marriage.* 4 *Celebration of the second marriage.* The first wife or husband was not a competent witness for the prosecution on any part of the case, either at common law (1 Hawk. c. 42, s. 8) or under the *Criminal Evidence Act*, 1898 (*ante*, pp. 458 *et seq.*) *R.* v. *Green*, Hertford Assizes, Nov. 18, 1889, 34 L. J. Newsp. 622, Wills, J. But the law in this respect has now been altered by 4 & 5 Geo. 5, c. 58, s. 28 (3) (*ante*, p. 1292), and the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence and without the consent of the person charged. Such wife or husband is not, however, a compellable witness against the person charged. *R.* v. *Leach* [1912] A. C. 305; 81 L. J. (K. B.) 616; 22 Cox, 721 (decided on similar words in 61 & 62 Vict. c. 36 (*Criminal Evidence Act*, 1898), s. 4, sub-s. 1, *ante*, p. 465).

1. Celebration of the first marriage.]—It is immaterial when or where the first marriage was celebrated, whether in England or elsewhere, 2 Hale, 692; 1 Hawk. c. 42, s. 7; 3 Chit. Cr. L. 720.

There must be evidence of celebration: as evidence of acknowledgment, cohabitation or repute will not suffice. *Morris* v. *Miller*, 4 Burr. 2057, 2058, Lord Mansfield, C.J. *In R.* v. *Wilson*, 3 F. & F. 119, 122 n., however, the

contrary seems to have been decided. To prove the celebration, it is not essential to prove that banns were published or a licence obtained or the marriage registered; *R.* v. *Allison*, R. & R. 109: *R.* v. *Manwaring*, 26 L. J. (M. C.) 10; and it is sufficient to call a person present at the ceremony, who can describe it so as to enable the judge to determine whether it would constitute a marriage in law; *R.* v. *Allison* (*supra*): *R.* v. *Millis*, 10 Cl. & F. 534; and can identify the parties. *R.* v. *Manwaring* (*supra*): *R.* v. *Simpson*, 15 Cox, 323. Since the establishment of a complete system of registration of marriages it is, however, now simpler and more satisfactory, and more usual to prove the celebration by a certified copy of the marriage register obtained from the general register office, or from the custodian of the particular register.

Identity.]—Evidence of the identity of the parties must also be given, and should be by persons who were present at the ceremony, or have other adequate means of knowing the parties to the marriage. Identification by photograph has been allowed; *R.* v. *Tolson*, 4 F. & F. 103; but is unsatisfactory, and in matrimonial cases is not acted on unless corroborated by other evidence. *Frith* v. *Frith* [1896] Prob. 74; 65 L. J. (P.) 53. Proof from the register of marriages that a person of the same name as the prisoner married R., and that the prisoner had subsequently cohabitated with R., and acknowledged and alluded to her as his wife, has been held to be sufficient evidence of identification. *R.* v. *Birtles*, 75 J. P. 288; 27 T. L. R. 402.

The special modes of proving marriages by particular ceremonies are as hereunder stated.

Marriage in Church of England.]—If celebrated in England, according to the rites of the Established Church, the marriage may be proved by the production of the original register of the marriage from the proper custody, that is, from the church itself, or from the custody of the "rector, vicar, curate or other officiating minister;" *Doe* v. *Fowler*, 14 Q. B. 700; or by a copy thereof, or extract therefrom, provided it is proved to be an examined copy or extract or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; 14 & 15 Vict. c. 99, s. 14 (*ante*, p.): *Sayer* v. *Glossop*, 2 C. & K. 694: *Re Hall's Estate*, 22 L. J. (Ch.) 177: *Re Porter's Trusts*, 25 L. J. (Ch.) 688; together with some proof either direct or presumptive of the identity of the parties. *See ante*, p. .

Where it was proved that the marriage was solemnized, not in the parish church, but in a chamber in a building a few yards from the church, while the church was under repair, and it was further proved that divine service had several times been performed in the building in question, it was held that the building must be presumed to have been licensed, and that therefore the marriage might properly be solemnized there. *R.* v. *Cresswell*, 1 Q. B. D. 446; 45 L. J. (M. C.) 77. As to marriages by banns in chapels, *see R.* v. *Bowen*, 2 C. & K. 227.

With respect to the places where the banns may be published and a marriage solemnized, *see the Marriage Acts* of 1823 (4 G. 4, c. 76), 1825 (6 G. 4, c. 92), and 1836 (6 & 7 W. 4, c. 85). The non-residence of the parties where the

banns were published, or, if the marriage was by licence, where the marriage was solemnized, is immaterial. 4 G. 4, c. 76, s. 26; *R.* v. *Hind*, R. & R. 253; 19 & 20 Vict. c. 119, s. 17. The Act of 1823 (4 G. 4, c. 76) does not apply to marriages beyond sea or in Scotland. *See R.* v. *Topping*, Dears. 647.

As to marriages of illegitimate children by licence in England, *see Priestly* v. *Hughes*, 11 East, 1.

In Church of Rome.]—Where the marriage to be proved has been celebrated in accordance with the rites of the Church of Rome, in some part of the United Kingdom, it is not sufficient to prove the marriage by a certificate from the officiating priest; but it is also necessary to prove that the statutory requirements in the case of such marriages have been complied with; *i.e.*, that the marriage has been celebrated (1) in the presence of the registrar under 6 & 7 W. 4, c. 85, s. 20, or (2) in accordance with the *Marriage Act*, 1898 (61 & 62 Vict. c. 58). In *R.* v. *Savage*, 13 Cox. 178, it was held by Lush, J., that in an indictment for bigamy everything must be proved most strictly, and therefore that evidence of the first marriage in Scotland, by a Roman Catholic priest who had many times previously performed similar ceremonies there, would not suffice, without proof of the law of Scotland as to such marriage, and this decision was followed by Walton, J., in *R.* v. *Lindsay*, 66 J. P. 505; 18 T. L. R. 761; *and see R.* v. *Povey*, Dears. 32; 22 L. J. (M. C.) 19; 6 Cox, 83 (*post*, p. 1300). But where the only evidence of the second marriage was that of the second wife, who proved that she had been married to the prisoner in the State of Illinois by a Roman Catholic priest according to the rites of his Church, this was held to be sufficient evidence of the second marriage, without proof of the law of that state relating to marriage. *R.* v. *Griffin*, 14 Cox, 308; 4 L. R. Ir. 497. Where the first marriage was celebrated abroad, it is submitted that evidence should be given to prove that a religious marriage according to the rites of the Church of Rome was accepted as valid by the civil authorities of the state in which it was celebrated. But in *R.* v. *Brampton*, 10 East, 282; followed in *R.* v. *Griffin* (*supra*), it would seem to have been considered that proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it, so as to throw upon the defendant the onus of impugning its validity. Where a man and woman were married in Ireland with the ceremonies making a marriage of Roman Catholics valid, they declaring themselves to be Roman Catholics, it was held that the man could not, on an indictment for bigamy, set up his alleged Protestantism to defeat such marriage. *R.* v. *Orgill*, 9 C. & P. 80.

In Greek Church.]—A first marriage in England according to the rites of the Greek Church must be proved under the *Marriage Act*, 1898 (61 & 62 Vict. c 58), if the marriage took place under the provisions of that Act, otherwise a proof of marriage in the presence of or before a registrar (6 & 7 W. 4, c. 85, s. 20) will be necessary to establish the validity of the marriage in England. *See Greek Marriages Act*, 1884 (47 & 48 Vict. c. 20). Where the second

marriage was according to the Greek rite, it is submitted that it is enough to prove celebration (*see post*, p. 1303).

Of Jews.]—Marriages between persons of the Jewish faith were excepted from 4 G. 4, c. 76 (*see* s. 31), and 61 & 62 Vict. c. 58 (*see* s. 13); but are provided for by 6 & 7 W. 4, c. 85, ss. 2, 16, 39; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, ss. 20-22. As to such marriages, *see Lindo* v. *Belisario*, 1 Hagg. Consist. Rep. 216; *Goldsmid* v. *Bromer*, *Id.* 324: *Ruding* v. *Smith*, 2 Hagg. Consist. Rep. 371; 1 St. Tr. (N. S.) 1053, 1064, 1065, Lord Stowell: *R.* v. *Millis*, 10 Cl. & F. 534; 8 Eng. Rep. 844. Where the marriage is alleged to have been celebrated according to Jewish law, it has been ruled that evidence must be given of a written contract between the parties; *Horn* v. *Noel*, 1 Camp. 61: *R.* v. *Althausen*, 17 Cox, 630: *R.* v. *Nasillski*, 61 J. P. 520: *R.* v. *Weinberg*, 33 L. J. Newsp. 239; and that the witnesses of the marriage were not blood relations of the parties. These rulings are doubtful, and seem inconsistent with *Lindo* v. *Belisario*, 1 Hagg. Consist. Cas. 227, and *Nathan* v. *Woolf*, 15 T. L. R. 250. *See* Henriques, Jewish Marriages and the English Law, p. 48. Even if good law, the rulings do not apply when the marriage has been registered under an Act of Parliament, and must be limited to Jewish marriages celebrated abroad. Jews domiciled in England cannot validly contract a marriage within the degrees prohibited by English law. *Re De Wilton* [1900] 2 Ch. 481; 69 L. J. (Ch.) 717; 1 Russ. Cr. (7th ed.) 998.

Of Quakers.]—Marriages between Quakers (*see Deane* v. *Thomas*, M. & M. 361) are excepted from 4 G. 4, c. 76 (*see* s. 31), and 61 & 62 Vict. c. 58 (*see* s. 13); but are provided for by 6 & 7 W. 4, c. 85, ss. 2, 16, 39; 3 & 4 Vict. c. 72, s. 5; 19 & 20 Vict. c. 119, ss. 20, 21; 23 & 24 Vict. c. 18; 35 & 36 Vict. c. 10. The two last-mentioned Acts apply even when one only or neither of the parties is a Quaker.

Of Protestant dissenters.]—Where the marriage was celebrated under the *Marriage Act*, 1898 (61 & 62 Vict. c. 58), in a registered building without the presence of the registrar, it may be proved by a certified copy from the general register office given under 6 & 7 W. 4, c. 86, s. 38, or by a certified copy given by the minister in charge of the register belonging to the building.

Where the marriage was celebrated in a registered building in the presence of the registrar under ss. 18-21 of the *Marriage Act*, 1836 (6 & 7 W. 4, c. 85), it may be proved by certified copies of the register from the general registry office at Somerset House (6 & 7 W. 4, c. 86, s. 38), or from the registrar who has custody of the original register (*Id.* s. 35).

Where the marriage was solemnized under 6 & 7 W. 4, c. 85, the certificate authorized by the 7th section of that Act (*now rep.*), and under 6 & 7 W. 4, c. 86, s. 38, coupled with evidence of the identity of the parties by persons present at the marriage, was held to be sufficient *primâ facie* evidence of a valid marriage. *R.* v. *Hawes*, 1 Den. 270; 2 Cox, 432. Proof of marriage before a registrar, or in a chapel not duly licensed, has been held sufficient. *R.* v. *Tilson*, 1 F. & F. 54. Proof that the marriage took place in a dissenting chapel,

in the presence of the registrar, that the entry in the registrar's book was signed by a person who proved the fact of the marriage, as a witness to the marriage, and that the parties afterwards cohabited for some years, was held to be sufficient *primâ facie* evidence that the chapel was duly registered, and was a place in which marriages might be lawfully solemnized under the above Act. *R.* v. *Manwaring*, Dears. & B. 132; 26 L. J. (M. C.) 10. So where it was proved that the marriage was celebrated in a dissenting chapel by a dissenting minister in the presence of the registrar of the district and two witnesses, and the certificate was produced, it was held unnecessary to prove that the chapel was registered. *R.* v. *Cradock*, 3 F. & F. 837.

By registrar.]—A marriage solemnized before a registrar under s. 21 of the *Marriage Act*, 1836 (6 & 7 W. 4, c. 85), may be proved by certified copies under ss. 35 or 38 of the *Births, Deaths and Marriages Registration Act*, 1836 (6 & 7 W. 4, c. 86), coupled with proof of the identity of the parties. As to certificates of marriages in the presence of the registrar and in buildings registered under s. 18 of the *Marriage Act*, 1836, *vide supra*.

Marriages in Scotland.]—Regular marriages in Scotland are best proved by certified extracts from the marriage register given under 17 & 18 Vict. c. 80, ss. 56, 58, 62; 18 Vict. c. 29; and 23 & 24 Vict. c. 85, which, if authenticated as required, are admissible in evidence in all parts of the King's dominions. *See* 10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 32, *s.* 1; *see also Lyell* v. *Kennedy* [1889] 14 App. Cas. 437, 449.

Marriages in Ireland.]—A marriage in Ireland, if according to the rites of the Church of Rome, is best proved by certified copies from the general register office or the superintendent registrar of the district in which the marriage was celebrated: 26 & 27 Vict. c. 90, ss. 17, 18. Marriages in Ireland (other than Roman Catholic) are best proved by certified copies of the register under 7 & 8 Vict. c. 81, ss. 68, 69, 70.

Marriages abroad.]—A marriage celebrated abroad may be proved by any person who was present at it; circumstances should also be proved from which the jury may infer that it was a valid marriage according to the laws of the country in which it was celebrated, or according to the national law of the parties if celebrated outside the state to which they belong. On this subject oral but not written evidence by experts is admissible. *Sussex Peerage Claim*, 6 St. Tr. (N. S.) 79; 11 Cl. & F. 85: 8 Eng. Rep. 1034. As to French marriages, *see Lacon* v. *Higgins*, D. & R. (N. P.) 38; 3 Stark (N. P.) 178. Marriages celebrated abroad by British officials under the *Foreign Marriage Act*, 1892 (55 & 56 Vict. c. 23), are proved under s. 13 of that Act.

2. Validity of the marriage.]—The second marriage is not bigamous unless the first marriage was valid; and the validity of the first marriage must be proved by the prosecution: *R.* v. *Kay*, 16 Cox, 292; for the law will not presume

it in the case of bigamy, as it will in civil cases. *Smith* v. *Huson*, 1 Phillimore, 287. And the first marriage must also have been a monogamous marriage as understood in Christian countries. *See Ardaseer Cursetjee* v. *Perozeboye*, 10 Moore P.C. 575; 14 Eng. Rep. 533: *Re Ullee*, 54 L. T. (N. S.) 286: *Re Bethell*, 38 Ch. D. 220; 56 L. J. (Ch.) 334: *Hyde* v. *Hyde*, L. R. 1 P. & D. 130; 35 L. J. (P. & M.) 57: *Brinkley* v. *Att.-Gen.*, 15 P. D. 76; 57 L. J. (Ch.) 487; Mayne, Ind. Cr. L. (ed. 1896), p. 772; Dicey, Conflict of Laws (2nd ed.).

In *R.* v. *Newton*, 2 M. & Rob. 503, the prisoner's admission of a prior marriage was held to be evidence that it was lawfully solemnized. *See* same case reported as *R.* v. *Simmonsto*, 1 C. & K. 164; and as *R.* v. *Simmonite*, 1 Cox, 30. But in *R.* v. *Savage*, 13 Cox, 178, Lush, J., refused to act upon *R.* v. *Newton*, as being inconsistent with the *Sussex Peerage Claim*, 11 Cl. & F. 85, 134; 8 Eng. Rep. 1034; and held that the prisoner's admission upon being apprehended that he had been married to his first wife in Scotland, was no evidence that that marriage had been lawfully solemnized, and this view seems to be supported by *R.* v. *Truman*, 1 East, P. C. 470: *R.* v. *Flaherty*, 2 C. & K. 782, and was adopted by Walton, J., in *R.* v. *Lindsay*, 66 J. P. 505; 18 T. L. R. 761.

Proof.]—The validity of a marriage *in point of form* is substantially the same as due celebration, and in the case of a marriage in England no further proof is needed except that the persons married were not within the prohibited degrees, or were not already married. If the defence seeks to defeat the validity of the marriage by setting up an earlier and subsisting marriage of one of the parties, they must prove it. *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. Rep. 54: *R.* v. *Millis*, 10 Cl. & F. 504; 8 Eng. Rep. 844.

It was decided in *R.* v. *Millis* (*supra*) that by the common law of England a marriage between British subjects is void unless solemnized in the presence of a person in holy orders or episcopally ordained in the Anglican, Greek, or Roman Churches, and therefore that all marriages not so solemnized in those parts of the British dominions to which the *Marriage Act*, 26 G. 2, c. 33 (*rep.*), did not extend, were void, and would not subject the parties, if they afterwards contracted a second marriage in the lifetime of both parties, to the penalties of bigamy. The decision in *R.* v. *Millis* has been much doubted, but binds English courts in cases where a statutory authority for the form of marriage in question does not exist. *See* Dicey, Conflict of Laws (2nd ed.), 621, *note (i)*. *See also Lautour* v. *Teesdale*, 8 Taunt. 830: *Re McLoughlin*, 1 L. R. Ir. 421. A priest in holy orders cannot lawfully solemnize a marriage between *himself* and another person. *Beamish* v. *Beamish*, 9 H. L. C. 274; 11 Eng. Rep. 735.

A marriage is valid at common law if celebrated on a British ship at sea by an episcopally-ordained minister; *Culling* v. *Culling* [1896] Prob. 116; 63 L. J. (P.) 59: *Du Moulin* v. *Druitt*, 13 Ir. C. L. Rep. 212; or on a British ship in accordance with the *Foreign Marriage Act*, 1892 (55 & 56 Vict. c. 23); or within the lines of the British army in a foreign country, if celebrated by an episcopally-ordained minister and if one party is subject to military law.

R. v. *Brampton (Inhabitants)*, 10 East, 282 : *Burn* v. *Farrar*, 2 Hagg. Consist. Rep. 369 : *Ruding* v. *Smith*, 2 Id. 371; 1 St. Tr. (N. S.) 1053 : *Waldegrave Peerage Claim*, 4 Cl. & F. 649. Such a marriage is also valid if celebrated as prescribed by the *Foreign Marriage Act*, 1892, s. 22.

A marriage abroad between British subjects is not valid at common law if celebrated before a layman (*Catherwood* v. *Caslon*, 13 M. & W. 261; *but see Catterall* v. *Catterall*, 1 Rob. Eccl. 304; 3 Id. 580 : *Burt* v. *Burt*, 29 L. J. (Matr.) 133); but may be validly celebrated by a marriage officer under the *Foreign Marriage Act*, 1892 (55 & 56 Vict. c. 23). As to forms and regulations, *see* Stat. Rules and Orders Revised (ed. 1904), vol. 8, tit. Marriage, p. 36.

To be valid the marriage, if contracted in England, must have been celebrated in a manner recognized by the law of England and between persons capable of contracting marriage, and who might lawfully intermarry; and if contracted elsewhere must have been according to the *lex loci contractûs*, or if contracted abroad must be valid under English law as to such marriages so contracted (55 & 56 Vict. c. 23, s. 19), or if celebrated in England not in accordance with English law, then only if celebrated in a foreign embassy or embassy chapel between subjects of the ambassador's sovereign. *Ruding* v. *Smith*, 2 Hagg. Consist. Rep. 371; 1 St. Tr. (N. S.) 1066 : *Pertreis* v. *Tondear*, 1 Hagg. Consist. Rep. 136. The latter class of marriage is treated as extra-territorial. Dicey, Conflict of Laws (2nd ed.), 618 *et seq.*

Consent.]—It is not necessary in order to establish the validity of a marriage in England between parties, of whom one or both are minors, to prove that the consent of parent or guardian required by law has been given. *See Marriage Act*, 1823 (4 G. 4, c. 76), s. 14 : *R.* v. *Birmingham*, 8 B. & C. 29 : *Marriage Registration Act*, 1856 (19 & 20 Vict. c. 119), s. 17, which applies to marriages celebrated under that Act or the Acts of 1836 (6 & 7 W. 4. c. 85), 1837 (7 W. 4, & 1 Vict. c. 22), and 1840 (3 & 4 Vict. c. 72) : *Prowse* v. *Spurway*, 46 L. J. (Prob.) 49. In the case of an illegitimate minor for whom no guardian has been appointed, no consent has ever been needed. *Horner* v. *Horner*, 1 Hagg. Consist. Rep. 337 : *Priestley* v. *Hughes*, 11 East, 1 (*and see* 4 G. 4, c. 76, ss. 14, 16, 17.). In the case of a marriage in a foreign country where the consent of parents, etc., is necessary for a valid marriage, it is submitted that such consent must be proved on a prosecution in England for bigamy.

If the marriage was celebrated in England, under English law, between foreigners not domiciled here, and in defiance of their national law, it would seem to be valid for purposes of a prosecution for bigamy. But this cannot be treated as absolutely settled. *See Sottomayor* v. *De Barros*, 5 P. D. 94; 49 L. J. (P. D. & A.) 1 : *Scott* v. *Att.-Gen.*, 11 P. D. 128; 55 L. J. (P. D. & A.) 57 : *Warter* v. *Warter*, 15 P. D. 152; 59 L. J. (P. D. & A.) 87 : *Ogden* v. *Ogden* [1908] P. 46; 77 L. J. (P.) 34.

Effect of marriage in false name or without due notice.]—Under the *Marriage Act*, 1823 (4 G. 4, c. 76, s. 22), in order to invalidate a marriage for want of due publication of the banns, the misdescription in the banns

must be knowingly and wilfully consented to by both parties. The rule under *Lord Hardwicke's Act* (26 G. 2, c. 33, *rep.*) was different. *See R.* v. *Tibshelf*, 1 B. & Ad. 190 : *R.* v. *Wroxton*, 4 B. & Ad. 640 : *R.* v. *Clarke*, 10 Cox, 474; 15 W. R. 796. Upon a prosecution for bigamy it appeared that the first marriage was by banns, and that the prisoner on procuring the publication of the banns fraudulently misstated the name of his intended wife, and that she was married in that name. There being no affirmative evidence that the woman was unaware of the misstatement, it was held that the first marriage was void. *R.* v. *Kay*, 16 Cox, 292, Huddleston, B.; *sed quære*. Under the same enactment, to invalidate a marriage for want of a licence, it must be established affirmatively that at the time the ceremony was solemnized both the parties were cognizant of the fact that the licence had not issued, and, knowing that fact, that they wilfully intermarried. *Greaves* v. *Greaves*, 41 L. J. (P. & M.) 66. To render a marriage invalid within 6 & 7 W. 4, c. 85, s. 42, which enacts, "that if any persons shall knowingly and wilfully intermarry under the provisions of this Act (*inter alia*), without due notice to the superintendent registrar, the marriage of such persons shall be null and void," it must be contracted with a knowledge by both parties that no due notice had been given; and therefore when one of the parties under s. 4 of the Act, which requires that the notice shall state (*inter alia*) the name and surname of each of the parties intending marriage, gave a notice stating therein a false christian name for such party, but it did not appear that that was done with the knowledge of the other party, the marriage was held to be valid. *R.* v. *Rea*, L. R. 1 C. C. R. 365; 41 L. J. (M. C.) 92 : *and see Re Knox*, 23 L. R. Ir. 542 : *R.* v. *Clarke* (*supra*). So also where a marriage notice given under 19 & 20 Vict. c. 119 was false to the knowledge of both parties as to the name of the woman and in other respects, the marriage was held to be valid. *Re Rutter* [1907] 2 Ch. 592; 77 L. J. (Ch.) 34.

Scotch marriages.]—As to what is necessary to constitute a valid marriage in Scotch law, *see R.* v. *Graham*, 2 Lew. 97 : *R.* v. *Savage*, 13 Cox, 178 : *Dalrymple* v. *Dalrymple* (*ante*, p. 1298); *Ruding* v. *Smith*, 1 St. Tr. (N. S.) 1053; 2 Hagg. Consist. Rep. 371, 376 : *Ilderton* v. *Ilderton*, 2 H. Bl. 145 : *Crompton* v. *Bearcroft*, Bull. (N. P.) 113 : *R.* v. *Povey*, Dears. 32; 22 L. J. (M. C.) 19 : *R.* v. *Topping*, Dears. 647; 25 L. J. (M. C.) 72; Fraser on Husband and Wife (2nd ed.). Gretna Green marriages were treated as valid in England until 1856, when they were made invalid unless celebrated in compliance with 19 & 20 Vict. c. 96. *Crompton* v. *Bearcroft* (*supra*) : *Lawford* v. *Davis*, 4 P. D. 61; 47 L. J. (P. D. & A.) 38. The validity of a Scotch marriage must be proved by an expert in Scots law. *R.* v. *Povey*, Dears. 32; 22 L. J. (M. C.) 19.

Irish marriages.]—In Ireland marriages between Protestant Episcopalians, or where one party is such, are regulated by 33 & 34 Vict. c. 110; between Presbyterians, by 7 & 8 Vict. c. 81; between Roman Catholics, by the law of their Church; *R.* v. *Orgill*, 9 C. & P. 80; 7 & 8 Vict. c. 81, s. 3; or in case of mixed marriages, by 33 & 34 Vict. c. 49, and 33 & 34 Vict. c. 110 : *and*

see Re Knox, 23 L. R. Ir. 542. These statutes override the decision in *R.* v. *Harley*, Carr. Supp. 254. As to the view of the Irish courts as to Irish law. *see R.* v. *Fanning*, 17 Ir. C. L. R. 289; 10 Cox, 411 (C. C. R.) : disapproved in *R.* v. *Allen*, L. R. 1 C. C. R. 367; 47 L. J. (N. S.) M. C. 97 : and in *R.* v. *Wright*, 28 Ir. L. T. R. 131, which followed *R.* v. *Allen*, *supra: R.* v. *Griffin*. 14 Cox, 308; 4 L. R. Ir. 497; and as to mixed marriages, *see R.* v. *Sunderland*, 2 Lew. 109.

Foreign marriages.]—In addition to proof of celebration, expert evidence as to the validity of the marriage must be called. *R.* v. *Naguib* [1917] 1 K. B. 359; 86 L. J. (K. B.) 709; 81 J. P. 116; 25 Cox 712; 12 Cr. App. R. 187. And this applies equally to the defendant who relies on a foreign marriage as a defence to the charge of bigamy. *Id.* Marriages between Christians in the Ottoman empire are valid if in accordance with the ecclesiastical law of their communion. *Parapano* v. *Happaz* [1894] A. C. 165. But such a marriage abroad between persons domiciled in England would appear to be insufficient to support a prosecution for bigamy. *Mette* v. *Mette*. 28 L. J. (Matr.) 117; 1 Sw. & Tr. 416; *Dicey*, Conflict of Laws (2nd ed.), 633.

Colonial marriages.]—The validity of marriages in a British possession should be proved by an expert in the law of the colony (*see ante*, p. 405, and *Westlake* v. *Westlake* [1910] P. 167; 79 L. J. (P.) 36) except in the case of Church of England marriages. *Perry* v. *Perry* [1920] P. 361.

Void and voidable marriages.]—A marriage between persons within the prohibited degrees of consanguinity or affinity is absolutely void under *Lord Lyndhurst's Act* (5 & 6 W. 4, c. 54) if celebrated in England; *R.* v. *Chadwick*. 11 Q. B. 173; 17 L. J. (M. C.) 33; 2 Cox, 381; or if celebrated abroad between British subjects who at the time of celebration were domiciled in England. *Re De Wilton* [1900] 2 Ch. 481: *Brook* v. *Brook*, 9 H. L. C. 193; 11 Eng. Rep. 703. It would seem that if a marriage was validly celebrated in the country of the husband's domicile between persons who are within the prohibited degrees of consanguinity or affinity according to English law, the parties would be indictable in England on a second marriage there, as the first marriage would be valid in England for succession to personalty (*Brook* v. *Brook*, *supra*); though not for succession to realty. In 1898 a domiciled Englishwoman went through a ceremony of marriage in England with P., a domiciled Frenchman. This marriage was annulled by the French Court in 1901, and P. subsequently married a Frenchwoman in France. In 1904 the Englishwoman went through a ceremony of marriage in England with O., a domiciled Englishman, describing herself as a widow. Held, that the *lex loci contractus* must prevail, and that this later marriage was bigamous and must be annulled at the suit of O. *Ogden* v. *Ogden* [1908] P. 46; 77 L. J. (P.) 34. Proof of a marriage which is *voidable* merely, will support an indictment for bigamy. 3 Co. Inst. 88. Thus a marriage by a minor in Ireland, without consent, which by the *Irish Marriage Act* was voidable only within a year, will support a conviction for bigamy, if the marriage is not vacated (*R.* v. *Jacobs*, 1 Mood.

140), and the same rule applies to a marriage voidable for impotence of one of the parties. *B., alias A.* v. *B.*, 27 L. R. Ir. 587, 608. But it is otherwise if the marriage is not voidable merely, but void; as, for instance, if a woman marries A., and in the lifetime of A. marries B.; and after the death of A., and whilst B. is alive, she marries C., she cannot be indicted for bigamy, in her marriage with C., because her marriage with B. was a mere nullity. 1 Hale, 693. And so if a man marries A., and in the lifetime of A. marries B., and afterwards in the lifetime of A. and B., marries C., he cannot be indicted for bigamy in marrying C., his wife "B." being then alive, because the marriage with B. was void. *See R.* v. *Willshire*, 6 Q. B. D. 366; 50 L. J. (M. C.) 57. So the marriage of an idiot, or of a lunatic not in a lucid interval, is void, because he is deemed in law incapable of entering into such a contract, 1 Bl. Com. 438, 439 : *Durham (Earl)* v. *Durham (Countess)*, 10 P. D. 80. The law on this subject is fully considered in Wood Renton on Lunacy, 17-28. If a boy under fourteen or a girl under twelve contracts matrimony it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. Co. Litt. 79. See *R.* v. *Gordon*, R. & R. 48.

In 1864 W. married A. In 1868 he was charged with bigamy in marrying B in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive. It was held that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C. *R.* v. *Willshire*, 6 Q. B. D. 366; 50 L. J. (M. C.) 57. *See also R.* v. *Lumley, infra.*

3. That the first marriage was subsisting.]—On the trial of an indictment for bigamy the prosecution must prove the fact that the first wife (or husband) was alive at the date of the second marriage. This may be done by some one who was acquainted with him or her, or saw him or her at the time of the second marriage or afterwards, or by his or her production in court and identification as the first husband or wife. The existence of the first husband or wife at a period *antecedent* to the second marriage may or may not afford a reasonable inference that he or she was living *at the time* of the second marriage. If, for example, it was proved that he or she was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he or she was living on the day of the second marriage, and the jury would in all probability find that he or she was so. If, on the other hand, it was proved that he or she was in a dying condition on the day preceding the second marriage, and nothing further was proved, they would probably decline to draw the inference that he or she was living on the day of the second marriage. The question is entirely for the jury, and the law makes no presumption either way. R. v. *Lumley*, L. R. 1 C. C. R. 196; 38 L. J. (M. C.) 86. Therefore, where, on the trial of a woman for bigamy,

the proof was that the second marriage took place in 1847, and that the first husband had been last seen alive in 1843, and the judge directed the jury that, there being no circumstances leading to any reasonable inference that he had died, he *must* be presumed to have been living at the date of the second marriage, this direction was held to be erroneous, and the jury having found the prisoner guilty, the conviction was quashed. *Id.* *See also* *R.* v. *Willshire*, *ante*, p. 1302.

Though the defendant cannot be convicted unless the jury are satisfied that the defendant knew that the first wife (or husband) was alive, the prosecution need not as a general rule prove this affirmatively. *R.* v. *Jones*, 11 Cox, 358: *R.* v. *Ellis*, 1 F. & F. 309: *and see post*, p. 1305.

The defence may prove that the first marriage was validly dissolved before the celebration of the second. *See post*, p. 1305.

A marriage is a subsisting marriage even after a decree *nisi* for its dissolution and until the decree is made absolute. *Hulse* v. *Hulse*, L. R. 2 P. & D. 259; 40 L. J. (N. S.) P. & M. 51.

4. The subsequent marriage.]—The prosecutor must prove the defendant's subsequent marriage with M. Y. (*i.e.*, that the defendant went through a form of marriage with M. Y.). Though the subsequent marriage would have been void, as for consanguinity or the like, the defendant is guilty of bigamy. *R.* v. *Brawn*, 1 C. & K. 144.

Where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute (24 & 25 Vict. c. 100, s. 57, *ante*, p. 1292) by reason of any special circumstances, which independently of the bigamous character of the marriage may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case. *R.* v. *Allen*, L. R. 1 C. C. R. 367, 369; 41 L. J. (M. C.) 101. And therefore where A., having a wife living, married another woman, to whom he stood within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void under 5 & 6 W. 4, c. 54, s. 2, he was held to be guilty of bigamy. *Id.* (*a*).

Under the Act of James I. the second marriage must have been proved to have taken place in England; for it is the second marriage which constitutes the offence ((1 Hale, 692, 693); but under the present enactment (*ante*, p. 1292) it is immaterial whether the second marriage takes place in England, or elsewhere, provided that, if the second marriage takes place out of England, the defendant is a subject of his Majesty. *Earl Russell's case* [1901] A. C. 446; 70 L. J. (K. B.) 998; 20 Cox, 51. The celebration of the second marriage is proved in the same manner as that of the first (*ante*, pp. 1293 *et seq.*). Proof

(*a*) *R.* v. *Fanning*, 17 Ir. C. L. R. 289; 10 Cox, 411, in which the Irish Court of Criminal Appeal held that to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, was fully considered in *R.* v. *Allen*, *supra*, and disapproved.

of marriage merely by evidence of acknowledgment, cohabitation, or reputation is insufficient. 1 Hawk. c. 42, s. 9 (*and see ante*, p. 1293).

The offence will be complete though the defendant assumes a fictitious name at the second marriage. *R.* v. *Allison*, R. & R. 109. And where, upon an indictment for marrying Anna T., the defendant's first wife being alive, it appeared that her name was not Anna but Susanna; but the defendant wrote her name Anna in the note for the publication of banns, and signed the register in which she was so called; it was held, that, although her name might not be Anna, he could not defend himself on the ground that he did not marry Anna T. *R.* v. *Edwards*, R. & R. 283. So, also, where the second wife was married by the name of Eliza Thick, which name she had assumed when the banns were published, purposely, that she might not be known to be the person intended (her name being Eliza Brown), Gurney, B., held it to be no answer to the charge. *R.* v. *Penson*, 5 C. & P. 412. And a man who, being married, marries a woman after stating a false name in his notice to the registrar without it appearing that she knew of that fact at the time, is guilty of bigamy. R. v. *Rea*, L. R. 1 C. C. R. 365; 31 L. J. (M. C.) 92.

Evidence for the Defence.

The first wife or husband is a competent witness *for the defence*, and may be called on the application of the defendant. 61 & 62 Vict. c. 36, s. 1 (*ante*, pp. 458 *et seq.*).

The following are good defences to an indictment for bigamy :—

1. Seven years' absence.]—That the wife or husband of the party indicted has been "continually absent from the other for the space of seven years then last past, and has not been known to the other to be living within that time" (*i.e.*, has not been known at any period during the seven years to be alive, *R.* v. *Cullen*, 9 C. & P. 681). 24 & 25 Vict. c. 100, s. 57 (*ante*, p. 1292). Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who it appeared had been living seventeen miles from where the defendant (a poor labouring man) resided; he was held entitled to an acquittal under this proviso. *R.* v. *Jones*, C. & Mar. 614. On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of her second marriage, she knew that he was alive; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that upon this finding the conviction could not be supported. *R.* v. *Briggs*, Dears. & B. 98; 26 L. J. (M. C.) 7. *See R.* v. *Dane*, 1 F. & F. 323: *R.* v. *Cross*, *Id.* 510. As to presumptions in favour of the accused in such cases, *see R.* v. *Twyning*, 2 B. & Ald. 386.

Where, on a trial for bigamy, absence for seven years is proved, it is for the prosecution to show that the prisoner knew his wife to be alive at some time during the seven years, and if they fail in doing so, the prisoner is entitled

to an acquittal. *R.* v. *Curgerwen*, L. R. 1 C. C. R. 1; 35 L. J. (M. C.) 58: *R.* v. *Heaton*, 3 F. & F. 819. *R.* v. *Lund*, 16 Cr. App R. 31. But where on the trial of an indictment for bigamy, it was proved that the prisoner had married W. in 1865, and lived with her after the marriage, but for how long was not known; that in 1882, W. being still alive, prisoner had gone through the form of marriage with another woman, but there was no evidence as to the prisoner and W. having ever separated, or as to when, if separated, they last saw each other, it was held that the prisoner was rightly convicted. *R.* v. *Jones*, 11 Q. B. D. 118; 52 L. J. (M. C.) 96; 15 Cox, 284.

2. Bonâ fide belief of death.]—That the prisoner, even though the seven years have not elapsed before the second marriage, at the time of the second marriage, in good faith and on reasonable grounds, believed that his first wife was dead. *R.* v. *Tolson*, 23 Q. B. D. 168; 58 L. J. (M. C.) 97; 16 Cox, 629. But such *bonâ fide* belief is not sufficient unless proper and reasonable inquiries have in fact been made by the prisoner. *R.* v. *Thomson* [1905] 70 J. P. 6, Bosanquet, Common Serjeant. (*a*) In *R.* v. *Faulkes*, 19 T. L. R. 250; 114 L. T. J. 383, 413, 439. Kennedy, J., held that the fact that the prisoner had wilfully deserted his first wife did not deprive him of this defence. (*b*)

3. Dissolution of marriage.]—That, before the second marriage, the party indicted was divorced from the bond of the first marriage. 24 & 25 Vict. c. 100, s. 57 (*ante*, p. 1292). The English courts will accept as valid a divorce *a vinculo* granted by any competent court of the country in which the husband was *bonâ fide* domiciled at the time of the grant of the decree, but will treat as invalid divorces granted by a court having jurisdiction only by reason of the so-called "matrimonial domicile," or when resort has been had to the jurisdiction merely for the purpose of divorce. *Le Mesurier* v. *Le Mesurier* [1895] A. C. 517; 64 L. J. (P. C.) 97: *Shaw* v. *Gould*, L. R. 3 H. L. 55; 37 L. J. (N. S.) Ch. 433: *Green* v. *Green* [1893] P. 89; 62 L. J. (P.) 112: *Harvey* v. *Farnie*, 8 App. Cas. 43; 52 L. J. (P.) 33. The grounds of divorce in the state where the husband was domiciled when he obtained the decree need not be those recognized by English law, but the decree must have been obtained in good faith, and without fraud or collusion. *See Armitage* v. *Att.-Gen.* [1906] P. 135: *Bater* v. *Bater* [1906] P. 209. In *R.* v. *Lolley*, R. & R. 237; 2 Cl. & F. 567 n.; it had been resolved by the judges that "no sentence or Act of any foreign country or any state can dissolve an English marriage *a vinculo matrimonii* for grounds on which it is not liable to be dissolved *a vinculo matrimonii* in England." But this resolution was criticized, if not overruled in *Harvey* v. *Farnie* (*supra*), and it was pointed out in the judgment of the Court of Appeal in that case (6 P. D. 35) that the Scotch divorce *a vinculo*, on the ground of the husband's adultery, which in *R.* v. *Lolley* was held to be invalid in England, was that of persons whose

(*a*) *Cf. R.* v. *Sellars* [1905] 9 Canada Cr. Cas. 153.
(*b*) *Cf. R.* v. *Siffers* [1904] 4 N. S. W. St. Rep. 320.

marriage had not only been solemnized in England, but whose domicile at the time of the divorce was *English*, so that the rule as above laid down in *R.* v. *Lolley* went much further than, and was not necessary to support, the actual decision in that case. *See also Le Mesurier* v. *Le Mesurier* [1895] A. C. 517 (*ante*, p. 1305); 64 L. J. (P. C.) 97; *and Bater* v. *Bater* [1906] P. 209, 229, where *R.* v. *Lolley* was considered. A *bonâ fide* belief on reasonable grounds that the accused has been divorced when in fact he has not, affords no defence in law to a charge of bigamy, though it may afford good reason for the infliction of a nominal punishment. *R.* v. *Wheat and Stocks* [1921] 2 K. B. 119; 90 L. J. (K. B.) 583; 85 J. P. 203; 37 T. L. R. 417; 124 L. T. 820; 15 Cr. App. R. 134.

4. Nullity of first marriage.]—That the former marriage was absolutely null and void by reason of the consanguinity or affinity of the parties (*ante*, p. 1301), or because of the incapacity of one or both of the parties to contract the marriage by reason of a prior subsisting marriage; *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. Rep. 54: *R.* v. *Millis*, 10 Cl. & F. 534; or of non-age or lunacy (*ante*, pp. 1301, 1302), or that the former marriage was declared to be void by the sentence of a court of competent jurisdiction. 24 & 25 Vict. c. 100, s. 57. The corresponding clause of 1 Jac. 1, c. 11, s. 3 (*rep.*), was held not to extend to the sentence of an ecclesiastical court in a cause of jactitation; *Duchess of Kingston's case*, 20 St. Tr. 355; 3 Sm. L. C. (11th ed.) 731, 739 (*see ante*, p. 426); and even sentences within this clause of the Act may be impeached on the part of the Crown, upon the ground of fraud or collusion. *Id.* It has been pointed out (*ante*, p. 1301) that it is not enough for the defence to prove the first marriage voidable. (*a*)

The *proof* of a prior subsisting marriage lies on the prisoner so soon as the first and second marriages are proved, *R.* v. *Thomson*, 70 J. P. 6, Bosanquet, Common Serjeant. The prisoner's *belief* in the existence of such prior marriage affords him no defence. *R.* v. *Wheat and Stocks*, *supra*.

(ii.) OFFENCES AGAINST THE MARRIAGE ACTS.

As to liability of the clergy to prosecution for refusing to celebrate a marriage according to the directions of 6 & 7 W. 4, c. 85, *and as to the requisites of indictment and evidence in such cases*, see R. *v.* James, 2 Den. 1; 3 C. & K. 167; 19 L. J. (M. C.) 179. And see Davis *v.* Black [1841] 1 Q. B. 900; 10 L. J. (Q. B.) 338; 1 Russ. Cr. (7th ed.) 1016.

(*a*) In the United States it has been held no defence to a charge of bigamy that the defendant by his religion was under an obligation to commit polygamy. *See Reynolds* v. *U. S.* [1878] 98 U. S. 145, where a woman was held to have been rightly convicted of bigamy. But if the first marriage was non-Christian, a second marriage would not be bigamy (*see ante*, p. 1297).

12 *G.* 3. *c.* 11 (*Royal Marriages Act*, 1772), *s.* 3.—*Knowingly and wilfully celebrating or assisting or present at celebration of marriage of member of royal family in contravention of Act.* Præmunire.—See Sussex Peerage Claim. 11 Cl. & F. 85; 6 St. Tr. (N. S.) 79.

4 *G.* 4, *c.* 76 (*Marriage Act*, 1823), *s.* 21.—*Offences as to celebration by rites of the Church of England.*]—If any person shall, from and after the said first day of November [1823], solemnize matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight in the forenoon and three in the afternoon unless by special licence from the Archbishop of Canterbury; or shall solemnize matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same: or if any person falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be *transported* for the space of fourteen years, according to the laws in force for transportation of felons, provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed. (*For present punishment*, see 54 & 55 Vict. c. 69, s. 1, ante, pp. 238, 239.)

6 *& 7 W.* 4, *c.* 85 (*Marriage Act*, 1836), *s.* 39.—*Offences as to celebration.*] —Every person who after the said first day of March [1837], shall knowingly and wilfully solemnize any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, according to the usage of the Jews), and every person who in any such registered building or office shall knowingly and wilfully solemnize any marriage in the absence of a registrar of the district in which such registered building or office is situated, shall be guilty of felony: and every person who shall knowingly and wilfully solemnize any marriage in England after the said first day of March (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid . . . shall be guilty of felony. [*Offences under this section are punishable under* 7 & 8 G. 4, c. 28, s. 8, p. 236. *The section does not apply to marriages celebrated in the absence of the registrar, but in accordance with* 61 *&* 62 Vict. c. 58. See *s.* 15 *of that Act.*]

Sect. 40.—*Offences by registrar as to certificates, etc.*]—Every superintendent registrar who shall knowingly and wilfully issue any certificate for marriage after the expiration of three months after the notice shall have been entered by him as aforesaid (s. 4), or any certificate for marriage by licence before the expiration of seven days after the entry of the notice, or any certificate for marriage without licence before the expiration of twenty-one days after the

entry of the notice or the issue of any certificate which shall have been forbidden as aforesaid by any person authorized to forbid the issue of the registrar's certificate, or who shall knowingly and wilfully register any marriage herein declared to be null and void, and every registrar who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar as aforesaid, or who shall knowingly and wilfully solemnize in his office any marriage herein (*see* s. 42) declared to be null and void, shall be guilty of felony. [*Punishable under* 7 & 8 G. 4, c. 28, s. 8, ante, p. 236.]

Sect. 41.—*Limitation of prosecutions.*]—Every prosecution under this Act shall be commenced within the space of three years after the offence committed.

7 *W.* 4 & 1 *Vict. c.* 22 (*Births and Deaths Registration Act*, 1837), *s.* 3.—*Offences by registrar.*]—Every superintendent registrar who shall knowingly and wilfully issue any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent registrar as provided by the *Marriage Act*, 1836, or who shall knowingly and wilfully solemnize or permit to be solemnized in his office any marriage in the said last recited Act (s. 42) declared to be null and void, shall be guilty of felony. [*Punishable under* 7 & 8 G. 4, c. 28, s. 8, ante, p. 236.]

1 & 2 *Geo.* 5, *c.* 6 (*Perjury Act*, 1911), *s.* 3.—*False statements, etc., with reference to marriage.*]—Ante, p. 1188.

3 & 4 *Geo.* 5, *c.* 27 (*Forgery Act*, 1913), *s.* 3.—*Forgery of any register or record of marriages, etc., or of any marriage certificate or licence.*]—Ante, pp. 818, 819.

Sect. 5.—*Forgery of the seal of the office of the registrar-general of births, deaths and marriages, or of the seal of any register office relating to marriages.*]—Ante, pp. 821, 822.

Sect. 6.—*Uttering any such forged document or seal.*]—Ante, p. 822.

Sect. 2.

PUBLIC NUISANCE.

Common Law.

Every person is guilty of a misdemeanor at common law, known as common nuisance, who (*a*) does an act not warranted by law, or (*b*) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all his Majesty's subjects. 2 Chit. Cr. L. 565; 1 Hawk. c. 75; Steph. Dig. Cr. L. (6th ed.), p. 140: *Hubert* v.

Groves, 1 Esp. 147, and earlier cases there collected : *Wilkes* v. *Hungerford Market Co.*, 2 Bing. (N. C.) 281 : *Barber* v. *Penley* [1893] 2 Ch. 447; 62 L. J. (Ch.) 623. It is immaterial whether the annoyance arises from noise, stench, unwholesomeness, or interference with public comfort or convenience. *See Att.-Gen.* v. *Keymer Brick & Tile Co.*, 67 J. P. 431; 2 Russ. Cr. (7th ed.) 1833 *et seq.*

If the legal duty does not exist at common law, and a particular penalty is imposed by the statute creating the duty. the remedy by indictment for common nuisance would seem to be excluded. *Bulbrook* v. *Goodere*, 3 Burr. 1768, 1770; *and cf. Saunders* v. *Holborn District Board* [1895] 1 Q. B. 64; 61 L. J. (Q. B.) 101.

The object with which the act or omission is done or made is immaterial if the probable result is to affect injuriously, in any of the ways above stated, the public (*R.* v. *Moore*, 3 B. & Ad. 184 : *R.* v. *Carlile*, 6 C. & P. 636 : *Barber* v. *Penley* [1893] 2 Ch. 447; 62 L. J. (Ch.) 623); or any appreciable part of it (*R.* v. *Lloyd*, 4 Esp. 200), and if the effect is such, the nuisance cannot be legalized by long continuance. *Dewell* v. *Saunders*, Cro. Jac. 490 : *R.* v. *Cross*, 3 Camp. 227 : *Foster* v. *Warblington District Council* [1906] 1 K. B. 665; 75 L. J. (K. B.) 514. It is only in this respect, and in the quantum of annoyance, that public differs from private nuisance.

Many forms of nuisance can now be punished summarily under statutes or by laws, but with few, if any, exceptions the remedy by indictment is preserved. *See* 52 & 53 Vict. c. 63, s. 33 (*ante*, p. 160).

Some acts which have been treated as nuisances are difficult to classify at all —*i.e.*, the offences of eavesdropping; 1 Hawk. c. 61, s. 4; Burn's Justice (30th ed.), tit. Eavesdropping; being a common scold (*communis rixatrix*), 1 Hawk. c. 61, ss. 4, 15; 2 Russ. Cr. L. (7th ed.) 1841; 4 Bl. Comm. 109; night-walking; 2 Hawk. c. 10, s. 58; refusal by a common innkeeper to admit traveller when he has accommodation. *R.* v. *Rymer*, 2 Q. B. D. 136; 46 L. J. (M. C.) 108 : *R.* v. *Ivens*, 7 C. & P. 213 : *R.* v. *Sprague*, 63 J. P. 233 (Surrey Quarter Sessions) : *R.* v. *Smith*, 65 J. P. 521; *and see* 2 Russ. Cr. (7th ed.) 1887. Keeping booths and stages for rope-dancers and the like, or unlicensed stage plays are not nuisances *per se*, but only as they draw together great numbers of people or coaches and sharpers thither; 1 Hawk. c. 75, s. 7 : *R.* v. *Betterton*, Cas. temp. Holt, 538; 5 Mod. 142 : *Barber* v. *Penley* [1893] 2 Ch. 447, 449—*i.e.*, that they may be indictable as disorderly houses (*post*, p. 1325), or as causing obstruction and nuisance to a highway (*post*, p. 1354; *and see Bellamy* v. *Wells*, 39 W. R. 158; 7 T. L. R. 135).

Public nuisances which are indictable may be thus classified :—

(*a*) Interference with comfort, enjoyment, or health (*post*, p. 1310).

(*b*) Acts dangerous to public safety (*post*, p. 1315).

(*c*) Acts injurious to public morals or decency (*post*, p. 1317).

(*d*) Unlawful treatment of dead bodies (*post*, p. 1345).

(*e*) Inteference with public rights of passage by land or water (*post*, p. 1347).

(*a*) NUISANCES TO PUBLIC COMFORT, ENJOYMENT, OR HEALTH.

Statutes.

1 & 2 *G.* 4, *c.* 41 (*Steam Engine Furnaces Act*, 1821), *s.* 1.—*Costs of prosecution.*]—Whereas great inconvenience has arisen, and a great degree of injury has been and is now sustained by his Majesty's subjects, in various parts of the United Empire, from the improper construction as well as from the negligent use of furnaces employed in the working of engines by steam: and whereas by law every such nuisance, being of a public nature, is abateable as such by indictment; but the expense attending the prosecution thereof has deterred parties suffering thereby from seeking the remedy given by law: be it therefore enacted, etc., that it shall and may be lawful for the Court by which judgment ought to be pronounced in case of conviction of any such indictment to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment as to the Court may seem fit. [*This section is not repealed by* 8 Edw. 7, c. 15, s. 10. See *that Act*, ante, pp. 267 et seq.]

Sect. 2.—*Order to prevent repetition of nuisance.*]—If it shall appear to the Court by which judgment ought to be pronounced, in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful for the Court, without the consent of the prosecutor, to make such order touching the premises, as shall be by the said Court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted. (*See* 2 Russ. Cr. (7th ed.) 1839.)

Sect. 3.—*Exemptions from the Act.*]—Provided always, that the provisions of this Act, so far as they relate to the payment of costs and the alteration of furnaces, shall not extend or be construed to extend to the owners, or proprietors, or occupiers of any furnaces of steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.

38 & 39 *Vict. c* 55 (*Public Health Act*, 1875), *s.* 91.]—*Definition of nuisances to be summarily dealt with under the Act.*

Sect. 111.]—The provisions of this Act relating to nuisances shall be deemed to be in addition to, and not to abridge or affect, any right remedy or proceeding under any other provision of this Act or under any other Act, or at law or in equity. Provided that no person shall be punished for the same offence both under the provisions of this Act relating to nuisances, and under any other law or enactment. *Cf.* 52 & 53 Vict. c. 63, s. 33 (ante, p. 160). [*Provisions similar to those of ss.* 91, 111, *are contained in the* Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 138.]

Indictment for carrying on an Offensive Trade. (*Common Law.*)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Public nuisance.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of London, caused a nuisance to the public by allowing offensive or unwholesome smells to be emitted from furnaces or boilers in which tripe was being burnt or boiled by the said A. B., which nuisance the said A. B. still continues.

Examples: for using a shop in a public market as a slaughter-house, Cro. Circ. Comp. 301, and see 4 Went. 224; and R. *v.* Watts, 2 C. & P. 486;—*for erecting a manufactory for hartshorn*, Cro. Circ. Comp. 311;—*for erecting a privy near the highway*, 3 Went. 225;—*for making sulphuric acid near a highway*, R. *v.* White, 1 Burr. 333;—*for polluting water*, R. *v.* Medley, 6 C. & P. 292;—*for placing putrid carrion near the highway*, 4 Went. 213;—*for keeping a corpse unburied*, R. *v.* Vann, 2 Den. 331; 21 L. J. (N. S.) M. C. 39 (see post, p. 1345);—*for keeping animals* (*dogs or fowls*) *to the annoyance of the public by their noise or the unwholesomeness of their kennels or coops;—for keeping hogs near a public street and feeding them with offal*, Cro. Circ. Comp. 305, and see 2 Ld. Raym. 1163;—*for bringing a horse diseased with glanders into a public place, to the danger of infecting the King's subjects*, R. *v.* Henson, Dears. 24;—*for exposing in the public streets a person infected with smallpox or any infectious disease*, R. *v.* Vantandillo, 4 M. & Sel. 73: Metropolitan Asylums Managers *v.* Hill, 6 App. Cas. 193, 204; 50 L. J. (Q. B.) 353, Lord Blackburn.

Burning arsenic so as to emit poisonous fumes is indictable. R. *v.* Garland, 5 Cox, 165: and see the Alkali, &c., Works Regulation Act, 1906 (6 Edw. 7, c. 14).

Misdemeanor at common law: fine, and (*or*) *imprisonment, with or without hard labour* (ante, pp. 239, 241, 246); *and judgment for "prostration" or abatement if the nuisance is alleged and proved to be then continuing.* See R. *v.* Incledon, 13 East, 164. 12 & 13 Vict. c. 45, s. 18, *by which any order of quarter sessions may be removed into the High Court* (*K. B. D.*) *and enforced as a rule of court, does not apply to an order of quarter sessions to abate a nuisance made after the trial of an indictment for such nuisance.* R. *v.* Bateman, 8 E. & B. 584; 27 L. J. (M. C.) 95.

Evidence

Prove that the defendant erected the boiler in question, or that he continued it after being erected by some other person; prove that he used it for the purposes alleged in the indictment; prove that the smoke or smell arising from it was either injurious to health, or so offensive as to detract sensibly from

the enjoyment of life and property in its neighbourhood; *see R.* v. *White*, 1 Burr. 333; it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they are offensive to the senses; *R.* v. *Neil*, 2 C. & P. 485 : *Malton Local Board* v. *Malton Farmers' Trading Co.*, 4 Ex. D. 302; 49 L. J. (M. C.) 90 : *Bishop Auckland L. B.* v. *Bishop Auckland Iron Co.*, 10 Q. B. D. 138; 52 L. J. (M. C.) 38. Prove also that it is in a populous neighbourhood, or near a highway; *R.* v. *Pappineau*, 2 Str. 686; for its being a nuisance depends in a great measure upon the number of houses and the concourse of people in its vicinity, which is a matter of fact to be determined by the jury. *R.* v. *White* (*supra*). As to the quantum of annoyance necessary to justify proceedings, *see St. Helens Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 11 Eng. Rep. 1483; 35 L. J. (Q. B.) 66. Nuisance by noise, if sufficiently great, is indictable (*see Walker* v. *Brewster*, L. R. 5 Eq. 25; 37 L. J. (Ch.) 33 : *Bellamy* v. *Wells*, 39 W. R. 158; 7 T. L. R. 135 : *Christie* v. *Davey* [1893] 1 Ch. 316; 62 L. J. (Ch.) 339), unless made in exercise of statutory powers and without negligence. *Harrison* v. *Southwark and Vauxhall W. W. Co.* [1891] 2 Ch. 409; 60 L. J. (Ch.) 630 : *Colwell* v. *Mayor, etc., of St. Pancras* [1904] 1 Ch. 707; 73 L. J. (Ch.) 275; 68 J. P. 286.

A distinction has been drawn between quiet and noisy neighbourhoods in considering whether the quantum of noise is sufficient to justify legal proceedings. *Sturges* v. *Bridgman*, 11 Ch. D. 852; 48 L. J. (Ch.) 875. But whether the noise amounts to a nuisance is a question of fact in each case, *Polsue & Alfieri, Ltd.* v. *Rushmer* [1907] A. C. 121; 76 L. J. (Ch.) 365.

It has been held that the defendant may prove that the business complained of as a nuisance was set up before the houses were built, or the roads constructed. *R.* v. *Cross*, 2 C. & P. 483. But in *Hole* v. *Barlow*, as reported in 27 L. J. (C. P.) 208, Byles, J., said that "it used to be thought that if a man knew there was a nuisance, and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That used to be thought one hundred years ago to be the law. That, however, is not the law now." But proof of its long continuance may justify a finding that it is not a nuisance in fact. *Id.* In *R.* v. *Russell*, 6 B. & C. 566; 9 D. & R. 566; 5 L. J. (K. B.) 221; it was said if a private person who goes to a nuisance may maintain an action in respect of it, it is difficult to see why, where the public go to a nuisance, an indictment may not be sustained for its continuance : or in a neighbourhood where there were already established other trades, etc., emitting smells extremely offensive or insalubrious, and which smells were not perceptibly increased by the alleged nuisance in question. *R.* v. *Neville*, Peake (3rd ed.), 125 : *R.* v. *Watts*, M. & M. 281. It is no defence to say that the alleged nuisance has existed for a number of years : for no length of time will legalize a public nuisance. *Dewell* v. *Saunders*, Cro. Jac. 490 : *R.* v. *Cross* (*supra*) : *and see Weld* v. *Hornby*, 7 East, 195, 199, Ellenborough, C.J. : *Bliss* v. *Hall*, 4 Bing. (N. C.) 183 : *Foster* v. *Warblington District Council* [1906] 1 K. B. 665; 75 L. J. (K. B.) 514; 7th Rep. Crim. Law Commissioners, 59. In *R.* v. *Russell* (*supra*), it was said that in judging of a public nuisance the public good it does might in some cases, where the public health was not concerned,

be taken into consideration, to see if the public benefit outweighed the public annoyance; but this doctrine was overruled in *R.* v. *Ward*, 4 A. & E. 384; 5 L. J. (K. B.) 221, where it was held to be no answer to an indictment for a nuisance in a harbour, by erecting an embankment, that although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to the other uses of the port. *See also* the observations of Jessel, M.R., on *R.* v. *Russell*, *in Att.-Gen.* v. *Terry*, L. R. 9 Ch. 423, 426 n.: *and see Att.-Gen.* v. *L. & N. W. R.* [1900] 2 Q. B. 78; 69 L. J. (Q. B.) 26. *R.* v. *Morris*, 1 B. & Ad. 441: *R.* v. *Tindall*, 6 A. & E. 143; 6 L. J. (M. C.) 97: *R.* v. *Randall*, C. & Mar. 496: *R.* v. *Betts*, 16 Q. B. 1022: *R.* v. *Train*, 2 B. & S. 640; 31 L. J. (M. C.) 169; 9 Cox, 180. A statute may, however, authorize and legalise acts which would otherwise amount to a nuisance. Defendants were authorized by Act of Parliament to make a railway, which ran by the side of a highway, and to use locomotives upon the railway. Horses upon the highway were frightened by the locomotives, but it was held, by the Court of King's Bench, that the defendants were not liable to be indicted for a nuisance, as the Act of Parliament had given them unqualified authority to use the locomotives. *R.* v. *Pease*, 4 B. & Ad. 30; 2 L. J. (M. C.) 26. The authority of *R.* v. *Pease* was impugned by Bramwell, B., in *Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J. (Q. B.) 428, but appears to be fully established by the decisions of the House of Lords in *Hammersmith, etc., Rail. Co.* v. *Brand*, L. R. 4 H. L. 171; 38 L. J. (Q. B.) 265, and *London, Brighton and South Coast Rail. Co.* v. *Truman*, 11 App. Cas. 45; 55 L. J. (Ch.) 354: *Withington L. B.* v. *Mayor, etc., of Manchester* [1893] 2 Ch. 19; 62 L. J. (Ch.) 393: *Att.-Gen.* v. *Mayor, etc., of Nottingham* [1904] 1 Ch. 673; 73 L. J. (Ch.) 512. But the statutory authority will not protect those who have it unless (1) it is given specifically or by necessary implication (*Metrop. Asylums Managers* v. *Hill*, 6 App. Cas. 193; 50 L. J. (Q. B.) 353, and cases above cited: *Canadian Pacific Rail. Co.* v. *Parke* [1899] A. C. 535; 68 L. J. (P. C.) 89); and (2) the manner of doing it follows the authority of the statute, and avoids causing a nuisance if it can be avoided by reasonable care. *London, Brighton and South Coast Rail. Co.* v. *Truman*, 11 App. Cas. 45; 55 L. J. (Ch.) 354; Beven, Negligence (3rd ed.); Craies on Statute Law (ed. 1907), 245 *et seq.* It is not unusual for a statute expressly to reserve liability to indictment for nuisance. This is done as to gasworks by the *Gas Works Clauses Acts*, 1847 (10 & 11 Vict. c. 15, s. 29) and 1871 (34 & 35 Vict. c. 41, s. 9). *See Att.-Gen.* v. *Gas Light and Coke Co.*, 7 Ch. D. 217; 47 L. J. (Ch.) 534: *Jordeson* v. *Hull Gas Co.* [1899] 2 Ch. 217; 68 L. J. (Ch.) 457: and as to electric lighting authorities by their provisional orders or special Acts, *see Colwell* v. *Mayor, etc., of St. Pancras* [1904] 1 Ch. 707; 73 L. J. (Ch.) 275; and as to the use of locomotives on highways by 24 & 25 Vict. c. 70, s. 13; 28 & 29 Vict. c. 83, s. 12 (*post*, p. 1352); and as to alkali works by 6 Edw. 7, c. 14.

The provisions for summary prosecution of nuisances under the *Public Health Act*, 1875, do not take away the remedy by indictment. 38 & 39 Vict. c. 55, s. 111 (*ante*, p. 1310); 54 & 55 Vict. c. 76, s. 138 (London): *Att.-Gen.*

v. *Logan* [1891] 2 Q. B. 100. A summary conviction for causing noxious effluvia by a trade process has been held inadmissible in favour of the Crown on a subsequent indictment at common law for the same offence. *R.* v. *Fairrie*, 8 Cox, 66.

It was laid down in *Hole* v. *Barlow*, 4 C. B. (N. S.) 334; 27 L. J. (C. P.) 208, that an action does not lie for the reasonable use of a lawful trade in a convenient place, although it may annoy another. But this case was overruled by *Bamford* v. *Turnley*, 3 B. & S. 62, 66; 31 L. J. (Q. B.) 286 (Ex. Ch.). See also *Cavey* v. *Leadbitter*, 13 C. B. (N. S.) 470; 32 L. J. (C. P.) 104; *St. Helens Smelting Co., Ltd.* v. *Tipping*, 11 H. L. C. 642; 35 L. J. (N. S.) Q. B. 66: *Shotts Iron Co.* v. *Inglis*, 7 App. Cas. 518: *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; 70 L. J. (Ch.) 148; *Polsue & Alfieri, Ltd.* v. *Rushmer* [1907] A. C. 121; 76 L. J. (Ch.) 365. These decisions appear to apply equally to indictments.

Where works are so carried on as to be a nuisance, it is no answer to an indictment against the master for the nuisance, that he did not personally superintend the works, and that he had given express orders to the workmen that they should be carried on in a mode which, if followed, would have prevented their causing a nuisance. *R.* v. *Stephens*, L. R. 1 Q. B. 702; 35 L. J. (Q. B.) 251; 11 Cox, 340. It was, however, held that an employer was not criminally responsible for a smoke nuisance caused by his servant using a furnace in a negligent manner, and that the employer could not be convicted under such circumstances of an offence under the *Smoke Nuisance (Metropolis) Act* (16 & 17 Vict. c. 128), *s.* 1 (*rep.*). *Chisholm* v. *Doulton*, 22 Q. B. D. 736; 58 L. J. (M. C.) 133 (*and see ante*, p. 25). That Act is repealed and superseded by 54 & 55 Vict. c. 76, s. 23.

Selling Food unfit for Human Consumption. (*Common Law.*)

The offence is now usually dealt with summarily under ss. 116-119 *of the* Public Health Act, 1875 (38 & 39 Vict. c. 55), *and in London under s.* 47 *of the* Public Health (London) Act, 1891. *Under the latter section the defendant can elect to be indicted* (see 42 & 43 Vict. c. 49, s. 17, *ante*, p. 7). *To expose for sale, or to have possession of, with intent to sell, meat unfit for food, is a nuisance at common law;* Shillito *v.* Thompson, 1 Q. B. D. 12; 45 L. J. (M. C.) 18, and cases collected ante, p. 1287; *and if death results from eating such meat, the seller may be indicted for manslaughter.* R. *v.* Stevenson, 3 F. & F. 106; R. *v.* Kempson, 28 L. J. Newsp. 477 (ante, p. 888). *It may be questioned whether the offence is a public nuisance or a common law cheat, as to which* see ante, p. 721, and R. *v.* Roebuck, Dears. & B. 24; 25 L. J. (M. C.) 101 (ante, p. 713). *If the latter, knowledge of the condition of the food is essential.*

(*b*) ACTS DANGEROUS TO PUBLIC SAFETY.

Common Law.

Under this head fall such cases as keeping a fierce and unruly bull in a field crossed by a public footway, Cro. Circ. Comp. 310; keeping a ferocious dog unmuzzled, Cro. Circ. Comp. 311; baiting a bull in the highway, 4 Went. 213; keeping naphtha in a populous place in such quantities as to cause terror or danger, *R.* v. *Lister*, D. & B. 209; 26 L. J. (M. C.) 196 : *see, too, Williams* v. *H. E. I. C.*, 3 East, 192; keeping gunpowder or other explosives in dangerous proximity to streets or houses, 2 Russ. Cr. (7th ed.) 1855 n. : *R.* v. *Taylor*, 2 Str. 1167; allowing a house near a highway to be ruinous, *R.* v. *Watts*, 1 Salk. 357 : *R.* v. *Watson*, 2 Ld. Raym. 856; having an unfenced excavation near a highway, *Hardcastle* v. *South Yorks Rail. Co.*, 28 L. J. (N. S.) 1 Ex. 139; 4 H. & N. 67 : *Barnes* v. *Ward*, 9 C. B. 392; 19 L. J. (N. S.) C. P. 195. Negligently blasting stone in a quarry, and thereby projecting large pieces of stone so as to endanger the safety of persons in houses and on the highways adjoining the quarry, is a misdemeanor indictable at common law. *R.* v. *Mutters*, L. & C. 491; 34 L. J. (M. C.) 22. As to allowing a quarry near a highway to be unfenced, *see Hounsell* v. *Smith*, 7 C. B. (N. S.) 731; 29 L. J. (C. P.) 203 : R. v. *Clerk of Assize of Oxford Circuit* [1897] 1 Q. B. 373; 66 L. J. (Q. B.) 271; 18 Cox, 518. The making and selling of fireworks or throwing them about in the street was declared a common nuisance by 9 & 10 W. 3, c. 7 (*rep.*). *R.* v. *Bennett*, Bell, 1; 28 L. J. (M. C.) 27; 8 Cox, 74. Their manufacture is now regulated by the *Explosives Act*, 1875, and lighting them in a street is summarily punishable under s. 80 of that Act, but apparently without prejudice to a remedy by indictment where a nuisance is created. (*See infra.*) In *R.* v. *Meade* [1903] 19 T. L. R. 540. Wills, J., held an indictment good which contained a count for going abroad in a public street armed without lawful occasion so as to be a nuisance and terror to the public (*and see ante*, p. 1227).

Statutes.

Storage of petroleum.]—The *Petroleum Acts*, 1871 (34 & 35 Vict. c. 105), 1879 (42 & 43 Vict. c. 47), and 1881 (44 & 45 Vict. c. 67), which are to be read together, provide numerous penalties summarily recoverable for breach of their regulations as to storage, carriage, etc., of inflammable substances. The penalties are for the most part recoverable summarily (*see* 34 & 35 Vict. c. 105, s. 15), but s. 18 of the Act of 1871 provides "that nothing in this Act contained shall be deemed to exempt any person from any penalty to which he would otherwise be subject in respect of a nuisance." In the case of petroleum, etc., for the use of light locomotives, the Acts apply only subject to Home Office regulations under 59 and 60 Vict. c. 36, s. 5. *See* Statutory Rules and Orders Revised (ed. 1904), vol. 8, tit. Locomotive, p. 3.

Storage of explosives.]—The *Explosives Act*, 1875 (38 & 39 Vict. c. 17), is "an Act to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitro-glycerine, and other explosive substances," and contains a variety of regulations on all these subjects, enforcing them by forfeitures and pecuniary penalties, with the alternative of imprisonment. In order to give a complete view of the subject, it would be necessary to insert the whole statute; but as the branch of law to which it relates is not likely, excepting in few cases, to form the subject of inquiry on indictment, as it may generally be enforced by courts of summary jurisdiction, it has not been thought desirable to do more than insert the following sections, which show when offences against the Act may, and when they must, be prosecuted by indictment.

Sect. 91.—*Summary proceedings.*]—Every offence under this Act may be prosecuted, and every penalty under this Act may be recovered, and all explosives and ingredients liable to be forfeited under this Act may be forfeited either on indictment or before a court of summary jurisdiction, in manner directed by the *Summary Jurisdiction Acts*. Provided that the penalty imposed by a court of summary jurisdiction shall not exceed one hundred pounds exclusive of costs, and exclusive of any forfeiture or penalty in lieu of forfeiture, and the term of imprisonment imposed by any such court shall not exceed one month. . . .

Sect. 92.—*Election to be tried on indictment.*]—Where a person is accused before a court of summary jurisdiction of any offence under this Act, the penalty for which offence as assigned by this Act, exclusive of forfeiture, exceeds one hundred pounds, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence, and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly. (*See ante*, pp. 7, 8, and *R.* v. *Chambers*, 65 L. J. (M. C.) 214; 18 Cox, 401, *ante*, p. 1285).

Sect. 102.—. . . This Act shall not exempt any person from any indictment or other proceeding for a nuisance, or for an offence which is indictable at common law, or by any Act of Parliament other than this Act, so that no person be punished twice for the same offence. (*See* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160).

When proceedings are taken before any court against any person in respect of any offence under this Act which is also an offence at common law, or by some Act of Parliament other than this Act, the Court may direct that, instead of such proceedings being continued, proceedings shall be taken for indicting such person at common law or under some Act of Parliament other than this Act. . . .

(*c*) ACTS INJURIOUS TO PUBLIC DECENCY, MORALS, OR ORDER.
OPEN AND NOTORIOUS LEWDNESS.

Common Law.

It is a misdemeanor indictable at common law publicly to expose the naked person. *R.* v. *Sedley*, 17 St. Tr. 155 n.; 1 Sid. 168; 1 Keb. 620; *and see* 1 East, P. C. 3: *R.* v. *Gallard*, 1 Sess. Cas. 231: *R.* v. *Newcastle-on-Tyne Justices*, 1 B. & Ad. 933: *R.* v. *Rowed*, 3 Q. B. 180; 11 L. J. (M. C.) 74 (*see ante*, p. 1048).

An indecent exposure, though in a place of public resort, if visible only by one person, is not indictable as a common nuisance. *R.* v. *Webb*, 1 Den. 338; 18 L. J. (M. C.) 39; 2 C. & K. 933; 3 Cox, 183: *R.* v. *Watson*, 2 Cox, 376: *see R.* v. *Elliott*, L. & C. 103: *R.* v. *Farrell*, 9 Cox, 446 (C. C. R. Ir.). An omnibus is a public place sufficient to support the indictment. *R.* v. *Holmes*, Dears. 207; 22 L. J. (M. C.) 122. In *R.* v. *Orchard*, 3 Cox, 248, an enclosed urinal, to which the public had free access, in a public market, was held not to be a public place. But in *R.* v. *Harris*, L. R. 1 C. C. R. 282; 40 L. J. (M. C.) 67, Bovill, C.J., said that he could not think that all the facts had been stated in the report of *R.* v. *Orchard*, and that he could not understand that case as reported. In *R.* v. *Harris* (*supra*) it was held, that a urinal open to the public and approached by a gate opening from a public footpath, but built in compartments, is such a public place as to make an act of indecency committed in the urinal and witnessed by two persons an indictable nuisance. It is not necessary that the exposure should be made in a place open to the public; it is sufficient if it is made where a number of persons may be offended by it, and several see it. *R.* v. *Thallman*, L. & C. 326; 33 L. J. (M. C.) 58; 9 Cox, 388. The prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place, upon evidence showing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without any strict legal right so to do, and that persons so going were never in any way hindered or interfered with. On a case reserved, the Court held that the conviction was correct, and that the jury were justified in finding that the place was public. *R.* v. *Wellard*, 14 Q. B. D. 63; 54 L. J. (M. C.) 14. *Semble*, that the offence of indecent exposure of the person may be indictable if committed before several persons, even if the place is not public. *Id.* (*a*) Men who bathe without any screen or covering, so near to a public

(*a*) In *R.* v. *Madercine* [1899] 20 N. S. W. Rep. (Law) 36, on a case reserved, it was held that exposure of the person on the verandah of a private house, in the presence of a number of children, was indictable at common law, and it seems to have been considered that the word "public" in the indictment was unnecessary. The Court relied on the dicta of the judges in *R.* v. *Wellard*, and on *R.* v. *Bunyan*, 1 Cox, 74, where a conviction took place on evidence that two persons had locked themselves in a room in a public-house, and had been seen behaving indecently through the window of another room by a servant, who fetched a constable.

footpath that exposure of their persons must necessarily occur, are guilty of an indictable nuisance. *R.* v. *Reed*, 12 Cox, 1, Cockburn, C.J.; *and see* 41 & 42 Vict. c. 14, s. 11. Nor is it any defence that there has been, so long as living memory extends, an usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incidental to such bathing. *Id. See also R.* v. *Crunden*, 2 Camp. 89.

As to obscene libels and exhibitions, *see infra.*

Indictment against a Man for publicly exposing his Naked Person.

(Common Law.)

STATEMENT OF OFFENCE.

Exposing person.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully, wilfully and publicly exposed his naked person in Oxford Street.

Misdemeanor at common law: fine and (or) imprisonment (ante, pp. 239, 246). *Hard labour may be imposed:* 14 & 15 Vict. c. 100, s. 29 (ante, p. 242; post, p. 1320).

The offence is now usually punished summarily under s. 4 of the Vagrancy Act, 1824 (5 G. 4, c. 83), *where the intent is to insult any female;* cf. 2 & 3 Vict. c. 47, s. 54 (12); 10 & 11 Vict. c. 89, s. 28 (*which is applied to urban districts by* 38 & 39 Vict. c. 55, s. 171); *and* 41 & 42 Vict. c. 14, s. 11.

OBSCENE LIBELS, EXHIBITIONS, ETC.

Common Law.

Libels.]—The publication of any obscene libel is a misdemeanor punishable at common law on indictment or information. 1 Hawk. c. 73, s. 9: *R.* v. *Curl*, 2 Str. 788: *R.* v. *Wilkes*, 4 Burr. 2527, 2574: *R.* v. *Hicklin*, L. R. 3 Q. B. 360; 37 L. J. (M. C.) 80. "The test of obscenity (*a*) is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of

(*a*) "Obscene" is defined in the Oxford Dictionary, *s.v.*, as "offensive to modesty," expressing or suggesting unchaste or lustful ideas, impure, indecent, lewd." *See R.* v. *Beaver* [1905] 9 Canada Cr. Cas. 415, 421, Osler, J. A.

this sort may fall." *R.* v. *Hicklin*, L. R. 3 Q. B. at p. 371; 37 L. J. (M. C.) 89, Cockburn, C.J.: *R.* v. *Barraclough* [1906] 1 K. B. 201, 211; 75 L. J. (K. B.) 77, Alverstone, C.J.

In *R.* v. *Thompson*, 64 J. P. 456, a prosecution for publishing the Heptameron, Bosanquet, Common Serjeant, directed the jury to consider the book as a whole, as well as the extracts referred to in the particulars, and to consider the circumstances of the publication and the nature of the general business of the defendant before deciding whether the publication was with "intent to corrupt" public morals.

The *obtaining and procuring* of obscene prints, with intent to sell them, is a misdemeanor (*see post*, p. 1324); but the mere keeping of them with that intent is not; *Dugdale* v. *R.*, 1 E. & B. 435; Dears. 64; 22 L. J. (M. C.) 50; but may be the subject of summary proceedings under 20 & 21 Vict. c. 83, s. 1 (*post*, p. 1320). The defendant inserted in a newspaper, of which he was editor, advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books and photographs. A police officer wrote to the addresses given in the advertisements, and received from the advertisers, who were foreigners resident abroad, obscene books and photographs. It was held that the defendant was rightly convicted of causing and procuring obscene books and photographs to be sold and published. *R.* v. *De Marny* [1907] 1 K. B. 388; 76 L. J. (K. B.) 210; 71 J. P. 14.

The indiscriminate publication of a pamphlet, half of which relates to controversial questions which are not obscene, but the other half of which is obscene, as relating to impure acts and words, is a misdemeanor, and proper to be prosecuted as such, although the publisher does not sell the pamphlet for the purposes of gain, nor to prejudice good morals,—although the indiscriminate sale of it is calculated to have that effect,—but sells it as a member of a politico-religious society, to promote the objects of that society, and to expose what he deems to be the errors of the Church of Rome, and particularly the immorality of the confessional. *R.* v. *Hicklin*, *ante*, p. 1318: *Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. (M. C.) 85. And the publication of an accurate report of a trial for the misdemeanor of publishing an obscene pamphlet, in which report such obscene pamphlet, which was in evidence on the trial, is fully set out, is not privileged on the ground of being a report of proceedings in a court of justice, but such publication of the trial is itself an indictable misdemeanor. *Steele* v. *Brannan* (*supra*). 51 & 52 Vict. c. 64, s. 3 (*ante*, p. 1241), which gives a modified protection to newspaper reports of judicial proceedings, and s. 4 of the same statute (*ante*, p. 1242), which gives a modified protection to newspaper reports of public meetings; both contain provisoes that nothing in those sections shall authorize the publication of any indecent matter. As to whether such a publication can in any case be justified, *see* Steph. Dig. Cr. Law (6th ed.), pp. 133, 134.

Exhibitions.]—The prisoners were indicted in one count for keeping a booth for the purpose of showing an indecent exhibition; in a second, for showing for gain an indecent exhibition in a booth; in a third, for showing an indecent

exhibition in a public place. It was proved that during the Epsom races the prisoners kept a booth on Epsom Downs for the purpose of an indecent exhibition, that they invited people to enter, and that those who paid entered and saw an indecent exhibition. It was held that the prisoners had committed an indictable offence, and that it was well laid in the indictment. *R.* v. *Saunders*, 1 Q. B. D. 15; 45 L. J. (M. C.) 11; 13 Cox, 116. Where the exhibition is exposed to view in a street, road, highway, or public place, or in the window or other part of any shop or building situate in any street, etc., it is also punishable under s. 4 of the *Vagrancy Act*, 1824 (5 G. 4, c. 83), and s. 2 of the *Vagrancy Act*, 1838 (1 & 2 Vict. c. 38).

A herbalist who publicly exposes in his shop, on a highway, a picture of a man naked to his waist and covered with sores, is guilty of a nuisance although there is nothing immoral or indecent in the picture, and the motive for its exhibition is innocent. *R.* v. *Grey*, 4 F. & F. 73; *and see R.* v. *Clark*, 15 Cox, 170 (*post*, p. 1345).

Statutes.

14 *& 15 Vict. c.* 100, *s.* 29.—When any person shall be convicted of . . . any public selling or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition, it shall be lawful for the Court to sentence the offender to be imprisoned for any term now warranted by law and also to be kept to hard labour during the whole or any part of such term of imprisonment. [*Sending by post is not public selling or exposure within this section.* R. *v.* Jackson, 3 Cr. App. R. 192.]

20 *& 21 Vict. c.* 83 (*Obscene Publications Act*, 1857: "*Lord Campbell's Act*"), *s.* 1.]—*Search under warrant for, and destruction of, obscene prints,* —"*Whereas it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles:*" *be it enacted as follows:*

1. It shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house,

shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and if necessary to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police, stipendiary magistrate, or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal (*see* s. 4), unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized. [*A warrant or an order under the section is bad unless it states that the prints, etc., ordered to be destroyed are of such a character that the publication would be a misdemeanor fit to be prosecuted as such.* Ex parte Bradlaugh, 3 Q. B. D. 509; 47 L. J. (M. C.) 107.]

Sect. 4.]—*Appeal to quarter sessions within seven days by either party against order or determination of magistrate, etc.*

8 *Edw.* 7, *c.* 48 (*Post Office Act*, 1908), *s.* 63.—*Prohibition of sending by post . . . indecent prints, words, etc.*]—(1) A person shall not send or attempt to send a postal packet which either—

(*a*) encloses explosives, etc. (*ante*, p. 583); or

(*b*) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or of any indecent or obscene article, whether similar to the above or not; or

(*c*) has on the packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character.

(2) If any person acts in contravention of this section, he shall be guilty of a misdemeanor, and shall be liable on summary conviction to a fine not exceeding ten pounds, and on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding twelve months.

(3) The detention in the Post Office of any postal packet on the ground of its

being in contravention of this section shall not exempt the sender thereof from any proceedings which might have been taken if the packet had been delivered in due course of post. [*This section re-enacts* 47 & 48 Vict. c. 76, s. 4. *For definition of postal packet*, see s. 89, ante, p. 585. *As to detention of packets*, see s. 16 *of the Act. As to soliciting another to commit an offence against this section*, see s. 69, ante, p. 583, and R. *v.* De Marny, ante, p. 1319.]

7 & 8 Geo. 5, *c.* 21 (*Venereal Disease Act*, 1917), *s.* 1.—*Prevention of the treatment of venereal disease otherwise than by duly qualified persons.*]—(1) In any area in which this section is in operation, a person shall not, unless he is a duly qualified medical practitioner, for reward either direct or indirect, treat any person for venereal disease or prescribe any remedy therefor, or give any advice in connection with the treatment thereof, whether the advice is given to the person to be treated or to any other person.—[*Recommendation of a medicine, drug, &c., as "good" for venereal disease may amount to "advice" within the meaning of s.* 1. R. *v.* Shadforth, 14 Cr. App. R. 77.]

(2) This section shall operate in any area to which it is applied by order of the Local Government Board (*a*), or, in Scotland and Ireland, the Local Government Board for Scotland and Ireland respectively :

Provided that no order shall be made in respect of any area until a scheme for the gratuitous treatment of persons in that area suffering from venereal disease has been approved by the Local Government Board (*a*), or, in Scotland and Ireland, the Local Government Board for Scotland and Ireland respectively, and is already in operation.

Sect. 2.—*Restriction on advertisements, &c.*]—(1) A person shall not by any advertisement or any public notice or announcement treat or offer to treat any person for venereal disease, or prescribe or offer to prescribe any remedy therefor, or offer to give or give any advice in connection with the treatment thereof.

(2) On and after the first day of November nineteen hundred and seventeen a person shall not hold out or recommend to the public by any notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with, any packet, box, bottle, phial, or other inclosure containing the same, any pills, capsules, powders, lozenges, tinctures, potions, cordials, electuaries, plaisters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and officinal preparations whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief of any venereal disease :

Provided that nothing in this section shall apply to any advertisement, notification, announcement, recommendation, or holding out made or published by any local or public authority or made or published with the sanction of the Local Government Board, or in Scotland and Ireland the Local Government Board for Scotland and Ireland respectively, or to any publication sent only to duly qualified medical practitioners or to wholesale or retail chemists for the purposes of their business.

(*a*) Now the Ministry of Health (9 & 10 Geo. V. c. 21), s. 3 (1) (*a*).

Sect. 3.—*Penalties.*]—If any person acts in contravention of any of the provisions of this Act, he shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or on summary conviction to a fine not exceeding one hundred pounds, or to imprisonment, with or without hard labour, for a term not exceeding six months.

Sect. 4.—*Definition.*]—In this Act the expression "venereal disease" means syphilis, gonorrhœa, or soft chancre.

Sect. 5.—*Short title.*]—This Act may be cited as the Venereal Disease Act, 1917.

Indictment for publicly selling an Obscene Print. (*Common Law.*)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Selling obscene prints.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, at his shop in Shaftesbury Avenue, unlawfully sold, published or uttered to C. D. obscene prints entitled [*state titles if any*].

R. *v.* Barraclough [1906] 1 K. B. 201; 75 L. J. (K. B.) 77. 44 & 45 Vict. c. 60, s. 6 (ante, p. 1241), *seems to apply the* Vexatious Indictments Act (ante, p. 67) *to this indictment.*

A count charging possession of an obscene print "with intent to publish" states no indictable offence. R. *v.* Rosenstein, 2 C. & P. 414; 2 Russ. Cr. (7th ed.) 1876 n.: Dugdale *v.* R., Dears. 64 (ante, p. 1319). *But such possession may be the subject of summary proceedings under* 20 & 21 Vict. c. 83, s. 1 (ante, p. 1320).

Where the print or picture is publicly exposed to view in a street, highway, road, or public place, or in a shop window, the publication is also punishable summarily under s. 4 *of the* Vagrancy Act, 1824 (5 G. 4, c. 83, s. 4): see the *Vagrancy Act*, 1838 (1 & 2 Vict. c. 38, s. 2).

Misdemeanor at common law: fine and (or) imprisonment with or without hard labour (ante, pp. 239, 241, 247); R. *v.* Wilkes, 4 Burr. 2527, 2574.

Indictment for selling and publishing Obscene Books, etc. (Common Law.)

As in last example, but stating the book as " an obscene libel in the form of a book intituled " [*state the title*].

A second count may be added for unlawfully obtaining the book for the purpose of selling it, etc., or causing it to be sold, etc.

As to this count, see Dugdale *v.* R. (ante, p. 1319). *It seems to be no defence that the libel is in a foreign language.* R. *v.* Hirsch, London County Sessions, March, 1899, 34 L. J. Newsp. 132. *But if it is, a translation of the obscene words must be included in the particulars.* See R. *v.* Peltier, 28 St. Tr. 529; and ante, p. 1246. *As to application of* Vexatious Indictments Act, see ante, p. 67.

In an indictment for " procuring an obscene libel with intent to publish " it, it seems still to be necessary to set out the obscene matter.

In an indictment for " publishing " an obscene libel, it is sufficient to deposit with the indictment particulars of the obscene matter, which may be in the following form:—

THE KING *v.* ——.

Particulars of Obscene Libels contained in (Books) intituled ——.

Count 1 of indictment]—book intituled the ——, beginning at p. ——, line ——, and ending at p. ——, line ——, with the words —— (*and so on with other counts and passages*).

The particulars must be handed in with the indictment when it is delivered to the clerk of the Court, unless they have already been deposited with him as an exhibit attached to the depositions. *R.* v. *Barraclough* [1906] 1 K. B. 201, 211.

Evidence.

Under the indictment on p. 1323 give the print in evidence, and prove that C. D. purchased it of the defendant, or of his servant, at his shop.

Put in evidence the print or book, or the passages of the book included in the particulars, and prove that it was purchased of the defendant, or his servant, or at his shop, or otherwise published by him. As to publication of libels generally, *see ante*, pp. 1121, 1248.

The tables and contents of other books on sale upon the premises where the book is said to have been sold may be admissible in evidence on the question whether the sale was with intent to corrupt public morals. *R.* v. *Thompson*, 64 J. P. 546, Bosanquet, Common Serjeant.

DISORDERLY HOUSES: INCLUDING BAWDY-HOUSES, GAMING-HOUSES, BETTING-HOUSES, BETTING AND GAMBLING.

General Statutory Provisions as to Disorderly Houses.

25 *G.* 2, *c.* 36 (*Disorderly Houses Act*, 1751), *s.* 2.—*Unlicensed places of public entertainment within certain limits declared disorderly houses.*]—And whereas the multitude of places of entertainment for the lower sort of people is another great cause of thefts and robberies, as they are thereby tempted to spend their small substance in riotous pleasures, and in consequence are put on unlawful methods of supplying their wants and renewing their pleasures: in order, therefore, to prevent the said temptation to thefts and robberies, and to correct as far as may be the habit of idleness which is becoming general over the whole kingdom, and is productive of much mischief and inconvenience, be it enacted by the authority aforesaid that:

From and after the 1st day of December, 1752, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof [*except in the administrative county of Middlesex*, 56 & 57 Vict. c. 15], without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place is situate (who are hereby authorized and empowered to grant such licence as they in their discretion shall think proper), signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place . . . [*provisions as to mode of granting licence and entry of police*] . . . and every person keeping such house, room, garden, or other place without such licence as aforesaid shall forfeit the sum of 100*l.* to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses. See R. *v.* Tucker, 2 Q. B. D. 417; 46 L. J. (M. C.) 197; 13 Cox, 600. [*This enactment applies only to the old cities of London and Westminster, and places within twenty miles thereof. The functions of the justices within this area were transferred by s.* 3 *of the* Local Government Act, 1888 (51 & 52 Vict. c. 41), *to County Councils. As to licences for music, etc., in closed swimming baths*, see 59 & 60 Vict. c. 59 (London), 62 & 63 Vict. c. 29 (elsewhere). *The present administrative county of Middlesex is no longer subject to the Act;* see 56 & 57 Vict. c. 15. *The licensing of such places outside the twenty-mile limit is regulated by* 53 & 54 Vict. c. 59, s. 51. *A licence under the section is no bar to a prosecution if the house, etc., is carried on in a disorderly manner.* R. *v.* Higginson, 2 Burr. 1232.]

Sect. 3.]—*Inscription over licensed places; conditions and revocation of licence.*

Sect. 4.]—*Saving as to theatres carried on under letters patent or licence from the Lord Chamberlain.* [*As to theatre licences*, see 6 & 7 Vict. c. 68. *A theatre licence does not warrant the giving of entertainments within* 25 G. 2, c. 36. R. *v.* Arthur, 72 J. P. 318.]

Sect. 5.]—*Provisions for prosecution of disorderly houses on complaint of inhabitants.* [*Amended* 58 G. 3, c. 70, s. 7; and see post, p. 1329.]

Sect. 6.—*Warrant to arrest keepers of such houses; and provisions for committal for trial.* (See R. *v.* Newton [1892] 1 Q. B. 648; 61 L. J. (M. C.) 121; and post, p. 1328.]

Sect. 8.—*Persons to be deemed to keep disorderly houses.*]—And whereas, by reason of the many subtle and crafty contrivances of persons keepy bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment: be it enacted, etc., that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.

Sect. 10.—*No certiorari.*]—And . . . no indictment which shall at any time after the said 1st day of June [1752] be preferred against any person for keeping a bawdy-house, gaming-house, or other disorderly house, shall be removed by any writ of *certiorari* into any other court; but such indictment shall be heard, tried, and finally determined at the same general or quarter session (*sic*) or assizes where such indictment shall have been preferred (unless the Court shall think proper, upon cause shown, to adjourn the same), any such writ or allowance thereof notwithstanding.

22 & 23 *Vict. c.* 17 (*Vexatious Indictments Act*, 1859).]—See ante, p. 67.

Bawdy-houses.

A common bawdy-house is a house or room, or set of rooms in any house, kept for purposes of prostitution. Steph. Dig. Cr. L. (6th ed.), p. 142. A "brothel" is the same thing as a "bawdy-house," and is a term which in its legal acceptance applies to a place resorted to by persons of both sexes for the purposes of prostitution. *Singleton* v. *Ellison* [1895] 1 Q. B. 608; 64 L. J. (M. C.) 123, Wright, J. (*a*) A woman who occupies a house frequented by men for the purpose of committing fornication with her, cannot be convicted of keeping a "brothel." *Id.: Caldwell* v. *Leech*, 23 Cox, 510; 109 L. T. 188; 77 J. P. 254; 29 T. L. R. 457. But where a porter was employed to look after a block of eighteen flats, among the tenants of which were twelve women who were in the habit of bringing different men nightly to the premises for the purpose of prostitution, it was held that he could be convicted under 48 & 49 Vict. c. 69, s. 13 (3), of being wilfully a party to the continued use of the premises or part thereof as a brothel. *Durose* v. *Wilson* [1907] 71 J. P. 263. Until the passing of 48 & 49 Vict. c. 69, s. 13; *infra*, the offence of keeping a bawdy-house was only punishable on indictment at common law.

(*a*) *Cf. R.* v. *Thick* [1907] Queensland State Reports, 198, on a colonial enactment in the same terms.

Statutes.

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 13.—*Suppression of brothels, etc.*]—Any person who—

(1) Keeps or manages or assists in the management of a brothel; or

(2) Being the tenant, lessee, or occupier [or person in charge] of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or

(3) Being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

shall on summary conviction, in manner provided by the *Summary Jurisdiction Acts*, be liable—

(1) To a penalty not exceeding 20*l.*, or, in the discretion of the Court, to imprisonment for any term not exceeding three months, with or without hard labour; and

(2) On a second or subsequent conviction, to a penalty not exceeding 40*l.*, or, in the discretion of the Court, to imprisonment for any term not exceeding four months, with or without hard labour. [*The words between square brackets have been added by* 2 & 3 Geo. 5, c. 20, s. 4 (1), infra. *Where a woman is the sole occupier of a house which she uses for the purpose of her own habitual prostitution with men she cannot properly be convicted under sub-s.* 2 *of permitting the premises to be used for the purposes of habitual prostitution.* Mattison *v.* Johnson, 85 L. J. (K. B.) 741; 114 L. T. 951. *A person accused under the section after a first conviction may elect to be indicted.* 42 & 43 Vict. c. 49, s. 17 (ante, p. 7). *And the indictment need not aver the fact of his election.* R. *v.* Chambers, 65 L. J. (M. C.) 14; 18 Cox, 401. *Evidence of the previous convictions may not be given until the jury have convicted of the subsequent offence.* R. *v.* Huberty, 70 J. P. 6, Bosanquet, Common Serjeant.]

2 & 3 *Geo.* 5, *c.* 20 (*Criminal Law Amendment Act*, 1912), *s.* 4.—*Suppression of brothels.*]—(1) Section thirteen of the *Criminal Law Amendment Act*, 1885, shall, so far as it relates to brothels, be amended by inserting after the word "occupier" the words "or person in charge."

(2) Any person who is convicted of a third or subsequent offence against the said section thirteen shall be liable on summary conviction to a penalty not exceeding one hundred pounds or, in the discretion of the court, to imprisonment for any term not exceeding twelve months, with or without hard labour, and, in addition to any such penalty or imprisonment, may be required by the court to enter into a recognizance with or without sureties, . . . to be of good behaviour for any period not exceeding twelve months, and, in default of entering into such recognizance, . . . such person may be imprisoned for a period not exceeding three months in addition to any term of imprisonment awarded in respect of his said offence.

(3) The provisions of section thirteen of the *Criminal Law Amendment Act*, 1885, in so far as they relate to third or subsequent offences, are hereby repealed.

Sect. 5.—*Determination of tenancy of premises on conviction for permitting use as brothel, etc.*]—See Mead and Bodkin on the Criminal Law Amendment Acts (4th ed.), pp. xxxvi-xlvii.

The offence committed by a publican in permitting his house to be used as a brothel, contrary to s. 77 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), *is a continuing offence.* Ex parte Burnby [1901] 2 K. B. 458; 70 L. J. (K. B.) 739; 20 Cox, 25.

Indictment for keeping a Bawdy-house. (*Common Law.*)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Keeping a bawdy-house.

PARTICULARS OF OFFENCE.

A. B., on the —— day of——, and on other days between that date and the —— day of ——, in the county of ——, for the purpose of gain, kept and maintained a bawdy-house called No. 37 St. Martin's Lane.

Misdemeanor at common law: fine and (*or*) *imprisonment* (*which may be with hard labour*, 3 G. 4, c. 114, ante, p. 242). *Counts may be joined for keeping a disorderly house other than a bawdy-house, or for keeping several bawdy-houses.* 1 Burn's Justice (30th ed.), 1395; and see R. *v.* Higginson, 2 Burr. 1232, and 2 Chit. Cr. L. 39. *The indictment may be in general terms, but particulars may be ordered.* I'Anson *v.* Stuart, 1 T. R. 748, 752: Clarke *v.* Periam, 2 Atk. 337, 339. See ante, p. 26. *If proceedings are taken under* 25 G. 2, c. 36, ss. 5, 6, *the magistrate need not take any depositions. A married woman may be indicted with her husband for this offence.* R. *v.* Williams, 1 Salk. 384; 10 Mod. 63: R. *v.* Dixon, 10 Mod. 335.

The Vexatious Indictments Act (ante, p. 67) *applies to this indictment. The indictment shall not be removed by* certiorari: 25 G. 2, c. 36, s. 10 (ante, p. 1326); *unless upon the part of the Crown;* R. *v.* Davies, 5 T. R. 626; *and it shall be determined at the same sessions or assizes at which it is preferred, unless the Court, upon cause shown, thinks proper to adjourn the same.* 25 G. 2, c. 36, s. 10 (ante, p. 1326): see 14 & 15 Vict. c. 100, s. 27 (ante, p. 102). *This offence is triable at borough quarter sessions.* R. *v.* Charles, L. & C. 90; 31 L. J. (M. C.) 69; 9 Cox, 18. *Where the offence is committed within the limits of* 25 G. 2, c. 36, s. 2 (ante, p. 1325), *except the administrative county of Middlesex* (ante, p. 1325), *the indictment, if the facts so warrant, may also contain a count for keeping the house for public music or dancing*

without a licence of the county council or other licensing authority. As to allowing children or young persons to be in brothels. 8 Edw. 7, c. 67, s. 16 (ante, p. 1026). *As to detaining women in brothels, see* 48 & 49 Vict. c. 69, s. 8 (ante, p. 1035). *As to procuring women to enter brothels*, see s. 2 (ante, p. 1034).

Evidence.

Prove that the house in question, or a room or rooms in it, were let out for the purposes mentioned in the indictment. And if a lodger lets her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. *R.* v. *Peirson*, 2 Ld. Raym. 1197; 1 Salk. 382; 3 Co. Inst. 204. It is not necessary that there should be evidence of any indecency or disorderly conduct being perceptible from the exterior of the house. *R.* v. *Rice*, L. R. 1 C. C. R. 21; 35 L. J. (M. C.) 93: *l'Anson* v. *Stuart*, 1 T. R. 748. (*a*).

Prove also that the defendants "acted or behaved as master or mistress, or as the persons having the care, government, or management" of the house in question; which is sufficient evidence that the defendants kept the house. 25 G. 2, c. 36, s. 8 (*ante*, p. 1326). Mere frequenters of the house seem not to be indictable; *but see* Wood's Inst. bk. 3, c. 3: Dalton, Country Justice, c. 124.

If a weekly tenant of a house uses it as a brothel, and the landlord receives no additional rent by reason of its immoral occupation, the latter cannot be convicted of keeping a brothel merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit: *R.* v. *Barrett*, L. & C. 263; 32 L. J. (M. C.) 36; 9 Cox, 255; nor would the landlord be liable to be so convicted even if at the time he let the house he knew that it was to be used for purposes of prostitution, and, by reason of its occupation as such, received an additional rent. *R.* v. *Stannard*, L. & C. 349; 33 L. J. (M. C.) 61; 9 Cox, 405: but the facts in this case would justify proceedings under 48 & 49 Vict. c. 69, s. 13 (ante, p. 1327).

On an indictment under 48 & 49 Vict. c. 69, s. 13, the evidence appears to be in substance the same as above.

Gaming-houses.

33 *H.* 8, *c.* 9.—*Punishment of unlawful games.*]—*Excessive gaming*, per se, *is no longer a criminal offence, but may be evidence of unlawful gaming. As to what is an unlawful game*, see Jenks *v.* Turpin, 13 Q. B. D. 505; 53 L. J. (M. C.) 161: R. v. Rogier, 1 B. & C. 272; 2 D. & R. 431; and post, p. 1334.

8 *& 9 Vict. c.* 109 (*Gaming Act*, 1845), *s.* 2.—*Evidence of house being common gaming-house.*]—In default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for

(*a*) As to evidence of reputation, *see R.* v. *Macnamara*, 20 Ontario, 489.

playing therein at any unlawful game, and that a bank is kept there by one or more of the players, exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law, and forbidden to be kept by the said Act of King Henry VIII. (33 H. 8, c. 9), and by all other Acts containing any provision against unlawful games or gaming-houses.

Sect. 4.—*Penalty for keeping common gaming-house.*]—The owner or keeper of any common gaming-house, and every person having the care or management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house, shall on conviction thereof, by his own confession, or by the oath of one or more credible witnesses, before any two justices of the peace, beside any penalty or punishment to which he may be liable under the provisions of the said Act of King Henry VIII. (33 H. 8, c. 9), be liable to forfeit and pay such penalty, not more than 100*l.* as shall be adjudged by the justices before whom he shall be convicted, or, in the discretion of the justices before whom he shall be convicted, may be committed to the house of correction, with or without hard labour, for any time not more than six calendar months [*levy of penalties by distress*] . . . Provided always, that nothing herein contained shall prevent any proceeding by indictment against the owner or keeper, or other person having the care or management of a common gaming-house: but no person who shall have been summarily convicted of any such offence shall be liable to be proceeded against by indictment for the same offence. [*On a charge under this section the accused may elect to be indicted.* 42 & 43 Vict. c. 49, s. 17, ante, p. 7; and see note to s. 4 of 17 & 18 Vict. c. 38, post, p. 1332.]

Sect. 5.—*Evidence.*]—It shall not be necessary, in support of any information for gaming in, or suffering any games or gaming in, or for keeping or using, or being concerned in the management or conduct of, a common gaming-house, to prove that any person found playing at any game was playing for any money, wager, or stake.

Sect. 6.]—*Power to commissioners of metropolitan police to authorize superintendents and constables to enter gaming-houses in metropolitan police district and arrest persons there found and seize instruments of gaming, etc.*

Sect. 7.]—*Power to such superintendents and constables to search, etc.*

Sect. 8.—*Evidence of gaming.*]—Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game shall be found in any house, room, or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under the provisions of this Act, or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming shall have been found were playing therein, although no play was actually going

on in the presence of the superintendent or constable entering the same under a warrant or order issued under the provisions of this Act, or in the presence of those persons by whom he shall be accompanied as aforesaid. . . . [*Power to magistrate to order destruction of instruments of gaming.*]

Sect. 9.]—*Persons concerned in gaming and giving evidence to be exempt from prosecution.*

17 & 18 *Vict. c.* 38 (*Gaming Houses Act*, 1854), *s.* 2.—*Obstructing entry of constable to be evidence that house is a gaming-house.*]—Where any constable or officer, authorized as aforesaid [*under the Gaming Act*, 1845 (8 & 9 Vict. c. 109, s. 3)] to enter any house, room, or place, is wilfully prevented from, or obstructed or delayed in entering the same, or any part thereof, or where any external or internal door of, or means of access to any such house, room, or place, so authorized to be entered, shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same, or any part thereof, of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place, is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming-house within the meaning of this Act and of the former Acts relating to gaming, and that the persons found therein were unlawfully playing therein.

Sect. 4.—*Penalty for keeping house, etc., for unlawful gaming.*]—Post, p. 1332.

22 & 23 *Vict. c.* 17 (*Vexatious Indictments Act*, 1859).—Ante, p. 67.

Indictment for keeping a Common Gaming-house. (*Common Law.*)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Keeping a common gaming-house.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, for gain kept and maintained a common gaming-house or gaming-room at No. 44, Leicester Square.

The offence is a continuing offence. See Onley *v.* Gee, 30 L. J. (M. C.) 222; Ex parte Burnby [1901] 2 K. B. 458; 70 L. J. (K. B.) 739; 20 Cox, 28. *In* R. *v. Rogier*, *ante*, p. 1329, Holroyd, J., *said that, in his opinion, it would be sufficient merely to have alleged that the defendant kept a common gaming-house.*

Misdemeanor: fine and (*or*) *imprisonment. Hard labour may be imposed* (3 G. 4, c. 114, ante, p. 242).

A married woman may be indicted with her husband for this offence. R. *v.* Dixon, 10 Mod. 335. *The indictment shall not be removed by* certiorari; 25 G. 2, c. 36, s. 10; *unless on the part of the Crown*; R. *v.* Davies, 5 T. R. 626; *and it shall be determined at the same sessions or assizes at which it is preferred, unless the Court upon cause shown thinks proper to adjourn the same.* 25 G. 2, c. 36, s. 10.

The Vexatious Indictments Act (ante, p. 67) *applies to this indictment.*

This offence is triable at borough quarter sessions. R. *v.* Charles, L. & C. 90; 31 L. J. (M. C.) 69; 9 Cox, 18. (See ante, p. 106 et seq.)

Evidence.

Prove that the house in question, or a room or rooms in it, were used as a "common gaming-house." *See* 5 T. R. 338. As to the evidence sufficient for this purpose, *see* 8 & 9 Vict. c. 109, ss. 2, 5, 8, and 17 & 18 Vict. c. 38, s. 2 (*ante*, pp. 1329—1331).

Prove that the defendant "acted or behaved as master or mistress, or as the person having the care, government, or management" of the house or room in question; which is sufficient evidence that the house or room was kept by the defendant. 25 G. 2, c. 36, s. 8, *ante*, p. 1326.

To constitute "unlawful gaming," it is not necessary that the games played should be "unlawful games"; it is enough that the play is carried on in a "common gaming-house." *Jenks* v. *Turpin*, 13 Q. B. D. 505; 53 L. J. (M. C.) 161. It makes no difference that play is confined to members of a club; it is not a *public* but a common gaming-house that is prohibited. *Id.*, *and see post*, p. 1335.

After an indictment for keeping a gaming-house has been preferred by a private prosecutor, the Court will allow any other person to go on with it, even against the consent of the prosecutor. *R.* v. *Wood*, 3 B. & Ad. 657; 1 L. J. (M. C.) 93.

Statute.

17 & 18 *Vict. c.* 38 (*Gaming Houses Act*, 1854), *s.* 4.—*Penalty for keeping or using house, etc., for unlawful gaming.*]—Any person being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty, not exceeding 500*l.*, as to such justices shall

seem fit, and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable: and [*on non-payment of such penalty and costs, or in the first instance* (*rep.* 47 & 48 Vict. c. 43, s. 4)], if to the said justices shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding twelve calendar months. [*The accused may elect to be tried on indictment.* 42 & 43 Vict. c. 49, s. 17, ante, p. 7. *And the fact of election need not be averred.* R. *v.* Chambers, 65 L. J. (M. C.) 214; 18 Cox, 401, ante, p. 1327. *As to scope of this section*, see Jenks *v.* Turpin, 13 Q. B. D. 505.]

Indictment under 17 & 18 *Vict. c.* 38, *s.* 4.

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

First Count:

Keeping a gaming-house, contrary to section 4 of the Gaming Houses Act, 1854.

PARTICULARS OF OFFENCE.

A. B., being the owner or occupier or having the use of [*give the designation of the house or room, giving the county also*], on the —— day of ——, and on other days between that date and the —— day of ——, kept or used it for the purpose of unlawful gaming being carried on therein.

STATEMENT OF OFFENCE.

Second Count:

Permitting the keeping of a gaming-house, contrary [as *in first count*].

PARTICULARS OF OFFENCE.

C. D., being the owner or occupier of [*as in first count*] on the [*as in first count*], knowingly and wilfully permitted A. B. to keep or maintain it for the purpose of unlawful gaming being carried on therein.

Add counts, if necessary, charging E. F. *with* "having the care and management," *or* "assisting in conducting the business" *of the house, as the case may be: also a count charging the keeping of a common gaming-house* (ante, p. 1331).

Misdemeanor: punishment, fine not exceeding 500*l.*, *and in default of payment, or in the first instance, imprisonment for not more than twelve months, with or without hard labour.* 17 & 18 Vict. c. 38, s. 4.

Evidence.

See evidence in support of indictment for keeping a common gaming-house, *ante*, p. 1332.

Unlawful games.]—Various games have been made unlawful by 33 H. 8, c. 9, and other statutes, some of which have been repealed. The effect of this legislation is considered in *Jenks* v. *Turpin*, 13 Q. B. D. 505; 53 L. J. (M. C.) 161. "The unlawful games now are—ace of hearts, faro, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of *mere skill*; and, I incline to add, any other game of mere chance." *Id.*, p. 524, Hawkins, J. Baccarat is an unlawful game. *Id.* "To play at a game of cards for money in a common gaming-house is unlawful gaming." *Id.*, p. 531, A. L. Smith, J., *and see Fairtlough* v. *Whitmore*, 64 L. J. (Ch.) 386: *Lockwood* v. *Cooper* [1903] 2 K. B. 428; 72 L. J. (K. B.) 690. *Welton* v. *Raffles*, 26 Cox, 534. As to progressive whist, see *R.* v. *Hendrick*, 15 Cr. App. R. 149. The question whether a particular game of cards is an unlawful game is a question of law for the judge, and not of fact for the jury, who must apply the facts to the definition of the law given by the judge. *R.* v. *Davies* [1897] 2 Q. B. 199; 66 L. J. (Q. B.) 513. *See also Morris* v. *Godfrey*, 23 Cox, 40; 106 L. T. 890; 76 J. P. 297; 28 T. L. R. 401.

Keep or use.]—Where the defendant with three friends went to his house and after playing whist there, played an unlawful game of cards, but there was no evidence that they or any one else had ever played an unlawful game of cards at the defendant's house, or on any other occasion, it was held that he could not be convicted of opening, keeping, or using the room within s. 4. *R.* v. *Davies* (*supra*); *cf. Martin* v. *Benjamin* [1907] 1 K. B. 64; 76 L. J. (K. B.) 81; *cf. R.* v. *Mean*, 69 J. P. 27; 21 T. L. R. 417 (*post*, p. 1340). Where the defendant kept in his shop an automatic machine, by means of insertion of a penny into which money would be won or lost without the exercise of skill on the part of the operator, it was held that he was rightly convicted of keeping, etc., his shop for the purpose of unlawful gaming within s. 4. *Fielding* v. *Turner* [1903] 1 K. B. 867; 72 L. J. (K. B.) 542; 67 J. P. 252: approved and followed in *Donaghy* v. *Walsh* [1914] 2 Ir. R. 261. *See also Forsyth* v. *Ross* [1919] 2 I. R. 335 and *post*, p. 1340.

Care and management—assisting in conducting the business.]—In *Jenks* v. *Turpin* (*supra*) it was held that the mere *players* at an unlawful game in a club which was a common gaming-house, as distinct from the proprietor and committee men of the club, were not liable to be summarily convicted of an offence under this branch of the section. But a "banker" at faro, who has "bought the bank," is a person assisting in conducting the business, etc., within this section. *Derby* v. *Bloomfield*, 20 Cox, 674; 68 J. P. 391.

Betting-houses, and betting with infants, or in streets.

16 & 17 *Vict. c.* 119 (*Betting Act*, 1853), *s.* 1.—*Betting-houses a common nuisance.*]—No house, office, room, or other place, shall be opened, kept, or

used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof betting with persons resorting thereto;

Or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person aforesaid, as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid:

And every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law. [*An offence declared to be a nuisance is indictable as such, though the statute creating the offence renders it punishable on summary conviction.* R. *v.* Crawshaw, Bell, 303; 30 L. J. (M. C.) 58; 8 Cox, 375.]

Sect. 2.—*Betting-houses to be deemed gaming-houses within* 8 *&* 9 *Vict. c.* 109.]—Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of the *Gaming Act*, 1845 (8 & 9 Vict. c. 109). (*As to what is evidence of a house being a common gaming-house*, see *ss.* 2, 5, *and* 8 *of that statute*, ante, pp. 1329—1331).

Sect. 3.—*Penalty on owner or occupier of betting-house.*]—Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or either of them, shall on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding 100*l.*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; [*and on the non-payment of such penalty and costs*] or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months. [*Words in italics rep.* 47 & 48 Vict. c. 43, s. 4.] *The accused may elect to be tried on indictment* (vide ante, p. 7), *and the election to be so tried need not be averred.* R. *v.* Chambers, 65 L. J. (M. C.) 14; 18 Cox, 401. *If he does so elect, the court of trial has power under this section to impose imprisonment in default of payment of a fine on the scale fixed by* 42 & 43 Vict. c. 49 (Summary Jurisdiction Act, 1879), s. 5. R. *v.* Perkins, 6 Cr. App. R. 248.

Sect. 4.]—*Penalty on persons receiving money on condition of paying money on event of any bet, etc. (not indictable).*

Sect. 7.]—*Penalty on persons exhibiting placards or advertising betting-houses (not indictable).*

Sect. 11.]—*Power of justice to authorize search of suspected houses.*

Sect. 12.]—*Power of search and seizure by metropolitan police.*

37 & 38 *Vict. c.* 15 (*Betting Act*, 1874.)]—*Extension of provisions as to penalties for advertising as to betting.*

55 & 56 *Vict. c.* 4 (*Betting and Loans (Infants) Act*, 1892), *s.* 1.—*Sending documents to an infant inviting him to bet.*—(1) If any one, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting, or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.

Sect. 2.—*Sending to infants circulars inviting to borrow money.*]—(1) If any one, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted, on summary conviction, to imprisonment, with or without hard labour, for a term

not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.

Sect. 3.—*Presumption of knowledge of infancy.*]—If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age. [*See Milton* v. *Studd* [1910] 2 K. B. 118; 79 L. J. (K. B.) 638; 74 J. P. 217; 26 T. L. R. 392.]

63 & 64 *Vict. c.* 51 (*Money Lenders Act*, 1900), *s.* 5.—*Presumption of knowledge of infancy.*]—Where in any proceeding under s. 2 of the *Betting and Loans* (*Infants*) *Act*, 1892, it is proved that the person to whom the document was sent was an infant the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age. [*See Director of Public Prosecutions* v. *Witkowski*, 104 L. T. 453; 75 J. P. 171; 27 T. L. R. 211.

55 & 56 *Vict. c.* 4, *s.* 4.—*Soliciting infant to make affidavit in connection with loan.*]—If any one, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connection with any loan, he shall be liable, if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine, and if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds.

Sect. 6.—*Defendant and wife or husband of defendant a competent witness.*] —In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case. [*This enactment seems to be superseded in England by the* Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), ante, pp. 458 et seq.]

6 *Edw.* 7, *c.* 43 (*Street Betting Act*, 1906), *s.* 1.—Any person frequenting or loitering in streets or public places on behalf either of himself or of any other

person for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager, or paying, or receiving, or settling bets, shall—

(*a*) in the case of a first offence be liable on conviction under the *Summary Jurisdiction Acts* to a fine not exceeding 10*l.*;

(b) in the case of a second offence be liable on conviction under the *Summary Jurisdiction Acts* to a fine not exceeding 20*l.*; and

(c) in the case of a third or subsequent offence, or in any case where it is proved that the person whilst committing the offence had any betting transaction with a person under the age of sixteen years, be liable on conviction on indictment to a fine not exceeding 50*l.*, or to imprisonment, with or without hard labour, for a term not exceeding six months without the option of a fine, or on conviction under the *Summary Jurisdiction Acts* to a fine not exceeding 30*l.*, or to imprisonment, with or without hard labour, for a term not exceeding three months, without the option of a fine;

and shall in any case be liable to forfeit all books, cards, paper, and other articles relating to betting which may be found in his possession. [*Frequenting means being at a place long enough for the purpose aimed at.* Airton *v.* Scott, 73 J. P. 148: Jones *v.* Scott, 73 J. P. 148; see Clark *v.* R., 14 Q. B. D. 92; 54 L. J. (M. C.) 66. *As to distributing handbills containing offers to receive bets*, see Dunning *v.* Sweetman [1909] 1 K. B. 774; 78 L. J. (K. B.) 359; 100 L. T. 604; 73 J. P. 191; 25 T. L. R. 302. 9 Edw. 7, c. 12 (Marine Insurance (Gambling Policies) Act, 1909), s. 1, *prohibits gambling on loss by perils of the sea, and renders persons making contracts prohibited by the Act liable on summary conviction to imprisonment, with or without hard labour, for not more than six months, or to a fine not exceeding* 100*l.*, *and to forfeit to the Crown all money received under the contract. No prosecution except by leave of the Attorney-General. The accused may elect to be tried on indictment* (ante, p. 7). *The increased punishment for second or subsequent offences can be inflicted only when the prior convictions were for offences under this Act.* R. *v.* Stone, 21 Cox, 653; 72 J. P. 388.]

(2) Any constable may take into custody without warrant any person found committing an offence under this Act, and may seize and detain any article liable to be forfeited under this Act.

(3) Any person who appears to the Court to be under the age of sixteen years shall for the purpose of this section be deemed to be under that age unless the contrary be proved, or unless the person charged shall satisfy the Court that he had reasonable ground for believing otherwise. [*Cf.* 8 Edw. 7, c. 67, s. 123, *ante*, p. 992.]

(4) For the purpose of this section the word "street" shall include any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not; and the words "public place" shall include any public park, garden, or sea-beach, and any unenclosed ground to which the public for the time being have unrestricted access, and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited

by the owners or persons having the control of the place a notice prohibiting betting therein. [*See ante*, p. 1317, as to public place.]

Sect. 2.—Nothing contained in this Act shall apply to any ground used for the purpose of a racecourse for racing with horses or adjacent thereto on the days on which races take place. [*See Stead* v. *Aykroyd* [1911] 1 K. B. 57; 80 L. J. (K. B.) 78; 103 L. T. 727; 74 J. P. 482.]

Indictment for using a Room contrary to 16 & 17 *Vict. c.* 119, *s.* 1 (ante, p. 1334).

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

First Count:

Keeping a betting-house, contrary to section 1 of the Betting Act, 1853.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, being the occupier of a public house called the Golden Lion, used the said house or a room in it for the purpose of C. D., a person using the said house or room, betting with persons resorting thereto.

STATEMENT OF OFFENCE.

Second Count:

As in first count.

PARTICULARS OF OFFENCE.

As in first count, except altering the purpose to for the purpose of money being received by or on behalf of C. D., a person using the said house or room as or for the consideration for a promise or agreement to pay money on events relating to horse races.

Misdemeanor: punishment, fine not exceeding 100*l.*, *and in default of payment, or in the first instance, imprisonment for not more than six months with or without hard labour.* 16 & 17 Vict. c. 119, s. 3.

Evidence.

The two branches of the section create distinct offences. *Bond* v. *Plumb* [1894] 1 Q. B. 169. As to its scope and effect, *see Powell* v. *Kempton Park Racecourse Co.* [1899] A. C. 143; 68 L. J. (Q. B.) 392: *Brown* v. *Patch*

[1899] 1 Q. B. 892; 68 L. J. (Q. B.) 588. Various forms of "coupon competitions" have been held to be within the section. *See R.* v. *Stoddart* [1901] 1 K. B. 177; 70 L. J. (Q. B.) 189; 19 Cox, 587; 64 J. P. 774: *Mackenzie* v. *Hawke* [1902] 2 K. B. 216; 71 L. J. (K. B.) 565; 66 J. P. 709: *Lennox* v. *Stoddart* [1902] 2 K. B. 21; 71 L. J. (K. B.) 747; 66 J. P. 469; *Stoddart* v. *Hawke* [1902] 1 K. B. 353; 71 L. J. (K. B.) 133; 20 Cox, 111; 66 J. P. 469: *Hawke* v. *Hulton*, 22 T. L. R. 169. So has an automatic machine kept in a shop for the purpose of persons resorting to the shop playing with the machine. *Peers* v. *Caldwell, Taylor* v. *Caldwell* [1916] 1 K. B. 371; 85 L. J. (K. B.) 754; 114 L. T. 609; 80 J. P. 181: *R.* v. *Peers and Brown*, 81 J. P. 143; 33 T. L. R. 231; 12 Cr. App. R. 210.

House, office, room, or other place.]—Prove that the business of betting is definitely localised. *Powell* v. *Kempton Park Racecourse Co.* [1899] A. C. 143; 68 L. J. (Q. B.) 392: *Brown* v. *Patch* [1899] 1 Q. B. 892; 68 L. J. (Q. B.) 588: *R.* v. *Deaville* [1903] 1 K. B. 468; 72 L. J. (K. B.) 272. Localisation is a question of fact. *R.* v. *Fisher*, 9 Cr. App. R. 164.

Use.]—In order to convict a bookmaker of using the bar of a public-house within this section it is not enough to prove mere physical user. The defendant must "have something in the nature of a right or licence to use the bar for the purposes of his betting business over and above the right of an ordinary member of the public to resort there." *Belton* v. *Busby* [1899] 2 Q. B. 380; 68 L. J. (Q. B.) 859: *Troman* v. *Hodkinson* [1903] 1 K. B. 30; 72 L. J. (K. B.) 21: *R.* v. *Russell*, 69 J. P. 247: *R.* v. *Moss*, 4 Cr. App. R. 112; 26 T. L. R. 323. Where therefore it was proved that the defendant was in the habit of frequenting the bar of a public-house for the purpose of carrying on a business of ready money betting with persons resorting thereto, but for the purposes of his business did not occupy any specific portion of the bar, it was held that the question whether he was guilty of "using" the bar within the section depended upon whether he carried on his betting business there with the knowledge and consent of the occupier of the house. *R.* v. *Deaville, supra: R.* v. *Worton* [1895] 1 Q. B. 227; 64 L. J. (Q. B.) 74: *Buxton* v. *Scott*, 73 J. P. 133. "If you get sufficient localisation of the betting business, as is the case where the betting man is in possession of the particular plot of ground or structure on which he carries on his business, the question of the permission or licence of the owner of that plot or structure to use it for betting purposes is immaterial." *R.* v. *Deaville, supra*, Alverstone, C.J.; approved in *R.* v. *Fisher*, 9 Cr. App. R. 167. A man who acts as a mere conduit pipe for making bets between a bookmaker and his customers, though he has no pecuniary interest in the transactions, may be guilty of using premises where he is employed within this section. *R.* v. *Wyton*, 5 Cr. App. R. 287. The contents of betting slips and other documents found upon the defendants, or in the house which they are charged with using, are admissible in evidence against them, though such documents do not relate to the days on which the offence is alleged in the indictment to have been committed. *R.* v. *Mean*, 69 J. P. 27; 21 T. L. R. 417: *R.* v. *Mortimer* [1911] 1 K. B. 70; 80 L. J. (K. B.) 76; 22 Cox, 359; 103 L. T. 910; 75 J. P. 37; 27 T. L. R. 17.

Resorting.]—An offence against this branch of the section may be proved by showing that the house was opened and advertised as a betting-house, although no person ever physically resorted thereto. But where "resorting" is relied upon as evidence of the offence there must be some evidence of a physical resorting, and it is not sufficient to show that letters and telegrams were sent to the defendant directing him to make bets with the senders. *R.* v. *Brown* [1895] 1 Q. B. 119; 64 L. J. (M. C.) 1; 18 Cox, 81. On the other hand, it is not necessary that the person resorting should actually effect an entrance into the house. *Taylor* v. *Monk* [1914] 2 K. B. 817; 80 L. J. (K. B.) 1125; 78 J. P. 194; 30 T. L. R. 367.

Paying in the bar of a public-house bets previously made elsewhere is not using such bar for the purpose of betting with persons resorting thereto within the section. *Bradford* v. *Dawson* [1897] 1 Q. B. 307; 66 L. J. (Q. B.) 191; *but see Lennox* v. *Stoddart*, *infra*.

Receipt of money.]—It has been held that in order to convict under the second branch of s. 1, the money must be received in the house; *Davis* v. *Stephenson*, 24 Q. B. D. 529; but proof that the house has been used by the occupier for an essential part of operations carried on for the purpose of money being received by him in contravention of the section is sufficient. *Lennox* v. *Stoddart* [1902] 2 K. B. 21, *ante*, *p.* 1340. Where an advertising agent in London allowed his office to be used by the London agents of a company (which carried on a betting business in Holland), solely for the purpose of saving postal expenses, the address of the London office nowhere appearing on any of the company's literature nor being known to the company's English customers, it was held that the office had been used as an essential part of the betting business of the company and was a common gaming-house. *R.* v. *Andrews*, 74 J. P. 255, Bosanquet, Common Serjeant. A sweepstake is not within the section. *R.* v. *Hobbs* [1898] 2 Q. B. 647; 67 L. J. (Q. B.) 928. *Quære*, whether postal orders are "money" within the section. *R.* v. *Mortimer*, *ante*, p. 1340.

Where an automatic machine is kept in a shop for the purpose of persons resorting to the shop playing with the machine for payment and receiving a prize if successful, the shop is kept for the purpose of the proprietor receiving money as or for the consideration for a promise to give a valuable thing on a certain event or contingency, and whether the game played with the machine be one of skill or otherwise an offence within the section is committed. *R.* v. *Peers and Brown*, 81 J. P. 143; 33 T. L. R. 231; 12 Cr. App. R. 210.

Betting in clubs.]—Members of a *bonâ fide* club who make bets with other members upon the club premises cannot be convicted of using the club for the purpose of betting with persons resorting thereto within the section. *Downes* v. *Johnson* [1895] 2 Q. B. 203; 64 L. J. (M. C.) 238. But where the jury found that the club was "used as a blind for betting purposes," and there was evidence that the members of the club were divided into two classes, the defendants being the bookmakers, and other members going there to bet with them, it was held that the defendants were properly convicted under the section.

R. v. *Corrie and Watson*, 68 J. P. 294 (C. C. R.), *and see R.* v. *Bradley*, 1 Cr. App. R. 146 : *R.* v. *Hitchin*, *Id.* 161 : *Jackson* v. *Roth* [1919] 1 K. B. 102; 83 L. J. (K. B.) 397; 83 J. P. 26; 26 Cox, 340.

ILLEGAL LOTTERIES.

The offence of keeping a lottery is rarely punished on indictment. For a precedent, *see R.* v. *Crawshaw*, Bell, 303; 30 L. J. (M. C.) 58; 8 Cox, 375.

Statutes.

10 *W.* 3, *c.* 23 (10 *& 11 W.* 3, *c.* 17, *Ruffhead*), *s.* 1 (1698).]—*All lotteries declared to be common and public nuisances. As to definition of lottery within this Act*, see Att.-Gen. *v.* Mutual Loan Agency Fund [1909] 9 N. S. W. State Rep. 148.

[*Sects.* 2, 3 *impose specific penalties on persons opening or drawing at lotteries. These and subsequent enactments of a similar character do not take away the right to indict for a common and public nuisance under s.* 1. R. *v.* Crawshaw, Bell, 303; 30 L. J. (M. C.) 58; 8 Cox, 375.].

8 *G.* 1, *c.* 2 (*Lotteries Act*, 1721).]—*Erection of offices for sales by way of lot and the publishing of proposals or schemes for the same made punishable by fine before two justices: appeal to quarter sessions.*

9 *G.* 1, *c.* 19 (*Lotteries Act*, 1722), *s.* 4.—*Foreign lotteries.*]—*Similar provisions with regard to any person who after 1st July*, 1723, "shall . . . . by virtue or colour of any grant or authority from any foreign prince, state, or government whatsoever, erect, set up, continue, or keep, or shall cause or procure to be erected, set up, continued, or kept, any lottery or undertaking in the nature of a lottery, under any denomination whatsoever, or shall make, print, or publish, or cause to be made, printed, or published, any proposal or scheme for any such lottery or undertaking, or shall within this kingdom sell or dispose of any ticket or tickets in any foreign lottery. . . ."

6 *G.* 2, *c.* 35 (*Lotteries Act*, 1732), *s.* 29.—*Foreign lotteries.*]—*Similar provisions, also penalty recoverable by action by informer with regard to any person who after 24th June*, 1833, "shall sell, procure, or deliver any ticket, receipt, chance, or number in or belonging to any foreign lottery or pretended foreign lottery or in or belonging to any class, part, or division of such lottery, or pretended lottery, or in or belonging to any undertaking whatsoever in the nature of a lottery, or shall sell, procure, or deliver any ticket, receipt, chance, or number in or belonging to any duplicate, or pretended duplicate, of any foreign lottery or pretended foreign lottery, or shall receive or cause to be received any money whatsoever for any such ticket, receipt, chance, or number, or for or in consideration of any money to be repaid in case any ticket or tickets, number or numbers, in any foreign lottery or pretended foreign lottery, or any class, part, or division thereof shall prove fortunate. . . ."

42 *G.* 3, *c.* 119 (*Gaming Act*, 1802), *s.* 2.]—*Every person to forfeit* 500*l.* at the suit of the Attorney-General, and to be deemed a rogue and vagabond, who " shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorized by parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place. . . ." (*As to what is a lottery*, see infra.)

4 *G.* 4, *c.* 60 (*Lotteries Act*, 1823), *s.* 41.]—*After authorizing a Treasury lottery, all persons to forfeit* 50*l.*, *and to be deemed rogues and vagabonds, who* " shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorized by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorized by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorized as aforesaid. . . ." [*This section has been held not to apply to a limited company.* Hawke *v.* Hulton, Ltd. [1909] 2 K. B. 93; 78 L. J. (K. B.) 633. *But* quære *whether s.* 62 *applies in such a case.*]

6 *& 7 W.* 4, *c.* 66 (*Lotteries Act*, 1836), *s.* 1.—*Advertising lotteries.*]—*Every person to forfeit* 50*l. in proceedings by action at law or information who after August* 13, 1836, " shall print or publish, or cause to be printed or published, any advertisement or other notice of or relating to the drawing or intended drawing of any foreign lottery, or of any lottery or lotteries not authorized by some Act or Acts of Parliament;" *or who* " shall print or publish, or cause to be printed or published, any advertisement or other notice of or for the sale of any ticket or tickets, chance or chances, or of any share or shares of any ticket or tickets, chance or chances of or in any such lottery or lotteries as aforesaid, or any advertisement or notice concerning or in any manner relating to any such lottery or lotteries, or any ticket, chance, or share, tickets, chances, or shares thereof or therein. . . ." [*See* Bottomley *v.* Director of Public Prosecutions, 79 J. P. 153; 24 Cox, 578.]

Evidence.

A lottery is a distribution of prizes by lot or chance without the use of any skill. *See R.* v. *Harris*, 10 Cox, 352 (" The Eastern Bazaar "): *Taylor* v. *Smetten*, 11 Q. B. D. 207; 52 L. J. (M. C.) 101 (sale of pound packages of tea with prize coupon): *Caminada* v. *Hulton*, 60 L. J. (M. C.) 116: 17 Cox, 307 (racing coupon competition): *but see R.* v. *Stoddart* [1901] 1 K. B. 177: *Barclay* v. *Pearson* [1893] 2 Ch. 154: 62 L. J. (Ch.) 636 (" missing word competition "): *Stoddart* v. *Sagar* [1895] 2 Q. B. 474; 64 L. J. (M. C.) 234

(racing coupon competition) : *Hall* v. *Cox* [1899] 1 Q. B. 198; 68 L. J. (Q. B.) 167 (C. A.) (prediction of coming event) : *Hall* v. *McWilliam*, 20 Cox, 33; 65 J. P. 742 (" spot " competition in newspaper) : *Barrett* v. *Burden*, 63 L. J. (M. C.) 33 (distributing coins in packets of sweets) : *Willis* v. *Young* [1907] 1 K. B. 448; 76 L. J. (K. B.) 390 (distributing medals entitling to prizes in certain events) : *Re International Securities Corporation, Ltd.*, 24 T. L. R. 837 (dealing in premium bonds) : *Blyth* v. *Hulton, Ltd.*, 72 J. P. 401; 24 T. L. R. 719 : *Smith's Advertising Agency* v. *Leeds Laboratory Co.*, 26 T. L. R. 335 (advertisements of " Limerick " and letter-writing competitions) : *Mintz* v. *Silvester*, 79 J. P. 543; 31 T. L. R. 589; 25 Cox, 247 (distribution of postal orders in a theatre). If a number of tickets are sold, one of which entitles the holder to a chance of a prize, that constitutes a lottery. It is not an essential ingredient in the offence that the money got for the tickets should be used for the purchase of the prize. *Bartlett* v. *Parker* [1912] 2 K. B. 497; 81 L. J. (K. B.) 857; 106 L. T. 869; 76 J. P. 280. Where the competition involves a certain amount of skill, and the adjudication is not a determination by mere chance, the scheme is not a lottery. *Scott* v. *Director of Public Prosecutions* [1914] 2 K. B. 868; 83 L. J. (K. B.) 1025; 78 J. P. 267; 30 T. L. R. 396.

A publican who promotes a sweepstakes on his premises is guilty of an offence against s. 2 of the *Gaming Act*, 1802 (42 G. 3, c. 119), *ante*, p. 1343, at all events if he makes any profit out of the transaction. *Hardwicke* v. *Lane* [1904] 1 K. B. 204; 73 L. J. (K. B.) 96; 68 J. P. 94 : *cf. R.* v. *Hobbs* [1898] 2 Q. B. 647; 67 L. J. (Q. B.) 928.

As to breach of the *Lottery Acts* by societies or public companies, *see Sykes* v. *Beadon*, 11 Ch. D. 170; 48 L. J. (Ch.) 822 : *Wallingford* v. *Mutual Benefit Society*, 5 App. Cas. 685; 60 L. J. (C. P.) 49 : *McNee* v. *Persian Investment Corporation*, 44 Ch. D. 306; 59 L. J. (Ch.) 695 : *Hawke* v. *Hulton, Ltd.* [1909] 2 K. B. 93; 78 L. J. (K. B.) 633 : *Att.-Gen.* v. *Mutual Agency Loan Fund* [1909] 9 N. S. W. State Rep. 148. Art Unions are not within the *Lottery Acts*, 9 & 10 Vict. c. 48.

UNLICENSED SUBURBAN RACECOURSES.

Statute.

42 & 43 *Vict. c.* 18.]—*By this statute a horse-race within ten miles of Charing Cross is prohibited, and shall be deemed to be a nuisance unless held under licence by the justices (now the county council) of the county in which it is held.*

(*d*) OFFENCES AS TO CORPSES.

Common Law.

There is no property in a corpse (*a*); it is therefore not the subject of larceny (*see ante*, p. 543); though the executors have a right to its possession. *Williams* v. *Williams*, 20 Ch. D. 659; 51 L. J. (Ch.) 385; 15 Cox, 39. But larceny may be committed with respect to coffins, shrouds, or property interred with the corpse. As to laying the property in such goods, *see ante*, p. 47.

To leave unburied the corpse of a person for whom the defendant was bound to provide "Christian burial" (which probably means only "decent burial:" Steph. Dig. Cr. L. (6th ed.), p. 138), such as a wife or child, is also an indictable misdemeanor, if he is shown to have been of ability to provide such burial. *R.* v. *Vann*, 2 Den. 325; 21 L. J. (M. C.) 39; 5 Cox, 379: *R.* v. *Stewart*, 12 A. & E. 773, 778; 4 P. & D. 349: *Jenkins* v. *Tucker*, 1 H. Bl. 90. But the mere burning of a dead body, instead of burying it, is not a misdemeanor; yet if it is burnt in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go, this is an indictable nuisance. *R.* v. *Price* [1884] 12 Q. B. D. 247; 53 L. J. (M. C.) 51; 15 Cox, 389. The indictment must allege a nuisance to the public, and not merely to private individuals. *R.* v. *Byers*, 71 J. P. 205, *post*, p. 1347. *See* 7 & 8 Vict. c. 101, s. 31; 12 & 13 Vict. c. 103, ss. 16, 17, as to the burial of poor persons by parish officers; and 31 & 32 Vict. c. 122, s. 13; 53 & 54 Vict. c. 5, s. 297, as to burial of idiots or lunatics dying in asylums; and as to burial of persons dying of infectious disease, etc., 38 & 39 Vict. c. 55, s. 142; 54 & 55 Vict. c. 76, s. 89. As to preventing burial, *see* 2 Russ. Cr. (7th ed.) 1872. The burning of dead bodies is regulated by the *Cremation Act*, 1902 (2 Edw. 7, c. 8) (*vide infra*), which (s. 10) expressly provides that nothing therein contained shall authorize the creation or permission of a nuisance.

Any disposition of a corpse with intent to obstruct or prevent a coroner's inquest (*b*), when one ought to be held, is a misdemeanor at common law. *R.* v. *Stephenson*, 13 Q. B. D. 331; 53 L. J. (M. C.) 176: *R.* v. *Price*, (*supra*).

Exposing the naked dead body of a child in or near, and within view of, the highway is a common law nuisance. *R.* v. *Clark*, 15 Cox, 171. As to secret disposition of the bodies of newly-born infants with intent to conceal their birth, *see ante*, pp. 919-920.

It is a misdemeanor at common law to remove, without lawful authority, a corpse from a grave, whether in a churchyard or in the burial-ground of a

(*a*) *See Doodeward* v. *Spence* [1907] 7 N. S. W. St. Rep. 727; 6 Aust. C. L. R. 406 and *ante*, p. 543, for a full discussion of the law as to property in corpses. The case arose out of a claim to ownership of the body of a still-born child preserved in spirits. *And see* Kenny, Outlines of Criminal Law, p. 192; Steph. Dig. Cr. Law (6th ed.), p. 253.

(*b*) The coroner at common law can legally direct disinterment for the purposes of an inquest (*ante*, p. 142). *R.* v. *Clerk* [1702] Cas. temp. Holt, 167: *R.* v. *Bond* [1716] 1 Str. 22; 2 Hawk. c. 9, s. 23; Jervis on Coroners (6th ed.), 27, 28. But in practice the disinterment is made under the authority of the Home Secretary under 20 & 21 Vict. c. 81, s. 25, or of the High Court under s. 6 of the *Coroners Act*, 1887 (50 & 51 Vict. c. 71). *See* Jervis on Coroners (6th ed.), pp. 53-56.

congregation of Protestant dissenters; and it is no defence to such a charge that the motives of the defendant were pious and laudable. *R.* v. *Sharpe*, Dears. & B. 160; 26 L. J. (M. C.) 47; 7 Cox, 214. In *R.* v. *Kenyon* [1901] 36 L. J. Newsp. 571, four persons were indicted before Phillimore, J., for unlawfully, wilfully, and indecently digging open graves in a Roman Catholic burial-ground, which had been closed for burials by order in council in 1859, and for taking out portions of bodies of deceased persons interred therein. The indictment also contained a count for contravening the *Disused Burial Grounds Act*, 1884 (47 & 48 Vict. c. 72), by building on the disused burial-ground in question. Pleas of guilty were entered, and sentences of imprisonment imposed. For precedent of indictment in such cases, *see R.* v. *Jacobson*, 14 Cox, 522. Penalties are imposed by s. 25 of the *Burials Act*, 1857 (20 & 21 Vict. c. 81), for removal of bodies from any place of burial without the licence of a Secretary of State, except in the cases of removal under faculty from one consecrated place of burial to another. *R.* v. *Tristram* [1898] 2 Q. B. 371; 68 L. J. (Q. B.) 637. These penalties appear to be alternative to the common law remedy (*see* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160). A person who without lawful authority disposes of a dead body for the purpose of dissection, is indictable at common law. *R.* v. *Lynn*, 2 T. R. 733; 1 Leach, 497: *R.* v. *Gilles*, R. & R. 366 n. It appears to be immaterial whether the body was disposed of for gain or not. *R.* v. *Cundick*, Dowl. & Ry. (N. P.) 13. But where the master of a workhouse, having as such the lawful possession of the bodies of paupers who died therein, and who therefore was authorized under the 7th section of the *Anatomy Act* (2 & 3 W. 4, c. 75), to permit the bodies of such paupers to undergo anatomical examination, unless to his knowledge the deceased person had expressed in his lifetime, in the manner therein mentioned, his desire to the contrary, " or unless the surviving husband or wife, or any known relative of the deceased person, *should require* the body to be interred without such examination,"—in order to prevent the relatives of the deceased paupers from making this requirement, and to lead them to believe that the bodies were buried without dissection, showed the bodies to the relatives in coffins, and caused the appearance of a funeral to be gone through; and, having by this fraud prevented the relatives from making the requirement, then sold the bodies for dissection; he was held not to be indictable at common law. *R.* v. *Feist*, Dears. & B. 590; 27 L. J. (M. C.) 164; 8 Cox, 18. [*Sed quære; see* 2 Russ. Cr. (7th ed.) 1871, n.]

Statute.

2 *Edw.* 7, *c.* 8 (*Cremation Act*, 1902), *s.* 8, *sub-s.* (1).]—Every person who shall contravene any such regulation as aforesaid, or shall knowingly carry out or procure or take part in the burning of any human remains except in accordance with such regulations and the provisions of this Act, shall (in addition to any liability or penalty which he may otherwise incur) be liable, on summary conviction, to a penalty not exceeding fifty pounds. . . . [*Appeal to quarter sessions.* See *regulations contained in* Stat. Rules and Orders Revised (ed. 1904), vol. 4, tit. Cremation, E.]

(2) Every person who shall wilfully make any false . . . representation, or sign or utter any false certificate, with a view to procuring the burning of any human remains, shall (in addition to any penalty or liability which he may otherwise incur) be liable to imprisonment, with or without hard labour, not exceeding two years. [*The words omitted have been repealed by* 1 & 2 G. 5, c. 6 (Perjury Act, 1911).]

(3) Every person who, with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation of any body, or, with such intent, makes any declaration or gives any certificate under this Act, shall be liable on conviction on indictment to penal servitude for a term not exceeding five years. *As to minimum term of penal servitude and term of imprisonment*, see 54 & 55 Vict. c. 69, s. 1, ante, pp. 238, 239. [*It would seem that "cremation" here means burning in a crematorium. Where the evidence was that the bodies of children were burnt by the prisoner in a kitchen range or stove in the prisoner's own house, it was held that there was no evidence "of procuring the cremation of any body" to go to the jury.* R. *v.* Byers [1907] 71 J. P. 205, Kennedy, J.]

(*e*) INTERFERENCE WITH PUBLIC RIGHTS OF PASSAGE. NUISANCE TO HIGHWAYS.

Common Law.

The common law remedy for obstruction of, or general interference by non-repair with, public rights of passage by land or water, *i.e.*, over highways, navigable rivers, and public bridges, is by indictment of the persons responsible for the nuisances caused to the public whether by misfeasance or non-feasance. *Cowley* v. *Newmarket Local Board* [1892] A. C. 345; 62 L. J. (Q. B.) 65; *Sydney Municipal Council* v. *Bourke* [1895] A. C. 433, 443; 64 L. J. (P. C.) 140: *Maguire* v. *Mayor, etc., of Liverpool* [1905] 1 K. B. 767; 74 L. J. (K. B.) 369. The procedure, though criminal in form, is now treated as in substance civil for most purposes of evidence and appeal; 40 & 41 Vict. c. 14 (*post*, p. 1352); 7 Edw. 7, c. 23, s. 20 (3), *post*, p. 1353. As to what constitutes a highway, *see post*, pp. 1360—1364.

Statutes.

3 *G.* 4, *c.* 126, *s.* 110.—*Fine for non-repair of turnpike road.*]—*All turnpike trusts have expired, and the turnpike roads have become main roads unless dismained by order of the county authority.* 41 & 42 Vict. c. 77, s. 13; and see Pratt on Highways (15th ed.), 11.

5 *& 6 W.* 4, *c.* 50 (*Highway Act*, 1835), *s.* 95.—*Mode of proceeding if obligation to repair is disputed.*]—If, on the hearing of any such summons respecting the repair of any highway [i.e., *a summons under s.* 94 *to the surveyor or*

person chargeable with the repairs], the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœned (*sic*), at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair. . . . Provided nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by *certiorari* or otherwise into his Majesty's Court of King's Bench. [*Words omitted rep.* 8 Edw. 7, c. 15, s. 10. *An indictment against inhabitants of a parish may be ordered under this section, notwithstanding* 41 & 42 Vict. c. 77, s. 10 (post, p. 1350). R. *v.* Morse [1904] W. N. 114 (K. B. D.). *Justices at petty sessions cannot try the liability to repair, if it is disputed.* R. *v.* Arnould, 8 E. & B. 550; 27 L. J. (M. C.) 92. *This section applies only to admitted highways.* Ex parte Bartlett, 30 L. J. (M. C.) 65: R. *v.* Farrer, L. R. 1 Q. B. 558; 35 L. J. (M. C.) 210. *As to incorporation of this section in the* South Wales Highway Act, 1860 (23 & 24 Vict. c. 68), see R. *v.* James, 32 L. J. (M. C.) 211. *As to effect on this section of s.* 25 *of the* Local Government Act, 1894, see Pratt, Highways (15th ed.), 649. *The urban district council or town council has in urban districts become surveyor of highways, but is not liable to indictment under this section.* R. *v.* Poole (Mayor, etc.), 19 Q. B. D. 608; 56 L. J. (M. C.) 131. *The words "or any other party charged therewith" mean persons liable* ratione tenuræ, *etc., and do not apply to district councils.* R. *v.* Biggleswade R. D. C. [1900] 64 J. P. 442, Wright, J.]

As to costs, see post, p. 1371.

25 *&* 26 *Vict. c.* 61 (*Highway Act*, 1862), *s.* 19.—*Mode of proceeding if obligation to repair is disputed, and where the highway is within the jurisdiction of a rural district council.*]—When, on the hearing of any such summons respecting the repair of any highway [i.e., *summons issued to the highway board and the waywardens under s.* 18 *of the Act*], the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair. [*The words omitted were rep.* 8 Edw. 7, c. 15, s. 10. *This section was used where a highway board and waywardens had been appointed to take over between them the duties of a parish surveyor.* Loughborough Highway Board *v.* Curzon, 16 Q. B. D. 565; 17 Q. B. D. 344. *It applies only to admitted highways.* R. *v.* Farrer, L. R. 1 Q. B. 588; 35 L. J. (M. C.) 210. *Highway*

boards and waywardens are now in most, if not all, parishes abolished, and their powers transferred to rural district councils, which are also surveyors of highways. 56 & 57 Vict. c. 73, s. 25 (post, p. 1351). *This section cannot be used against a rural district council.* R. *v.* Biggleswade R. D. C., 64 J. P. 442; see Pratt, Highways (15th ed.), 615. *The liability of the inhabitants to be indicted appears not to be transferred to the parish council by* 56 & 57 Vict. c. 73, s. 6. R. *v.* Shipley Parish Council, 18 Cox, 531; 61 J. P. 488, Mathew, J. *As to costs*, see p. 1371.]

5 & 6 *W.* 4, *c.* 50, *s.* 96.—*Levying and application of fines.*]—No fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer, or other court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied towards the repair and amendment of such highway: and the person so ordered to receive such fine shall and is hereby required to receive, apply, and account for the same, according to the direction of such court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture, to be imposed for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and the said justices are hereby empowered and authorized, by warrant under their hands, to make an order on the surveyor of the parish for payment of the same, out of the money receivable by him for the highway rate, and shall within two months next after service of the said order on him pay unto such inhabitant the money therein mentioned. [*The section is here printed as it appears in the* Statutes Revised (2nd ed.), vol. v., p. 742. *The fine, etc., is applicable only to repair of the highway, and if none is needed proceedings for levy of the fine will be stayed or the fine modified.* R. *v.* Barnard Castle, 10 L. J. (M. C.) 53; 5 Jur. (O. S.) 799: R. *v.* Claxby, 24 L. J. (Q. B.) 233; 1 Jur. (N. S.) 710.]

Sect. 98.—*Costs.*]—*Rep.* 8 Edw. 7, s. 15, s. 10. See post. p. 1371.

Sect. 99.—*Proceeding by presentment abolished.*]—From and after the commencement of this Act, it shall not be lawful to take or commence any legal proceeding, by presentment, against the inhabitants of any parish or other person, on account of any highway or turnpike road being out of repair. (*See* R. *v.* Mawgan in Meneage, 8 A. & E. 496; 7 L. J. (M. C.) 98; 3 Nev. & P. 502: R. *v.* Denton, 18 Q. B. 761; 21 L. J. (M. C.) 207; 8 Dears. 3. *It would seem that the remedy by indictment under s.* 95 *is substituted for presentment.* R. *v.* Arnould, 8 E. & B. 550, 556; 27 L. J. (N. S.) Q. B. 92, Coleridge, J. And see *s.* 78 (3) *of the* Local Government Act, 1888 (51 & 52 Vict. c. 41), post, p. 1351. *As to the nature of a presentment*, see 2 Co. Inst. 739; 3 Comb. 225.]

Sect. 107.—*Certiorari.*]—Provided always that no rate or any proceeding to be had touching the conviction of any offender against this Act, or any order made, or any other matter or thing done or transacted in or relative to the

execution of this Act, shall be vacated or quashed for want of form, or be removed or removable (except as herein mentioned, i.e., *in case of appeal, where the sessions grant a case*, s. 108: R. *v.* Thomas, 7 E. & B. 399, 405, Coleridge, J.) by *certiorari*, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster. [*This section does not affect the power to remove by* certiorari *an indictment preferred by order of justices under s.* 95. R. *v.* Sandon, 3 E. & B. 540; 23 L. J. (M. C.) 129. *Where the indictment is against a body corporate, it must be removed into the High Court for trial;* see ante, pp. 9, 111.]

41 & 42 *Vict. c.* 77 (*Highways and Locomotives* (*Amendment*) *Act*, 1878), *s.* 10.—*Mode of proceeding where county authority has made an order for the repair of a highway on a highway authority, and the highway authority disputes its liability to repair.*]—Where complaint is made to the county authority (i.e., *the county council*) that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint. . . .

Where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the county authority, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway in respect to which they are alleged to have made default has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such manner as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway.

If the county authority decide to submit the question to a jury, they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the liability of the defaulting authority to repair the highway. Until the trial of the indictment is concluded the order of the county authority shall be suspended. On the conclusion of the trial, if the jury find the defendants guilty, the order of the county authority shall forthwith be deemed to come into force; but if the jury acquit the defendants the order of the county authority shall forthwith become void.

The costs of the indictment, and of the proceedings consequent thereon, shall be paid by such parties to the proceedings as the Court before whom the case is tried may direct. Any costs directed to be paid by the county authority shall be deemed to be expenses properly incurred by such authority, and shall be paid accordingly out of the county rate; and any costs directed to be paid by the highway authority shall be deemed to be expenses properly incurred by such authority in maintenance of the roads within their jurisdiction, and shall be paid out of the funds applicable to the maintenance of such roads.

[*The above provision as to costs is not repealed by* 8 Edw. 7, c. 15. See post, p. 1371.]

This enactment does not repeal the procedure under ss. 94, 95 *of the* Highways Act, 1835 (ante, p. 1347). See R. *v.* Morse [1904] W. N. 114, K. B. D. *The* Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 144), *does not make an urban sanitary authority liable to indictment for non-repair of a highway.* R. *v.* Poole (Mayor, etc., of), 19 Q. B. D. 602; 56 L. J. (M. C.) 131. *But an indictment will lie under* 41 & 42 Vict. c. 77, s. 10, *against an urban sanitary authority acting as the highway authority of the district, for non-repair of a highway.* R. *v.* Wakefield (Mayor, etc.), 20 Q. B. D. 810; 57 L. J. (M. C.) 52: R. *v.* Crompton U. D. C., 20 Cox, 243. *This decision appears to apply to rural district councils which are highway authorities under* 56 & 57 Vict. c. 73, s. 25, infra. R. *v.* Biggleswade R. D. C. [1900] 64 J. P. 442. *As to the proper form of an order under this section, and the consequences of variance from it,* see R. *v.* Southport (Mayor, etc.), 65 J. P. 184. *As to proceedings where the county council neglect or refuse to make an order,* see R. *v.* Dorset County Council, 67 J. P. 19.

Sect. 38.—*Interpretation.*]—"County authority" means the justices of a county in general or quarter sessions assembled [*now the county council:* see 51 & 52 Vict. c. 41, ss. 3 (infra), 11 (post, p. 1378).]

"Highway authority" means as respects an urban sanitary district the urban sanitary authority, and as respects a highway district the highway board, and as respects a highway parish the surveyor or surveyors or other officers performing similar duties. [*Now the rural district council:* see 56 & 57 Vict. c. 73, s. 25, infra.]

51 *& 52 Vict. c.* 41 (*Local Government Act*, 1888), *s.* 3.]—There shall be transferred to the council of each county on and after the appointed day the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions, in respect of the several matters following, namely,— . . . (viii.) Bridges and roads repairable with bridges, and any powers vested by the *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. c. 77), in the county authority: . . . (*For s.* 11, *as to main roads and bridges carrying them, see* post, p. 1378.)

56 *& 57 Vict. c.* 73 (*Local Government Act*, 1894), *s.* 25.]—(1) As from the appointed day there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of . . . any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the . . . highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under ss. 144 to 148 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), and these sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority. . . . (*As to effect of this section*, see Pratt, Highways (15th ed.), 650.)

(2) *Provision as to repair by district council of highway repairable* ratione tenuræ, *and recovery of the costs by action against the person liable.* (See Cuckfield U. D. C. *v.* Goring [1898] 1 Q. B. 865; 67 L. J. (Q. B.) 539: Daventry R. D. C. *v.* Parker [1900] 1 Q. B. 1; 69 L. J. (Q. B.) 105: Esher U. D. C. *v.* Marks, 71 L. J. (K. B.) 309: Bingley U. D. C. *v.* Ferrand, 67 J. P. 370.)

(3) *Transfer to rural district councils of excluded parts of parishes within s.* 216 *of the* Public Health Act, 1875.

40 & 41 *Vict. c.* 14 (*Evidence Act*, 1877), *s.* 1.—*Evidence.*]—On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence. (*See ante*, p. 457.)

24 & 25 *Vict. c.* 70 (*Locomotives Act*, 1861), *s.* 13.]—Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this Act, such indictment or action could be maintained.

28 & 29 *Vict. c.* 83 (*Locomotives Act*, 1865), *s.* 12.]—Nothing in this Act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law; and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive.

59 & 60 *Vict. c.* 36 (*Locomotives on Highways Act*, 1896), *s.* 1.]—(1) The enactments mentioned in the schedule to this Act, and any other enactment restricting the use of locomotives on highways and contained in any public general or local and personal Act in force at the passing of this Act [14th August, 1896], shall not apply to any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle without its locomotive not to exceed in weight unladen four tons), and is so constructed that no smoke or other visible vapour is emitted therefrom except from any temporary or accidental cause; and vehicles so exempted, whether locomotives or drawn by locomotives, are in this Act referred to as light locomotives.

Provided that (a) the council of any county or county borough shall have power to make bye-laws preventing or restricting the use of such locomotives upon any bridge within their area, where such council are satisfied that such use would be attended with damage to the bridge or danger to the public.

(b) A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule,

regulation, or bye-law made under any Act of Parliament, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply accordingly. (*See ante*, pp. 892, 954.)

(2) In calculating for the purposes of this Act the weight of a vehicle unladen, the weight of any water, fuel or accumulators used for the purpose of propulsion shall not be included.

Schedule.]—The *Locomotives Act*, 1861 (24 & 25 Vict. c. 70), except so much of s. 1 as relates to tolls on locomotives, and ss. 7 and 13, *supra*. . . . The *Locomotives Act*, 1865 (25 & 26 Vict. c. 83). Part II. of the *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. c. 77). . . .

61 & 62 *Vict. c.* 29 (*Locomotives Act*, 1898).—*Regulation and licensing of locomotives used on highways, other than light locomotives within the Act of* 1896. *As to recovery of expenses incurred in repairing a highway by reason of damage caused by excessive weight and extraordinary traffic*, see R. *v.* Judge James and Midland Railway Co. [1908] 1 K. B. 958; 77 L. J. (K. B.) 402; Bromley R. D. C. *v.* Croydon (Mayor, etc.) [1908] 1 K. B. 353; 77 L. J. (K. B.) 335.

3 *Edw.* 7, *c.* 36 (*Motor Car Act*, 1903).—*This Act amends the Act of* 1896, *and makes further provision for regulating the use of motor-cars on highways.* —*s.* 15.]—Nothing in this Act shall affect any liability of the driver or owner of a motor-car by virtue of any statute or at common law.

7 *Edw.* 7, *c.* 23 (*Criminal Appeal Act*, 1907), *s.* 20 (3).]—Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river in whatever court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act. [*See post*, p. 1372.]

8 *Edw.* 7, *c.* 15 (*Costs in Criminal Cases Act*, 1908), *s.* 9 (3).]—This Act shall not apply in the case of an offence in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, and costs in any such case may be allowed as in civil proceedings, as if the prosecutor or defendant were plaintiff or defendant in any such proceedings. [*See post*, p. 1371.]

NUISANCE BY OBSTRUCTION.

Indictment for obstructing a Common Highway. (*Common Law.*)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Obstructing a Highway..

PARTICULARS OF OFFENCE.

A. B., on the —— day of —— [*and on other days between that date and the —— day of ——*], in the county of ——, obstructed or caused to be obstructed the common highway called the Strand by [*state in ordinary language the obstruction.*]

See *as instances of obstructing a highway*, 3 Chit. Cr. L. 607;—*by continuing a hedge across it*, Cro. Circ. Comp. 307;—*by erecting a gate across it*, 6 Went. 401, 405: R. *v.* Botfield, C. & Mar. 151:—*by building or continuing a building upon it*, 4 Went. 181, 191: R. *v.* Pedly, 3 L. J. (N. S.) M. C. 119; 1 A. & E. 822;—*by placing carts upon it for the sale of vegetables*, Cro. Circ. Comp. 305;—*by taking an unreasonable time in delivering beer to the cellar of a public-house, or depositing or sawing logs thereon*, R. *v.* Jones, 3 Camp. 230;—*by laying soil upon it*, Cro. Circ. Comp. 303;—*by laying rubbish upon it*, Cro. Circ. Comp. 315;—*by digging holes in it*, Cro. Circ. Comp. 303, 314;—*by digging a horsepond and erecting a cistern in it*, Cro. Circ. Comp. 304;—*by stopping a water-course and thereby overflowing the highway*, Cro. Circ. Comp. 376;—*by digging trenches in order to lay down pipes for the supply of gas from mains to private houses*, R. *v.* Longton Gas Co., 2 E. & E. 651; 29 L. J. (M. C.) 118;—*by exhibiting effigies at a window, and thereby attracting a crowd*, R. *v.* L. Carlile, 6 C. & P. 636; R. *v.* Moore, 3 B. & Ad. 184; and see Walker *v.* Brewster, L. R. 5 Eq. 25; 37 L. J. (Ch.) 33: Bellamy *v.* Wells, 39 W. R. 158; Barber *v.* Penley [1893] 2 Ch. 447; 62 L. J. (Ch.) 623; Lowdens *v.* Keaveney [1903] 2 Ir. Rep. 82: Original Hartlepool Collieries Co. *v.* Gibb, 5 Ch. D. 713; 46 L. J. (Ch.) 311; Att.-Gen. *v.* Brighton and Hove Co-operative Supply Association [1900] 1 Ch. 276; 69 L. J. (Ch.) 204;—*by laying down a tramway in it*, R. *v.* Train, 2 B. & S. 640; 31 L. J. (M. C.) 169; 9 Cox, 180; 2 B. & S. 647 n.;—*by setting up telegraph posts on it*, R. *v.* United Kingdom Telegraph Co., Ltd., 31 L. J. (M. C.) 166; 9 Cox, 174; 3 F. & F. 73;—*by digging up streets to insert telegraph or telephone wires, even by consent of the local authority, except under the licence or authority of the postmaster-general.* Id.

Misdemeanor at common law: fine and (or) imprisonment with or without hard labour. See ante, pp. 239, 241, 246. *On conviction for obstructing a highway, the Court may give judgment for prostration, but is not bound to do so if the obstruction has been removed or legalized.* R. *v.* Incledon, 13 East, 164, 166.

The trial of an indictment for obstructing a highway will not be postponed until after the trial of an action by the prosecutor against the defendant in respect of the same obstruction. R. *v.* Bowles, 2 F. & F. 371.

As to indictments for jointly obstructing a highway, see R. *v.* Lynn, 1 C. & P. 527.

As to appeal against conviction, see post, p. 1372.

Evidence.

The defendant and his wife are admissible as witnesses and compellable to give evidence on the trial of this indictment. 40 & 41 Vict. c. 14, s. 1 (*ante*, p. 457).

Prove the way in question to be a common highway. (*See post*, pp. 1360—1364.) Old maps may be evidence of reputation, but are not so of the exact boundaries of the highway. *R.* v. *Berger* [1894] 1 Q. B. 823; 63 L. J. (Q. B.) 529; 17 Cox, 761. (*See ante*, p. 412.) Prove the obstruction, as stated in the indictment; and prove that it was productive of inconvenience to persons passing through the street, either in carriages or on foot. Where a waggoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriages could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying upon the ground ready for loading; this was held to be a public nuisance, although it appeared that there was room for two carriages to pass on the opposite side of the street. *R.* v. *Russell*, 6 East, 427: *and see R.* v. *Jones*, 3 Camp. 230: *R.* v. *Cross*, 3 Camp. 224: *Harris* v. *Mobbs*, 3 Ex. D. 273: *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J. (Ch.) 321: *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association* [1900] 1 Ch. 276; 69 L. J. (Ch.) 204. As to the uses to which a highway may lawfully be put, see *Hadwell* v. *Righton* [1907] 2 K. B. 345; 76 L. J. (K. B.) 891. Where a highway runs between fences, the right of passage which the public have along it extends *primâ facie*, and unless there be evidence to the contrary, over the whole space between the fences. *Steel* v. *Prickett*, 2 Stark. (N. P.) 463: *R.* v. *Wright*, 3 B. & Ad. 681: *R.* v. *United Kingdom Electric Telegraph Co.* (*supra*): *Locke-King* v. *Woking U. D. C.*, 14 T. L. R. 32; 62 J. P. 167: *Harvey* v. *Truro R. D. C.* [1903] 2 Ch. 638; 72 L. J. (Ch.) 705; 68 J. P. 51. But the mere existence of fences on either side of a highway is not conclusive; in order to raise the presumption, it must be proved that there is nothing to show that they were not put up as boundaries of the highway. *Offin* v. *Rochford R. D. C.* [1906] 1 Ch. 342; 75 L. J. (Ch.) 348. The nature of the district, the width and level of the margins, and the regularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication. There is no invariable presumption. *Countess of Belmore* v. *Kent C. C.* [1901] 1 Ch. 873; 70 L. J. (Ch.) 501. The case of *Neeld* v. *Hendon U. D. C.*, 81 L. T. 405; 63 J. P. 724, which is discussed in *Offin* v. *Rochford R. D. C.* [1906] 1 Ch. 342; 75 L. J. (Ch.) 348, turned on the fact that the strips were proved to be waste of a manor, and that there was ample evidence to rebut the presumption

if it existed. Where a fence was not put up with reference to a highway, but was the original boundary of a close through which the highway was made, it was held that the presumption that the fence was the boundary of the highway was rebutted, and that, in the absence of sufficient evidence of public user to found the inference of dedication, the open waste land between the fence and the metalled part of the highway was not part of the highway. Att.-Gen *v.* Moorsom-Roberts [1908] 72 J. P. 123. Where the road runs over unfenced land, there is no such presumption. *Easton* v. *Richmond Highway Board*, L. R. 7 Q. B. 69; 41 L. J. (N. S.) M. C. 25; *and see* Pratt on Highways (15th ed.), pp. 36, 37. A permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a public nuisance at common law. *R.* v. *United Kingdom Electric Telegraph Co.*, ante, p. 1355. Where, therefore, the defendants placed telegraph posts upon a highway and permanently kept them there, such posts being of such size and solidity as to obstruct the passage of carriages and horses, or foot passengers, upon the parts of the highway where they stood, the defendants were held liable to be found guilty upon an indictment for a nuisance. And it was also held, that it made no difference in the defendants' liability to conviction that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that sufficient space was left for the public traffic. *Id.* On an indictment for the continuance of a nuisance, viz., the continuance of a wall obstructing a highway, the record of the judgment on a former indictment for the same nuisance against the same defendant on which he was convicted is conclusive evidence that the *locus in quo* is a highway, and that the wall is a nuisance. *R.* v. *Maybury*, 4 F. & F. 90. Although an Act of Parliament authorizes alterations in a public highway, yet if those alterations are not made with reasonable care, and cause unnecessary danger to persons using the highway, the contractor executing the works may be indicted for obstructing the highway. *R.* v. *Burt*, 11 Cox, 399, Hawkins, J.

The use of locomotives and motor-cars on highways and other roads is regulated by 24 & 25 Vict. c. 70, and 28 & 29 Vict. c. 83, and by 41 & 42 Vict. c. 77, Part II.; 59 & 60 Vict. c. 36; 61 & 62 Vict. c. 29, and 3 Edw. 7, c. 36; but the two first-mentioned Acts in ss. 13 and 12 respectively (*ante*, p. 1352) forbid the construction or use of such machines so as to be a nuisance at common law. It has been held that the use of locomotives and trucks on a highway does not amount to a nuisance by obstruction to the highway, unless such use creates a substantial obstruction, and occasions delay and inconvenience to the public substantially greater than would have been caused by horses and carts. *R.* v. *Chittenden*, 15 Cox, 725, Hawkins, J. Uninterrupted use of part of a street as a fair or market for rags has been held an answer to an indictment for obstruction. *R.* v. *Smith* [1802] 4 Esp. 111 (*Rag Fair case*), Ellenborough, C.J.

Where a statute enacted, that the erection of a building within certain limits should be deemed a "common nuisance," and also gave a summary remedy, by proceedings before magistrates, it was held that the offender might be indicted for the nuisance. *R.* v. *Gregory*, 5 B. & Ad. 555; 3 L. J. (M. C.) 25. (*See ante*, p. 5; *and* R. *v.* Charlesworth, 16 Q. B. 1012.)

The obstruction to warrant a conviction must be appreciable. *R.* v. *Bartholomew*, 72 J. P. 79 (C. C. R.) : *R.* v. *Leprue*, 30 J. P. 723.

Where the way is proved to be a highway, and to be obstructed, the only defence is the existence of statutory authority to obstruct it, or that it has been closed by order of justices under 5 & 6 W. 4, c. 50, s. 84, or in London under *Michael Angelo Taylor's Act* (57 G. 3, c. xxix.), with the consents required by that Act and the *Local Government Acts* of 1888 and 1894. *See* Pratt on Highways (15th ed.), chap. vi.; or that, if it is a street in a town, it has been closed under s. 66 of the *Towns Police Clauses Act*, 1847 (10 & 11 Vict. c. 89). *See R.* v. *Platts*, 49 L. J. (Q. B.) 848; 28 W. R. 915.

Upon the trial of an indictment for obstructing a highway, an agreement was approved by the judge that the prosecutor should consent to a verdict of "not guilty" if defendants restored the highway within seven years. The defendants did not carry out their part of the agreement, and an action was thereupon brought against them for specific performance or damages. It was held, however, that the action would not lie, as the consideration, the consenting to the verdict of "not guilty," was illegal. *Windhill Local Board* v. *Vint*, 45 Ch. D. 351; 59 L. J. (Ch.) 608.

In some cases the consent of the highway authority may be an answer to an indictment for encroachment or obstruction. *See R.* v. *Burrell*, 10 Cox, 462 (C. C. R.) : *R.* v. *Bartholomew* [1908] 1 K. B. 554; 72 J. P. 79.

Indictment for obstructing the Navigation of a Public River.

(*Common Law.*)

PARTICULARS OF OFFENCE.

As in last precedent, substituting for the street "that part of the River Thames, being a public navigable river lying between —— and ——."

Misdemeanor: fine and (*or*) *imprisonment with or without hard labour* (see ante, pp. 239, 241, 246). *Also, to divert a part of a public river, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance.* 1 Hawk. c. 75, s. 11. See R. *v.* Grosvenor, 2 Stark. (N. P.) 511, *an indictment for erecting a wharf in the Thames to the injury of navigation:* R. *v.* Ward, 4 A. & E. 384; 5 L. J. (N. S.) K. B. 221 : Att.-Gen. *v.* Terry, L. R. 9 Ch. App. 423, 426 (disapproving R. *v.* Russell, 6 B. & C. 566; 5 L. J. (K. B.) 221) : R. *v.* Tindall, 6 A. & E. 143; 1 Nev. & P. 719; 6 L. J. (M. C.) 97 : R. *v.* Morris, 1 B. & Ad. 441 : and R. *v.* Randall, C. & Mar. 496 (ante, p. 1313). *If a ship or other vessel sinks by accident in a river, although it obstruct the navigation, yet the owner is not indictable, as for a nuisance, for not removing it.* R. *v.* Watts, 2 Esp. 675. *As to the remedy in such cases, see* The Crystal [1894] A. C. 508; 63 L. J. (P. D. & A.) 146 : Barraclough *v.* Brown [1897] A. C. 615; 66 L. J. (Q. B.) 672.

Evidence.

The defendant and his wife are admissible as witnesses and compellable to give evidence on the trial of this indictment. 40 & 41 Vict. c. 14, s. 1 (*ante*, p. 457).

Prove that the river in question is public and navigable in that part of it which was obstructed (*see R.* v. *Betts*, 16 Q. B. 1022: *Simpson* v. *Att.-Gen.* [1904] A. C. 476); and prove the obstruction stated in the indictment, in the same manner as under the last precedent. Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths therein, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage occasioned by these staiths was for a public purpose, and occasioned a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was held that this direction was right. *R.* v. *Russell* (ante, p. 1357), Tenterden, C.J., *diss.* But the opinion of the majority was dissented from in *R.* v. *Ward*, 4 A. & E. 384; in *R.* v. *Betts*, 16 Q. B. 1022, and in *Att.-Gen.* v. *Terry* (*supra*); *and see Mayor, etc., Norwich* v. *Norfolk Rail. Co.*, 24 L. J. (N. S.) Q. B. 105; 4 E. & B. 397, 440, and the cases collected (*supra*).

The building of a bridge, or of a wall or embankment, partly in the bed of a navigable river, does not *necessarily* constitute a nuisance; the question whether in fact it is so or not in the particular instance is for a jury; and where the verdict of a jury negatives any actual obstruction, that is in effect an acquittal. *R.* v. *Betts*, 16 Q. B. 1022: *see R.* v. *Charlesworth*, *Id.* 1012. Where the judge at the trial asked the jury whether they thought the erection would be "a material nuisance," in which case they were to find a verdict of guilty: but told them that if they thought the "nuisance" was so slight, uncertain and rare, that the defendant ought not to be made criminally liable for it, they should acquit him; and the jury saying that they considered the erection, "although a nuisance, was not sufficiently so to render the defendant criminally liable," he directed an acquittal: the Court held that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction in question was so insignificant; and so that there was not a misdirection which would warrant a new trial. *R.* v. *Russell*, 3 E. & B. 942; 23 L. J. (M. C.) 173; *and see R.* v. *Tindall*, 6 A. & E. 143, 152; 6 L. J. (M. C.) 97. It is a defence to an indictment for obstructing a public navigable river to prove that the obstruction was erected under statutory authority. *Jolliffe* v. *Wallasey L. B.*, L. R. 9 C. P. 62, 82; 43 L. J. (N. S.) C. P. 41: *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662; 46 L. J. (Ch.) 68.

Where the workmen of the defendant, in working his colliery, stacked the refuse in such a manner that it fell into and obstructed a navigable river, and the defendant was indicted for a nuisance in causing such obstruction, it was held, that the fact of his not having personally superintended the works, of his

having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and that it was not to be thrown into the river, would not relieve him from liability upon the indictment. *R.* v. *Stephens*, L. R. 1 Q. B. 702; 35 L. J. (Q. B.) 251; 7 B. & S. 710; 10 Cox, 340. *Cf. Chisholm* v. *Doulton*, 22 Q. B. D. 736; 58 L. J. (M. C.) 133 (*ante*, p. 25).

NON-REPAIR OF HIGHWAYS.

Indictment against a Parish for not repairing a Highway.

(*Common Law.*)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Non-repair of Highway.

PARTICULARS OF OFFENCE.

The inhabitants of the parish of ——, in the county of ——, on divers days between the —— day of —— and —— day of ——, neglected to repair that part of the King's highway leading from —— to —— within the said parish, and thereby caused danger or a nuisance to persons using the said highway.

Where a public footway led from A. to the gate of a churchyard, and communicated through that gate by a public path which in one part of it formed an acute angle with the church, it was held that it might be described as a footway leading from A. towards and unto the church. R. *v.* Marchioness of Downshire, 4 A. & E. 232; 5 Nev. & M. 662. *Where the highway was described as leading from the village of T. to the village of E., and the evidence was that it led from the village of T. into a turnpike road from A. to B., and then, after passing along it for some distance, branched off to the village of E., it was held well described.* R. *v.* Turweston, 16 Q. B. 109; 20 L. J. (M. C.) 46. *Where the indictment stated the way to be a carriage-way leading from the town of A., in the county of B., towards and unto the village of E., in the same county, and the part charged to be out of repair was a portion of a lane called F. lane, and it appeared in evidence that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then cross the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.: it was held, that the road was not misdescribed.* R. *v.* Steventon, 1 C. & K. 55. *Where an indictment charged the obstruction of a footway from A. to C., and it appeared that the way was a carriage-way from A. to B., and a footway from B. to C., the obstruction being between B. and C., this was held, if a misdescription, amendable under* 14 & 15 Vict. c. 100,

s. 1 (*rep.*). R. *v.* Sturge, 3 E. & B. 734; 23 L. J. (M. C.) 172. *The indictment, however, must show with certainty the part of the road which is out of repair, etc.* 1 Hawk. c. 76, ss. 234, 235; but see 2 Wms. Saund. 158 (*d*); *and that it is within the parish;* see R. *v.* Hartford, 1 Cowp. 111: R. *v.* Gamlingay, 3 T. R. 513: R. *v.* Knight, 6 L. J. (M. C.) 19; 7 B. & C. 413: R. *v.* Upton-on-Severn, 6 C. & P. 133. *If the parish was situate part in one county and part in another, the indictment must be against the whole parish, although the road out of repair were in a part of the parish lying in one county only;* R. *v.* Clifton, 5 T. R. 498: sed. contra R. *v.* Weston, 4 Burr. 2507. In R. *v.* Landulph, 1 M. & Rob. 393, *it was held that where two parishes are separated by a river, the* medium filum aquæ *is the presumptive boundary between them. But this view was doubted in* Bridgwater Trustees *v.* Bootle, L. R. 2 Q. B. 4, 7. *Where a public way crosses the bed of a river which washes over it at every tide, and leaves a deposit of mud, the parish is not bound to make it good.* R. *v.* Landulph (supra). *It has been held that the liability of the inhabitants of a parish to indictment has not been transferred to the parish council by* 56 & 57 Vict. c. 73 (Local Government Act, 1894); R. *v.* Shipley Parish Council, 18 Cox, 531; 61 J. P. 488; *but still exists.* R. *v.* Morse [1904] W. N. 114 (K. B. D.). *As to the liability to indictment of district councils, including borough councils,* see ante, p. 1351.

Misdemeanor: fine. As to the levying and application of such fine, see 5 & 6 W. 4, c. 50, s. 96, ante, p. 1349; *and cases there cited.*

Plea of General Issue.

And J. S. and J. N., two of the inhabitants of the said parish of ——, by A. B., their solicitor, for themselves and the rest of the inhabitants of the said parish, say they are not guilty of the offence charged against them in the indictment.

Evidence for the Prosecution under the General Issue.

The parishioners of the defendant parish and their wives may be compelled to give evidence for the prosecution. 40 & 41 Vict. c. 14, s. 1 (*ante*, p. 457).

1. The prosecutor must prove that the road or street in question is a public highway—that is to say, a way open and common to all persons. 1 Hawk. c. 76, s. 1; *see* 3 Chit. Cr. L. 565 *et seq.*: *R.* v. *Richards*, 8 T. R. 634: *Rugby Charity Trustees* v. *Merryweather*, 11 East, 376 n.; 5 Taunt. 125: *R.* v. *Lloyd*, 1 Camp. 260: *R.* v. *Barr*, 4 Camp. 16; *R.* v. *St. Benedict's, Cambridge*, 4 B. & Ald. 447: *R.* v. *Mellor*, 1 B. & Ad. 32: *R.* v. *Paul*, 2 M. & Rob. 307. A highway may be so by prescription—*i.e.*, user as a highway for the time of legal memory—or by dedication and acceptance. Highways are not within the *Prescription Act*, 1832 (2 & 3 W. 4, c. 71), and proof of common law prescription is in practice never now given, proof of dedication being simpler. *See Mann* v. *Brodie*, 10 App. Cas. 378, 386. Once the way is proved to be a highway, mere disuse for however long does not deprive the public of their

right of way. *Harvey* v. *Truro R. D. C.* [1903] 2 Ch. 638 : 72 L. J. (Ch.) 705 : *R.* v. *Edwards* [1847] 11 J. P. 602. Where a footway was laid out under an inclosure award, it was held that user by wheeled traffic for forty or fifty years was in its inception illegal, and could not be legalized by length of time. *Sheringham U. D. C.* v. *Halsey* [1904] 68 J. P. 395. As to the admissibility and effect of maps, *see ante*, pp. 412, 1355. A road or street may *in law* be a public highway, though it is not a *thoroughfare*; it is a question of fact for the jury in each case whether it is so or not. *Bateman* v. *Bluck*, 18 Q. B. 870; 21 L. J. (Q. B.) 406 : *Bourke* v. *Davis*, 44 Ch. D. 110, 123 : *Robinson* v. *Cowpen*, L. B., 62 L. J. (Q. B.) 619. In rural districts it is doubtful whether a way which is not a thoroughfare can be a highway. *Eyre* v. *New Forest Highway Board*, 56 J. P. 518. But although the lawful stoppage of access to *one* end of a highway does not make it cease to be a highway (*Wood* v. *Veal*, 5 B. & Ald. 454 : *R.* v. *Downshire* (*Marquis*), 5 L. J. (N. S.) M. C. 72; 4 A. & E. 698), a highway ceases to be such where the access to it at *both* ends has become impassable by reason of other highways leading to it having been legally stopped up. *Bailey* v. *Jamieson*, 1 C. P. D. 329. A road dedicated to and used by the public becomes (subject to 5 & 6 W. 4, c. 50, s. 23) a highway repairable by the parish, although neither such dedication nor such use has been adopted or acquiesced in by the parish, and although the parish may in fact never have repaired the road. *R.* v. *Leake*, 5 B. & Ad. 469; 2 Nev. & M. 583 : *R.* v. *Newbold*, 11 Cox, 231 : *see Roberts* v. *Hunt*, 15 Q. B. 17 : *R.* v. *Lordsmere*, 15 Q. B. 689; 89 L. J. (M. C.) 215. The absence of repair by the parish is, however, a circumstance (to be weighed with the other evidence in the case) going to prove that the road is not a public one. *R.* v. *Leake*: *R.* v. *Newbold* (*supra*). Public user of a road for many years is evidence from which the jury may infer a dedication, though it may not be clear in whom the ownership of the soil is vested. *R.* v. *East Mark*, 11 Q. B. 877; 11 L. J. (Q. B.) 177 : *see Poole* v. *Huskinson*, 11 M. & W. 827 : *R.* v. *Petrie*, 24 L. J. (N. S.) Q. B. 167; 4 E. & B. 737. A public user, even for less than twenty years, *may* be sufficient evidence for this purpose, if clearly shown to have been acquiesced in by the owner of the soil. *R.* v. *Chorley*, 12 Q. B. 515. Such user, if uninterrupted and with the knowledge and consent of the owner, is sufficient evidence of intention to dedicate. *Leckhampton Quarries Co.* v. *Ballinger*, 68 J. P. 464, Eady, J.; affirmed as to costs by Court of Appeal, 69 J. P. 377. Where the user of a road by the public had been such as would have warranted a presumption of dedication as against an owner in fee in possession, it was held that the consent of the tenant for life and remainderman must be presumed, although in fact the tenant for life had no knowledge of the user of the road by the public. *Farquhar* v. *Newbury R. D. C.* [1909] 1 Ch. 12; 78 L. J. (Ch.) 170; 100 L. T. 17; 73 J. P. 1. Persons entitled to a right of passage by way of easement or licence over a driftway or other private road are not "occupiers" of the way within the meaning of s. 36 of the *Highway Act*, 1862, and their consent is not necessary to an application to justices for a declaration converting the way into a public highway. *R.* v. *Somers* [1906] 1 K. B. 326; 75 L. J. (K. B.) 144. The *Highway Act*, 1835 (5 & 6 W. 4, c. 50), does not apply retrospectively to roads

completely public by dedication before the Act, but only to roads then made, and in progress of dedication. *R.* v. *West Mark*, 2 M. & Rob. 305. Where a road has been dedicated to the public, but the conditions have not yet been fulfilled which, under the 23rd section of that Act, make it repairable by the parish, the owner of the soil is not liable for its repair. *R.* v. *Wilson*, 18 Q. B. 348; 21 L. J. (N. S.) Q. B. 281: *see Roberts* v. *Hunt*, 15 Q. B. 17. A road newly formed, or continued under an award made under an Inclosure Act, is not repairable by the parish until it has been declared by justices in special sessions to be fully and sufficiently formed, completed, and repaired, under 41 G. 3, c. 109, s. 9: *R.* v. *Hatfield*, 4 A. & E. 156; even though the parish had in fact repaired it before and after the award, which was made eighteen years ago. *R.* v. *East Hagbourne*, Bell, 135; 8 Cox, 135 (C. C. R.), As to proof of dedication of a *cul-de-sac* as a highway, *see Whitehouse* v. *Hugh* [1906] 1 Ch. 253; 75 L. J. (Ch.) 677. *And see Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188, at p. 207; 74 L. J. (Ch.) 599, Farwell, J. There is no such inconsistency between the powers and duties of commissioners of sewers to keep up a sea or river wall, and a right of way enjoyed by the public along such a wall, as to prevent such a right of way being acquired:—evidence of long and uninterrupted user may establish the right of way in such a case as well as in the ordinary case of a right of way claimed and used over the land of an individual. *Greenwich District Board of Works* v. *Maudslay*, L. R. 5 Q. B. 397; 39 L. J. (Q. B.) 205. The public have no common law right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner. *Brinkman* v. *Matley* [1904] 2 Ch. 313; 73 L. J. (Ch.) 160.

There cannot in law be a dedication to a *part* of the public, but it seems that there may be a dedication partial as to the *use* of the road by the whole public; *e.g.*, that it shall be used on foot only; or for all purposes except carrying coals; or that it shall continue subject to such use of portions of it as the occupiers of adjoining houses had been accustomed to make. *See Marquis of Stafford* v. *Coyney*, 5 L. J. (K. B.) 285; 7 B. & C. 257: *Le Neve* v. *Vestry of Mile End Old Town*, 27 L. J. (N. S.) Q. B. 208; 8 E. &.B. 1054: *Morant* v. *Chamberlin*, 6 H. & N. 541. Or there may be dedication of a highway subject to a partial interruption during the continuance of a fair or market for a certain limited and not unreasonable time. *Elwood* v. *Bullock*, 6 Q. B. 383: *Gingell* v. *Stepney Borough Council* [1906] 2 K. B. 468; 77 L. J. (K. B.) 347. So a foot road may legally be dedicated to and accepted by the public as a highway, subject to the inconvenience of being occasionally ploughed up. *Mercer* v. *Woodgate*, L. R. 5 Q. B. 26; 39 L. J. (M. C.) 21. There cannot in point of law be a dedication to the public for a limited time. *R.* v. *Lordsmere*, 15 Q. B. 689; 19 L. J. (M. C.) 220, Byles, J.: *Corsellis* v. *London County Council* [1907] 1 Ch. 704; [1908] 1 Ch. 13; 77 L. J. (Ch.) 120. There must be acceptance by the public. *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 Ch. D. 327; 49 L. J. (Ch.) 68: *Cubitt* v. *Maxse*, L. R. 8 C. P. 715; 42 L. J. (C. P.) 278.

Where a highway is supported by a wall, and such wall becomes dangerous by reason of non-repair, the inhabitants of the place in which such highway

is situate, if liable to repair the highway, can be convicted upon an indictment for non-repair, it being a question for the jury whether the wall forms part of the highway or not. *R.* v. *Lordsmere*, 16 Cox, 65 (C. C. R.). *Cf. Kent County Council* v. *Sandgate U. D. C.*, 61 J. P. 517; 79 L. T. 425 (C. A.): *Att.-Gen.* v. *Staffordshire County Council* [1905] 1 Ch. 336; 74 L. J. Ch. 153.

The powers of companies created by statute, and possessing statutory authority to carry on railways or canals, to dedicate land for highways depend on a consideration of the statutes relating to the company. *Att.-Gen.* v. *London and South Western Rail. Co.*, 69 J. P. 110: *Taff Vale Rail. Co.* v. *Pontypridd U. D. C.*, 93 L. T. 126; 69 J. P. 351: *Coats* v. *Herefordshire County Council* [1909] 2 Ch. 579; 78 L. J. (Ch.) 781. But such a statutory body has power to dedicate a right of way along the embankment of a reservoir where such dedication need not result in the cost of the upkeep being materially increased. *Lancs and Yorks Rail. Co.* v. *Davenport* [1906] 70 J. P. 129. As to widening highways or bridges over railways, *see Rhondda U. D. C.* v. *Taff Vale Rail. Co.* [1908] 1 K. B. 239; 78 L. J. (K. B.) 647; 71 J. P. 189. As to fires caused by sparks from railway engines, *see* 5 Edw. 7, c. 11 (*Railway Fires Act*, 1905). A parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged highway used to pass. *R.* v. *Paul*, 2 M. & Rob. 307. So, where part of a highway had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to the point from which it had been destroyed, at which point the road was terminated by a perpendicular cliff, caused by successive encroachments; it was held that there was no obligation on the parish to provide an available carriage-way from that point, in the line of the former road, down to the beach. *R.* v. *Hornsea*, Dears. 291; 23 L. J. (M. C.) 59: *see also R.* v. *Bamber*, 5 Q. B. 279; 1 Dav. & M. 367; 13 L. J. (M. C.) 13 (*post*, p. 1370). Where, however, part of a highway which ran along the slope of a hill several hundred feet above the level of a valley beneath, was carried away into the valley by a landslip and its place filled up with débris, but the line of the part of the highway so carried away was known and admitted, and there was evidence that it was practicable to form a road along the old track of a similar character to the adjoining part of the old road at a cost of 341*l.*, it was held that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it. *R.* v. *Greenhow*, 1 Q. B. D. 703; 45 L. J. (M. C.) 141.

The record of a former conviction of the parish or of a former judgment against them on a presentment for non-repair of the same road is, when not guilty alone is pleaded, conclusive evidence against the defendants (in the absence of fraud or want of notice) that the highway is in the parish, and that the parish is liable to repair it. *R.* v. *St. Pancras*, Peake (3rd ed.), 286: *R.* v. *Whitney*, 7 C. & P. 208: *R.* v. *Haughton*, 22 L. J. (N. S.) M. C. 89; 1 E. & B. 501; 6 Cox, 101. And a conviction on an indictment against an adjoining parish, for non-repair of a piece of road in continuation of the way in question, was held admissible in evidence to prove that the way

in question was a highway. *R.* v. *Brightside Bierlow*, 13 Q. B. 933; 19 L. J. (M. C.) 50.

2. He must prove that that part of the road in question which is out of repair, is within the parish charged by the indictment. A previous conviction for non-repair has been held conclusive that the highway is within the parish. *R.* v. *Nether Hallam*, 6 Cox, 435. Want of certainty in such description cannot be taken advantage of under the general issue. *R.* v. *Hammersmith*, 1 Stark. (N. P.) 357.

3. He must prove the part of the road so described to be out of repair, as stated in the indictment. *See R.* v. *Stretford*, 2 Ld. Raym. 1169. The liability either at common law or by statute is general to repair and maintain the highway, leaving the person liable to find out the best or an adequate means of discharging the liability. *See Att.-Gen.* v. *Staffordshire County Council* [1905] 1 Ch. 336; 74 L. J. Ch. 153, and cases there cited. The proprietary right of the highway authority in the soil of a highway, by virtue of s. 149 of the *Public Health Act*, 1875, is confined to what is necessary to maintain the road as a highway. *Wednesbury Corporation* v. *Lodge Holes Colliery Co.* [1905] 2 K. B. 823; 75 L. J. (K. B.) 112, Jelf, J., affirmed [1908] A. C. 323.

4. It is not necessary to prove the liability of the parish to repair; for the law presumes that until the contrary is shown. *R.* v. *Great Broughton*, 5 Burr. 2700 : *R.* v. *Leake*, 5 B. & Ald. 469. And this primary liability of the inhabitants of the parish was held not to be taken away even by a statute which imposed on a canal company the liability to repair the same highway out of tolls granted to them for that purpose. *R.* v. *Brightside Bierlow*, 13 Q. B. 933; 19 L. J. (M. C.) 50. In the case of highways created since 1835, the liability of the parish, etc., to repair must be proved. As to the effect of the transfer to rural district councils and parish councils of the control of highways, etc., under the *Local Government Act*, 1894, *see R.* v. *Shipley Parish Council*, 18 Cox, 531; 61 J. P. 488; *and see R.* v. *Morse* (*ante*, p. 1348).

Evidence for the Parish, under the General Issue.

The parishioners of the defendant parish and their wives are competent and compellable witnesses. 40 & 41 Vict. c. 14, s. 1 (*ante*, p. 457).

Under the general issue, the parish may prove that the road in question is not a common highway, or that it is in good and sufficient repair, or that the part out of repair is not within the parish. 2 Wms. Saund. 158 (*a*), *in notis*: *R.* v. *Norwich*, 1 Str. 177, 181. As to rebutting the presumption of dedication, *see Neeld* v. *Hendon U. D. C.* [1899] 63 J. P. 724; 81 L. T. 481, explained in *Harvey* v. *Truro R. D. C.* [1903] 2 Ch. 638; 72 L. J. (Ch.) 705; *and see Countess of Belmore* v. *Kent County Council* [1901] 1 Ch. 873; 70 L. J. (Ch.) 501 : *Offin* v. *Rochford R. D. C.* [1906] 1 Ch. 342; 75 L. J. (Ch.) 348 (*ante*, p. 1355). As to presumption with reference to ownership of ditches, *see R.* v. *Waring* [1899] 63 J. P. 788 : *Simcox* v. *Yardley R. D. C.* [1905] 69 J. P. 66; and of the soil of the highway, *see Mappin Bros.* v. *Liberty & Co.* [1903] 1 Ch. 118; 72 L. J. (Ch.) 63. There is no rule of law

that a ditch running alongside a highway between the road and the fence cannot be dedicated as part of the highway merely because it is not part of the roadway and cannot be used by the public for purposes of passage. *Chorley Corporation* v. *Nightingale* [1907] 2 K. B. 637; 75 L. J. (K. B.) 793. They cannot prove the liability of particular persons, *ratione tenuræ*, or the like, or the liability of a particular part of the parish by custom, to repair the road in question; for those defences must be made the subject of a special plea in all cases; *R.* v. *St. Andrew's, Holborn*, 1 Mod. 112; Keb. 301 (as to which *see R.* v. *Weston*, 4 Burr. 2511, Lord Mansfield: *Anon.*, 1 Vent. 256; 1 Hawk. c. 76, s. 9; 2 Wms. Saund. 159 (*a*), *n.* (10): *R.* v. *Sheffield*, 2 T. R. 106: *R.* v. *Penderryn*, *Id.* 513: *R.* v. *Hatfield*, 4 B. & Ald. 75: *R.* v. *Netherthong*, 2 B. & Ald. 179; unless the parish have been relieved of their liability by a public statute. *R.* v. *St. George, Hanover Square*, 3 Camp. 222.

The inhabitants of a parish are not bound to repair a way used by the public and repaired by the parish for twenty years if there is no owner who could dedicate it, and the repairs by the parish are shown to have been begun and continued under a mistaken notion of the liability to repair. *R.* v. *Edmonton*, 1 M. & Rob. 24. *See R.* v. *Leake* (*ante*, p. 1364).

Plea that others, ratione tenuræ, *are bound to repair.*

And J. S. and J. N., two of the inhabitants of the said parish of ——, by A. B., their solicitor, for themselves and the rest of the inhabitants of the said parish (excepting one A. C.), say, that our lord the King ought not further to prosecute the said indictment against the inhabitants of the parish aforesaid (excepting the said A. C. as aforesaid); because they say, that the said A. C., by reason of his tenure of certain lands and tenements called ——, lying and being in the said parish, ought to repair and amend the part of the said highway set out in the indictment.

Prescription to bind an individual to repair a highway must be in respect of the tenure of his land, taking of toll or other profit. 2 Wms. Saund. 158 (*f*), n. (9). *It seems that a parish cannot be liable by prescription to repair a highway situate in another parish.* R. *v.* Ashby Folville, L. R. 1 Q. B. 213; 35 L. J. (M. C.) 154. *Nor can a parish get rid of its liability to repair, and throw the liability to indictment upon an individual by reason of any agreement between the individual and others.* R. *v.* Liverpool (Mayor, etc.), 3 East, 86: R. *v.* Beeby, 8 L. J. (M. C.) 38. *It is therefore necessary, in all cases where the parish in which the road is situate seeks to throw the liability to repair upon an individual or upon another parish, etc., to state in the plea the consideration for such liability. Merely stating a prescription will not be sufficient, except in the case of a corporation sole or aggregate, who may be bound by a prescription or usage, without consideration:* R. *v.* St. Giles, Cambridge, 5 M. & Sel. 260: R. *v.* Ashby Folville, L. R. 1 Q. B. 213; 35 L. J. (M. C.) 154; *and except, also, where the liability is thrown upon a district or township in the same parish, there an immemorial custom for the district to repair all the roads within it may be pleaded, without expressly stating any consideration for it, for the consideration appears sufficiently upon the face*

of it. R. *v.* Ecclesfield, 1 B. & Ald. 348; and R. *v.* W. R. of Yorkshire, 4 B. & Ald. 623. *To an indictment against the inhabitants of the parish of A. for the non-repair of a highway within the parish, there was a plea that the inhabitants of the parish of G. from time immemorial, and in consideration of levying and receiving certain rates in respect of certain lands in the parish of A. adjacent to the highway, had repaired and ought to repair the highway so often as there should be occasion. Replication, that the agreement in the plea mentioned was duly determined by notice. On demurrer to the replication the plea was held bad, since the alleged consideration was insufficient to support the liability of G., because it could not be enforced, and because it could not from its nature be immemorial, and the repairs must have been done by G. under some arrangement between the two parishes which might be, and had been, put an end to.* R. *v.* Ashby Folville (supra). See also R. *v.* Ardsley (post, p. 1371).

Form of Replication.

H. A. [*the clerk of the Court*], who prosecutes for our said lord the King in this behalf, joins issue.

Evidence.

In order to support this plea, the defendants must prove that A. C. is the occupier of the lands and tenements mentioned in the plea: for it is the occupier who is liable, whether he be owner or not. *R.* v. *Watts*, 1 Salk. 357: *R.* v. *Watson*, 2 Ld. Raym. 856: *R.* v. *Bucknell*; 7 Mod. 55: *R.* v. *Barker*, 25 Q. B. D. 213; 59 L. J. (M. C.) 106 (*post*, p. 1369). Prove also, either that these lands were formerly granted to be holden by the service of repairing this part of the highway in question, or that A. C., or those who occupied the land before him, were always used and accustomed to repair it, from which circumstance such a grant will be presumed. A grant from the Crown may be a legal origin of an obligation to repair *ratione tenuræ; Esher U. D. C.* v. *Marks*, 71 L. J. (K. B.) 309; and prescription is not the only way of proving the obligation. But in cases where prescription is relied on the liability must exist from time out of memory; and therefore, if it appears that the tenement in respect of which the liability is charged originated within time of memory, the plea will not be supported. *R.* v. *Hayman*, M. & M. 401. Evidence of reputation is admissible to prove the liability *ratione tenuræ*. *R.* v. *Sutton*, 7 L. J. (N. S.) Q. B. 205; 8 A. & E. 516: *R.* v. *Bedfordshire*, 24 L. J. (N. S.) Q. B. 81; 4 E. & B. 535 (*overruling R.* v. *Wavertree*, 2 M. & Rob. 353): *R.* v. *Cotton*, 3 Camp. 444. Where the occupier of land is bound, *ratione tenuræ*, to repair a highway, and the land is afterwards divided among several occupiers, each occupier is liable for the repair of the whole, and he may have his remedy over against the others for contribution. *R.* v. *Bucklugh* (*Duchess*), 1 Salk. 358; 2 Wms. Saund. 159 n. An indictment for the non-repair of a highway in parish A., alleging the liability by reason of the tenure of lands in A., is not supported by proof of a liability to repair a way extending through A. and other parishes, by reason of the tenure of a farm made up of lands in A. and the other parishes. *R.* v. *Mizen*, 2 M. & Rob. 382.

The record of an acquittal upon a former indictment against the parish, with respect to the same piece of highway, is not evidence for the defendants; for it might have proceeded upon other grounds than the non-liability of the parish to repair. *R.* v. *St. Pancras*, Peake (3rd ed.), 286. So, the record of a former conviction, although conclusive against the parish upon the plea of not guilty; *Id.*: *R.* v. *Whitney*, 7 C. & P. 208: *R.* v. *Haughton*, 1 E. & B. 501; 22 L. J. (M. C.) 89; unless fraud or want of notice can be shown; 2 Wms. Saund. 160 (*a*) n.; yet is not, it would seem, evidence against them, when they plead specially that an individual or corporation, etc., are bound to repair. But the record of a judgment after verdict against the parish upon such a plea would, it would seem, be conclusive evidence against the parish, upon their pleading the same plea to any subsequent indictment. *See R.* v. *Eardisland*, 2 Camp. 494.

Plea that a particular Division of the Parish is bound to repair.

And J. S. and J. N., two of the inhabitants of a certain district or township called A. in the parish of ——, by A. B., their solicitor, for themselves and the rest of the inhabitants of the said district or township, say, that our lord the King ought not further to prosecute the said indictment, so far as respects the inhabitants of the district or township aforesaid; because they say that the said parish of —— is, and, from time whereof the memory of man is not to the contrary, hitherto hath been, divided into two districts or townships called A. and C.; and that the inhabitants respectively of the several districts or townships of A. and C. have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships independently of each other; and that the said part of the highway referred to in the said indictment lies in that part of the said parish of —— called the district or township of C.; and that the inhabitants of the said district or township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A., in the said parish. *If the plea alleges that the particular district has been accustomed to repair all the roads within it*, which otherwise would be repairable by the parish at large, *it must show not only that the road in question is within the particular district, but also that it is one which, but for the custom, would be repairable by the parish.* R. v. Eastrington, 5 A. & E. 765; 6 L. J. (M. C.) 17; and see R. v. Ecclesfield (ante, p. 1365). *It is necessary that the prescription should be pleaded: for if judgment were given against the parish, whether after verdict on the general issue, or by default, it would be conclusive evidence afterwards that the whole parish is bound to repair;* R. v. St. Pancras, Peake (3rd ed.), 286: R. v. Whitney, 7 C. & P. 208; *unless fraud could be shown; Id.: or unless the defence in the former case were managed by the district in which the road lay, and the other districts had no notice of the prosecution, in which case the Court would give leave to the other districts to plead the prescription to the subsequent indictment.* R. v. Townshend, 2 Doug. 421; 2 Wms. Saund. 160 (*a*) n. (10): and see R. v. Eardisland, 2 Camp. 494. See *the precedents*, Cro. Circ. Comp. 392; 6 Went. 394, 410,

411; and see particularly R. *v.* Ecclesfield (ante, p. 1365). *Where an indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid for such liability, the indictment was held bad in arrest of judgment. But it was held to be no objection that the three townships were charged conjointly.* R. *v.* Bishop Auckland, 1 A. & E. 744.

Evidence.

Prove that the districts of A. and C. have been accustomed, as far as aged witnesses can recollect, each to repair the highways within its own district. The liability is an exception to the *primâ facie* liability of the parish as a whole. *R.* v. *Barnoldswick*, 4 Q. B. 499; 12 L. J. (M. C.) 44. Proof of a highway extinguished, as such, sixty years before, by an Inclosure Act, but since used by the public, and repaired by the district charged, is not sufficient to support the indictment. *R.* v. *West Mark*, 2 M. & Rob. 305. That the way is out of repair is impliedly admitted by the plea, and that the part in question lies within the district of C. is impliedly admitted by the above replication.

Proof of immemorial exemption of a township from highway rate, without proof that it has repaired its own highways, is not sufficient to establish usage charging it with its own highways and exempting it from the highway rate. *R.* v. *Rollet*, L. R. 10 Q. B. 469; 44 L. J. (N. S.) M. C. 190.

Proof of a previous conviction of the inhabitants of a hamlet for non-repair is evidence of the customary liability. *R.* v. *Lordsmere*, 16 Cox, 65 (C. C. R.); *and see ante*, p. 1364.

Quære, whether, on an indictment against inhabitants of a district, charging them with liability to repair a highway *out of* the district, it is necessary to prove a specific consideration for such liability, or whether consideration may be inferred from the fact of repair without other evidence. *Semble*, it may. *R.* v. *Denton*, 18 Q. B. 761; 21 L. J. (M. C.) 207 n.; 1 Dears. 3: *but see R.* v. *Ardsley* (*post*, p. 1371).

As to the repair of roads and streets in towns governed by local improvements Acts, incorporating the *Towns Improvement Clauses Act*, 1847, *see Slater* v. *Mayor, etc., of Ashton-under-Lyne*, 18 Q. B. 398.

Indictment against an Individual for not repairing ratione tenuræ (*a*).

As in precedent on p. 1359, except substituting for the inhabitants of the parish, "A. C., of the parish of ——, being by reason of his tenure of certain lands lying in the said parish, liable to repair, etc."

If land adjoining a highway not inclosed be afterwards inclosed by the owner (not being done by virtue of a writ of ad quod damnum [*now disused*; see Glen on Highways (2nd ed.), 416, 417; Pratt on Highways (15th ed.)] *or other legal proceedings), he thereby renders himself liable during the continuance of the*

(*a*) Instead of trying liability *ratione tenuræ* by indictment, it is now usual to try it by civil proceedings under 56 & 57 Vict. c. 73, s. 25 (2). *See Esher U. D. C.* v. *Marks*, 71 L. J. (K. B.) 309; 66 J. P. 243, *and note, ante*, p. 1352.

inclosure to repair that part of the highway adjoining the land so inclosed; 2 Wms. Saund. 161 n. (2); *and he may be indicted for allowing it to be out of repair. The indictment must set out the special matter. And these or the like considerations for the liability to repair must be stated in all cases where the indictment is against an individual, or against another parish than that in which the road is situate. To state a prescription alone is not sufficient, except in the case of a corporation sole or aggregate, which may be bound to repair by prescription or usage, without consideration.* R. v. St. Giles, Cambridge, 5 M. & Sel. 260; 1 Hawk. c. 76, s. 8.

General Issue.

"And the said A. C., by A. B., his solicitor, says, that he is not guilty."

Evidence.

A. C. and his wife are admissible witnesses and compellable to give evidence. 40 & 41 Vict. c. 14, s. 1 (*ante*, pp. 457, 1352).

Prove the liability of A. C. to repair the part of the highway in question *ratione tenuræ*, as directed *ante*, p. 1366. If it appears that the tenement in respect of which the liability is charged originated within the time of legal memory, the defendant must be acquitted. *R.* v. *Hayman*, M. & M. 401: *see R.* v. *Sheffield Canal Co.*, 13 Q. B. 913; 19 L. J. (M. C.) 44: *R.* v. *Ramsden*, E. B. & E. 949; 27 L. J. (M. C.) 296. Prove that A. C. is the occupier of the lands, for an owner of lands who is not the occupier of them cannot be charged *ratione tenuræ* with the repair of a common highway. *R.* v. *Barker*, 25 Q. B. D. 213; 59 L. J. (M. C.) 105: *Daventry R. D. C.* v. *Parker* [1900] 1 Q. B. 1; 69 L. J. (Q. B.) 105. And prove the highway to be out of repair, as directed *ante*, p. 1364.

The defendant may prove, under the general issue, either that the road is not out of repair, or that, instead of his being bound to repair it, the parish at large, or some district of it, by prescription or custom, or some individual *ratione tenuræ*, is bound to repair it; a special plea is not necessary in such a case. 2 Wms. Saund. 159 n. (10). If he pleads specially, after pleading the liability of the parish, district, or person, he must conclude with a special traverse of his own liability. *Id.* 159 (*a*) n. (10).

An infant, whose guardian in socage is in possession of the property, is not such owner or occupier of the land as to be chargeable *ratione tenuræ* for the non-repair of a bridge or highway: the guardian must be charged. *R.* v. *Sutton*, 3 A. & E. 597; 4 L. J. (K. B.) 215. But it seems that infancy would not exempt if there were no other person against whom the performance of the repairs could be enforced. *Id.*

Where, on an indictment in the common form for not repairing a highway, alleging the defendant's liability *ratione tenuræ*, it was found by a special verdict that the defendant's land adjoined the sea: that anciently a highway went over this land, and that the defendant's predecessors had repaired it, etc.: that within living memory the sea had encroached, and that the ancient highway was covered by the sea; that the defendant's predecessors had from time to time gradually removed the ancient highway as the sea encroached, and

appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea-coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had, shortly before the finding of the indictment, made an encroachment and washed away part of the highway alleged to be out of repair, and washed away large quantities of the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank of about seventy feet; it was held that the defendant was entitled to judgment. *R.* v. *Bamber*, 5 Q. B. 279; 13 L. J. (M. C.) 13. Where a highway repairable *ratione tenuræ* is, under statutory powers, as under a Turnpike Act, so altered in its nature and course as to be practically destroyed, the liability to repair *ratione tenuræ* ceases. *R.* v. *Barker*, 25 Q. B. D. 213; 59 L. J. (M. C.) 105: *Heath* v. *Weaverham Overseers* [1894] 2 Q. B. 108; 63 L. J. (M. C.) 187. Payment under s. 35 of the *Highway Act*, 1862, of a composition in respect of liability to repair *ratione tenuræ*, does not extinguish a previous exemption from highway rates. *N. E. Rail. Co.* v. *Dalton Overseers* [1900] A. C. 345; 67 L. J. (Q. B.) 715. Liability to repair *ratione tenuræ* and exemption from highway rate often co-exist. *R.* v. *Browne* [1845] 13 Q. B. 654. But liability to repair a highway *ratione tenuræ* can exist with or without exemption from other burdens, and the existence of any such exemption is in each case a matter of fact to be proved by the person claiming it. *Bingley U. D. C.* v. *Ferrand*, 67 J. P. 370.

Where the defendant was charged with a liability to repair a highway by reason of his tenure of land called Saw-pit Field, evidence of the conviction of a former owner and occupier of the Saw-pit Field, for the non-repair of the same highway (on a presentment preferred against him, alleging his liability to repair it *ratione tenuræ*, to which he pleaded guilty): together with evidence of the subsequent repair of the highway by the occupiers of the same lands, and of the sale of them, with public notice that they were subject to such liability; was held sufficiently to prove the liability charged: and some of the judges thought that the conviction was an *estoppel* on the defendant, although not pleaded. *R.* v. *Blakemore*, 2 Den. 410; 21 L. J. (M. C.) 60: *see* *R.* v. *St. Pancras* (*ante*, p. 1367).

The liability to repair a highway *ratione clausuræ* is only on the *occupier* of the lands inclosed, and not on the owner. *R.* v. *Ramsden*, E. B. & E. 949; 27 L. J. (M C.) 296. As to this form of liability, *see* Pratt, Highways (15th ed.), 78: Glen, Highways (2nd ed.), 141.

Where the indictment is against a particular district of a parish, *e.g.*, the township of C., prove the liability of the township of C. to repair the part of the highway in question, by proving that the township has been used and accustomed to do so heretofore. (*See ante*, p. 1367). Townships are now in most, if not all, cases poor-law parishes, and might be combined by justices under 27 & 28 Vict. c. 101, s. 7, into highway parishes. Under the *Local Government Act*, 1894 (56 & 57 Vict. c. 73), highway parishes have now, in all cases, been included in urban or rural districts, and no separate highway rate is levied for townships or parishes in such districts. *See* Pratt on Highways

(15th ed.), 650. It is now well established that a township may be liable, to the same extent and in the same way as if it were a parish, to maintain its highways. *R.* v. *Ardsley*, 3 Q. B. D. 255, 257; 47 L. J. (M. C.) 65. Prove the highway to be out of repair, as directed *ante*, p. 1364.

The defendants, under the general issue, may prove either that the road is in repair, or that, instead of their district being bound to repair it, the parish at large, or some other district in the parish (*see R.* v. *Ardsley*, *supra*), or some individual *ratione tenuræ*, is bound to repair it. A special plea is not necessary in such a case. 2 Wms. Saund. 159 n. (10). If a special plea is put in, it must, after pleading the liability of the parish, district, or person, conclude with a special traverse of the liability of the district indicted. *Id.* 159 (*a*) n. (10). See *the precedents*, 4 Went. 161, 166; 6 Went. 414. If the indictment charges the district or township with the repair of all roads within it generally, a special plea would be necessary; for such a prescription makes the township, for all legal purposes, as to the repair of roads, a parish, and they must plead, etc.; in the same manner as a parish would under the same circumstances. *R.* v. *Hatfield*, 4 B. & Ald. 75: *R.* v. *Lordsmere*, 16 Cox, 65 (C. C. R.). And where the indictment charges the district or township with the repair of all the highways within it generally, and there is no special plea that some individuals *ratione tenuræ* are bound to repair the highway in question, evidence of repairs to such highway by individuals is inadmissible. *R.* v. *Hatfield* (*supra*). Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would be otherwise *primâ facie* liable. *Id.* Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors, each township having appointed its own surveyors and levied its own highway rates. With the exception of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway in question had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair. It was held that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement, in the absence of sufficient consideration, was not binding on W. *R.* v. *Ardsley*, 3 Q. B. D. 255: 47 L. J. (M. C.) 65.

25 & 26 Vict. c. 61, s. 32, does not subject places formerly extra-parochial to the common law liability to indictment for non-repair of highways. *R.* v. *Central Wingland*, 2 Q. B. D. 349; 46 L. J. (M. C.) 282.

COSTS.

The power to award costs on highway indictments rests wholly on statute. There are now two enactments giving such power. 8 Edw. 7, c. 15, s. 9 (3) (*ante*, p. 1353), authorizes the Court to allow the costs on conviction or acquittal

as if the parties were respectively plaintiff and defendant in a civil action. Sect. 10 of the same Act repeals the provisions as to costs contained in 5 & 6 W. 4, c. 50, ss. 95, 96, 98, and 25 & 26 Vict. c. 61, s. 19 (*a*). 41 & 42 Vict. c. 77, s. 10 (*ante*, p. 1350), empowers the Court of trial to direct by whom the costs of an indictment under the section are to be paid. This section is not repealed by 8 Edw. 7, c. 15, s. 10.

APPEALS.

On a *conviction* on indictment or criminal information at common law for obstruction or non-repair of a highway, public bridge or navigable river, the defendant may now appeal to the Court of Civil Appeal in all respects as if the conviction were a verdict in a civil action tried at the assizes. It is immaterial whether the indictment was tried at quarter sessions or in a court of assize or in the King's Bench Division. 7 Edw. 7, c. 23, s. 20 (3) (*ante*, p. 1353).

The time for appealing and the procedure on the appeal are regulated by R. S. C., Ord. 58: Ann. Pr.

By the Crown Office Rules, 1908, r. 17 a—" (a) appeals under the *Criminal Appeal Act*, 1907, s. 20 (3), from convictions on highway indictments, shall be set down and entered at the Crown Office.

(b) On the setting down of an appeal under the *Criminal Appeal Act*, 1907, s. 20 (3), if the indictment has not already been removed into the King's Bench Division for the purpose of trial, a writ of *certiorari* (*see* ante, p. 110) shall be issued to the appellant, as a matter of course, to remove the indictment and all things touching the same into the King's Bench Division for the purpose of appeal to the Court of Appeal without any order or recognizances."

The Court of Appeal has power to order a new trial. Ord. 58, r. 5. Where a new trial is asked for it would seem necessary to specify the notice of appeal. Ord. 39, r. 3. And a new trial will not be granted for misdirection or improper admission or rejection of evidence, or because the verdict of the jury was not taken on a question which the judge at the trial was not asked to leave to the jury unless the Court of Appeal consider that some substantial wrong or miscarriage of justice was thereby caused at the trial. Ord. 39, r. 6. The grounds on which the Court of Civil Appeal can grant a new trial on conviction on a highway indictment are substantially the same as those on which the Court of King's Bench could grant a new trial under the former practice (*b*).

(*a*) For decisions on the repealed enactments *see* Archb. Cr. Pl. (23rd ed.) 1234.

(*b*) Under that practice a new trial might, after *conviction*, be moved for on the ground that the prosecutor had omitted to give due notice of trial, or that the verdict was against the weight of the evidence, after allowing for presumptions in favour of innocence (*see* 1 Taylor, Evidence (11th ed.), s. 112: Best, Evidence (11th ed.), 335; *R.* v. *Stytche* [1901] 20 N. Z. L. R. 744), or contrary to evidence, or to the direction of the judge, or on the ground that there was no evidence to warrant the conviction (*R.* v. *Sandoval*, 3 T. L. R. 411; 16 Cox, 206), or for the improper reception or rejection of evidence (*R.* v. *Berger* [1894] 1 Q. B. 823; 63 L. J. (Q. B.) 529), or for any other mistake or misdirection of the judge, or for any gross misbehaviour of the jury among themselves, or for surprise, or for any other cause, where it shall appear to the Court that a new trial will further the ends of justice (3 Bl. Com. 387; 1 Chit. Cr. L. 654; Short & Mellor, Cr. Off. Pr. (2nd ed.) 142: *R.* v. *Whitehouse*, Dears. 1).

After *acquittal* of the defendant, in general, a new trial was not granted. *R.* v. *Mann*, 4 M. & Sel. 337; *R.* v. *Wandsworth*, 1 B. & Ald. 63; *R.* v. *Sutton*, 5 B. & Ad. 52; 2 L. J. (M. C.) 75. *R.* v. *Tremearne*, 5 B. & C. 254, seems to have been a case of *venire de novo* (*see ante*, p. 346). Where the object of the proceeding substantially was to try a civil right, and the verdict would bind the right, as in cases of indictments for non-repair of a highway or bridge, it was held that a new trial might be had after verdict for the defendant, if evidence had been improperly received, or there had been misdirection, or a verdict contrary to the evidence. *R.* v. *Yorkshire* (*West Riding*), 2 East, 353 n.: *R.* v. *Chorley*, 12 Q. B. 515: *R.* v. *Cricklade*, 3 E. & B. 947 n. An indictment for obstructing a navigation, or a highway, was held not to be within this latter rule, inasmuch as in such a case the defendant was liable on conviction to fine and imprisonment, and the verdict of acquittal did not bind any right. *R.* v. *Russell*, 3 E. & B. 942; 23 L. J. (M. C.) 173: *R.* v. *Johnson*, 2 E. & E. 613: 29 L. J. (M. C.) 133: *R.* v. *Duncan*, 7 Q. B. D. 198; 50 L. J. (M. C.) 95.. And even where the object of the proceeding was to try a civil right, and the verdict would bind the right, as in cases of indictments for non-repair of a highway or bridge, it was held that after a verdict of not guilty had been returned a new trial would not be granted; but that under very special circumstances the Court might order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment. *R.* v. *Southampton* (*Inhabitants*), 19 Q. B. D. 590; 56 L. J. (M. C.) 112, 118. In *R.* v. *North Eastern Rail. Co.*, 70 L. J. (K. B.) 584; 19 Cox, 682, the defendants were indicted for obstructing a highway. The judge at the trial directed the jury to acquit on the first count on the ground that the defendants were by their special Acts entitled to do the acts on which the count was framed, and the jury acquitted on the other counts. A motion to stay entry of judgment on the ground of misdirection was refused, on the ground that the entry of judgment would not prevent the prosecutors from indicting again if the obstruction continued.

In *R.* v. *Norfolk County Council*, 26 T. L. R. 269, the defendant had been indicted for non-repair of Magdalen Bridge, crossing the river Ouse. The indictment was removed into the King's Bench Division and tried at Norfolk Assizes in January, 1910, when the jury found a verdict for the defendants, finding the bridge to be private. A rule *nisi* was granted to show cause why judgment on the indictment should not be suspended till further order on the ground that the verdict was against the weight of the evidence, and that there was no evidence that the bridge was private. The rule was discharged on April 20, 1910, by Lord Alverstone, C.J., Bray and Pickford, JJ., without expressing a decided opinion on the question whether proceedings can now be taken to review a verdict of not guilty on such an indictment.

NON-REPAIR OF BRIDGES.

Common Law.

At common law and under the early statutes (*post*, p. 1375) the primary liability for the repair of a bridge falls on the inhabitants of the county, city, or town corporate within which the bridge lies (*see* 2 Chit. Cr. L. 588), unless they can prove under a special plea sufficient to throw the burden on the inhabitants of a parish (*R.* v. *Hendon*, 4 B. & Ad. 628; 2 L. J. (M. C.) 55), or township (*R.* v. *Yorkshire* (*W. R.*), 4 B &. Ald. 623), or district of the county (such as a hundred; *R.* v. *Oswestry*, 6 M. & Sel. 361), as being bound to repair it by immemorial usage (*R.* v. *Sutton*, 3 A. & E. 597; 4 L. J. (K. B.) 215); or upon some individual or body corporate or politic bound to repair it *ratione tenuræ* (*R.* v. *Kerrison*, 1 M. & Sel. 435), or by prescription (*R.* v. *Yorkshire* (*W. R.*), 7 East, 588), or by the terms on which they have received statutory powers to interfere with public rights. *R.* v. *Kerrison*, 3 M. & Sel. 526. The liability of the inhabitants of a county appears to be transferred to the county council by 51 & 52 Vict. c. 41, s. 79 (2) (*post*, p. 1380); but that of the inhabitants of a borough, parish, or township to be unaltered. *R.* v. *Poole* (*Mayor, etc.*), 19 Q. B. D. 602; 56 L. J. (M. C.) 131; 16 Cox, 323. The pleas and evidence are the same, *mutatis mutandis*, with the pleas and evidence in the case of an indictment for not repairing a highway. (*See ante*, pp. 1360—1366). The liability extends to bridges built by private individuals prior to 43 G. 3, c. 59, if of utility to and used by the county. *R.* v. *Wilts*, 6 Mod. 307: *R.* v. *Yorkshire* (*W. R.*), 5 Burr. 2594: *R.* v. *Yorkshire* (*W. R.*), 2 East, 342: *R.* v. *Bucks*, 12 East, 192: *R.* v. *Salop*, 13 East, 95: *R.* v. *Kent*, 13 East, 220: *R.* v. *Devon*, 14 East, 477: *R.* v. *Oxfordshire*, 16 East, 223: *R.* v. *Same*, 4 B. & C. 194: *R.* v. *Same*, 1 B. & Ad. 297 n.: *R.* v. *Kent*, 2 M. & Sel. 513: *R.* v. *Isle of Ely*, 15 Q. B. 827; Burn's Justice (30th ed.), tit. Bridges; Pratt on Highways (15th ed.), 84. A bridge always open to the public, but only used in time of flood, has been held to be a public bridge. *R.* v. *Devon*, Ry. & M. 144. Where a bridge has been built on a public highway before 1803, the county can only avoid its common law liability by proving that it has been cast on some other person. *Att.-Gen.* v. *West Riding of Yorkshire County Council*, 67 J. P. 103; 1 Loc. Govt. Rep. 223: *Yorkshire* (*W. R.*) v. *R.*, 2 Dow. (H. L.), 1; 3 Eng. Rep. 767. As to the liability of the county to repair a bridge built by a private individual and used by the public, and the evidence necessary to support such liability, *see R.* v. *Southampton*, 17 Q. B. D. 424; 19 Q. B. D. 590. In that case it was held that there must be evidence of acceptance by the county: hereon *see* Pratt on Highways (15th ed.), 90. Bridges built since 43 G. 3, c. 59, cannot become county bridges except under that Act, or under 33 & 34 Vict. c. 73, s. 12, or 41 & 42 Vict. c. 77, s. 21, or 51 & 52 Vict. c. 41, ss. 6, 11 (*post*, p. 1378). *And see New Windsor* (*Mayor, etc.*) v. *Taylor* [1899] A. C. 41; 68 L. J. (Q. B.) 87. As to partial dedication of a bridge, *see R.* v. *Northampton*, 2 M. & Sel. 262.

As to what is a bridge, and what a culvert, and so part of the highway, *see R.* v. *Oxfordshire*, 1 B. & Ad. 289: *R.* v. *Whitney*, 3 A. & E. 69; 4 L. J. (M. C.) 86; 7 C. & P. 208: *R.* v. *Derbyshire*, 2 Q. B. 745; 11 L. J. (M. C.) 51: *R.* v. *Lancaster*, 32 J. P. 711. A footbridge formed by three planks nine or ten feet long, and a hand-rail, which carried a public footpath over a small stream, was held not to be such a bridge as the county was bound to repair. *R.* v. *Southampton*, 18 Q. B. 841; 21 L. J. (M. C.) 201. Where a county bridge, which had been washed away, was, after 43 G. 3, c. 59, built wider than before, and without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river, it was held that this was not a new bridge within the meaning of the Act, and that the county was still liable to repair it. *R.* v. *Devon*, 5 B. & Ad. 383; 2 L. J. (M. C.) 74; 2 Nev. & M. 212: *see R.* v. *Adderbury East*, Dav. & M. 324; 13 L. J. (M. C.) 9. The county is not compellable to widen a bridge; *R.* v. *Devon*, 4 B. & C. 670; but if a county bridge is accidentally destroyed, the county is liable to rebuild it. *R.* v. *Yorkshire* (*W. R.*), 5 Burr. 2594. As to widening bridges over railways, *see Rhondda U. D. C.* v. *Taff Vale Rail. Co.* [1908] 1 K. B. 239; 78 L. J. (K. B.) 647: 71 J. P. 189. The *Locomotives Act*, 1861 (24 & 25 Vict. c. 70, s. 7), does not apply to public bridges repairable by the inhabitants of a county so as to relieve them from their common law liability to repair, or to render the owner of a locomotive liable to an indictment for non-repair of a county bridge damaged by such locomotive. *R.* v. *Kitchener*, L. R. 2 C. C. R. 88; 43 L. J. (M. C.) 9. The transfer of a part of a county to another county transfers the liability as to bridges within the transferred portion, unless the liability rested on statute or prescription. *R.* v. *Breconshire*, 15 Q. B. 813; 19 L. J. (N. S.) M. C. 203: *Re Staffordshire and Derbyshire County Councils*, 54 J. P. 566. Where a borough, incorporated by charter with a *non-intromittant* clause, was enlarged, under 2 & 3 W. 4, c. 64, s. 35 (*rep.*), and 5 & 6 W. 4, c. 76, s. 7 (*rep.*), by the addition of a parish within the same county, containing a bridge which until that time the county had repaired, it was held that this transfer of the new district did not of itself, without evidence that the borough had been used to maintain any bridges, render the borough liable to repair such bridge. *R.* v. *New Sarum*, 7 Q. B. 941; 15 L. J. (M. C.) 15: *see* 45 & 46 Vict. c. 50, s. 119 (*post*, p. 1379).

The franchise of a ferry is only a grant of the exclusive right to carry passengers over by a ferry, and does not debar others from constructing a bridge over the water. *Dibden* v. *Skirrow* [1908] 1 Ch. 41; 77 L. J. (Ch.) 107.

Statutes.

22 *H.* 8, *c.* 5, *s.* 1.—*Jurisdiction of quarter sessions.*]—. . . The justices of the peace in every shire of this realm, franchise, city, or borough, or four of them at the least whereof one to be of the quorum, shall have power and authority to inquire, hear and determine in the King's general sessions of the peace of all manner of anoysances (*nuisances*) of bridges broken in the highways to the damage of the King's liege people; and to make such process and

pains upon every presentment afore them for the reformation of the same again such as owen (*ought*) to be charged for the making or amending of such bridges as the King's justices of his bench use commonly to do, or as it shall seem by their discretion to be necessary and convenient for the speedy amendment of such bridges.

Sect. 2.—And where in many parts of this realm it cannot be known and proved what hundred, riding, wapentake, city, borough, town or parish, nor what person certain or body politic ought of right to make such bridges decayed, by reason whereof such decayed bridges for lack of knowledge of such as owen (*ought*) to make them for the most part lyen long without any amendment, to the great annoance of the King's subjects; for the remedy thereof, be it enacted by authority aforesaid, that in every such case the said bridges, if they be without city or town corporate, shall be made by the inhabitants of the shire or riding within which the said bridge decayed shall happen to be: and if it be within any city or town corporate then by the inhabitants of every such city or town corporate wherein such bridges shall happen to be; and if part of any such bridges so decayed happen to be in one shire, riding, city or town corporate, and the other part thereof in another shire, riding, city or town corporate, or if part be within the limits of any city or town corporate and part without, or part within one riding and part within another, that then in every such case the inhabitants of the shires, ridings, cities or towns corporate shall be charged and chargeable to amend, make and repair such part and portion of such bridges so decayed as shall lie and be within the limits of the shire, riding, city or town corporate, wherein they be inhabited at the time of the same decay. [*This section is declaratory of the common law.* R. *v.* Yorkshire (W. R.), 7 East, 588; affirmed 2 Dow. (H. L.), 1; 3 Eng. Rep. 767. *But* quære *as to highways not then existing.* R. *v.* Southampton, 17 Q. B. D. 424, 436. *The Isle of Ely is a riding within this section.* R. *v.* Isle of Ely, 15 Q. B. 827; 19 L. J. (M. C.) 223. *A town is not liable within this section for a bridge not within its limits, unless a consideration for the liability can be proved.* R. *v.* Machynlleth and Pennegoes, 2 B. & C. 166. *A county of a city created by charter has the same liabilities as to bridges as a county at large, and the county at large from which the county of a city is carved is not liable for the bridges within the city.* R. *v.* Southampton, 17 Q. B. D. 424, 438.

Sect. 3.—*Rating by justices and collection of rates.*]—*Superseded by* 51 & 52 Vict. c. 41.

Sect. 4.]—*Sending process into other shires.*

Sect. 5.]—*Bridges in the Cinque Ports.*

Sect. 7.]—Forasmuch that albeit bridges decayed were amended and repaired according to the tenour of this Act, yet nevertheless if speedy remedy for the ways next adjoining to every of the ends of such bridges should not be had and made, the King's subjects should take little or none avail or commodity in many parties (*sic*) of this realm by the making of the bridges: in consideration whereof be it enacted . . . that such part and portion of the highways in every part of this realm as well within franchise or without as lie next adjoining to any ends of any bridges within this realm distant from any of

the said ends by the space of 300 feet, be made, repaired and amended as often as need shall require. . . . [*Justices to have the same jurisdiction to inquire, hear, and determine nuisances to such highways as they have under the Act as to bridges.* Sect. 7 *does not apply to the roads at the ends of bridges built since* 1835. See 5 & 6 W. 4, c. 50, s. 21 (*post*, p. 1378). *The liability to repair a bridge includes liability to maintain the approaches for a space of* 300 *yards.* R. *v.* Mayor, etc., of Lincoln, 7 L. J. (N. S.) Q. B. 161; 8 A. & E. 65. *This liability falls on the highway authority*, i.e., *in main roads on the county council, unless placed elsewhere by a particular statute or by prescription.* Att.-Gen. *v.* Oxford Canal Navigation, 72 L. J. (Ch.) 285: Nottinghamshire County Council *v.* Manchester, etc., Rail. Co., 71 L. T. 430. *The liability is* primâ facie *on the inhabitants, and if they wish to exonerate themselves they must specially plead and prove liability in another by prescription or tenure.* Yorkshire (W. R.) *v.* R., 2 Dow (H. L.), 1; 3 Eng. Rep. 767. Cf. Nottinghamshire County Council *v.* Manchester, etc., Rail. Co. (supra): Att.-Gen. *v.* Yorkshire (W. R.) County Council, 67 J. P. 103. *The* 300 *yards limit imposed by this section applies to county bridges and bridges repairable by prescription or*, semble, ratione tenuræ, *but is not to be presumed to apply to bridges constructed by individuals or companies under special Acts.* Hertfordshire County Council *v.* New River Co. [1904] 2 Ch. 513; 74 L. J. (Ch.) 49; Eady, J.]

1 *Anne, c.* 12, *s.* 1.]—*Recites and continues* 22 H. 8, c. 5, *with modifications by ss.* 2, 3, *as to mode of assessment of costs of repair and their collection from towns and parishes.* See Pratt on Highways (15th ed.), 849.

Sect. 4.—*Fines for non-repair.*]—And whereas upon presentments and indictments for not repairing such bridges and the highways at the end of such bridges, the fines imposed and set upon such presentments and indictments and other fines and issues for not repairing, building, and amending such bridges and the highways at the end of such bridges, are returned into the Court of Exchequer or other courts, be it therefore further enacted by the authority aforesaid, that no fine, issue, penalty, or forfeiture shall hereafter be returned into the Court of Exchequer or other court, but shall be levied and paid into the hands of the treasurer or treasurers so as aforesaid appointed by the said justices (*now the county treasurer*) to be accounted for by the said treasurer, and to be applied by the said justices towards the building, repairing, or amending such bridges and the highways at the end of such bridges, and to no other end or purpose whatsoever. (*Cf.* 5 & 6 W. 4, c. 50, s. 21, *post*, p. 1378).

Sect. 5.—*Place of trial.—No certiorari.*]—And . . . all matters concerning the repairing and amending of the bridges and highways hereinbefore mentioned shall be determined in the county where they lie and not elsewhere, and . . . no presentment or indictment for not repairing such bridges or the highways at the end of such bridges shall be removed by *certiorari* out of the said county into any other court. [*This section applies only to* certiorari *at the instance of the defendants*; R. *v.* Cumberland, 6 T. R. 194; *and seems not to prevent a change of venue.* R. *v.* Wilts, 6 Mod. 307; Cas. temp. Holt, 339: R. *v.* Southampton, 17 Q. B. D. 424; 19 Q. B. D. 595.]

Sect. 8.—*Saving as to individual liability to repair.*]—Provided always that this Act nor anything therein contained shall excuse or discharge any particular persons, estates, or places from repairing any bridge which they have heretofore (1702) usually repaired.

Sect. 9.—And . . . all the penalties and forfeitures incurred by this Act shall be applied towards the repairing the said bridges and highways at the end of the same.

43 *G.* 3, *c.* 59 (*Bridges Act*, 1803), *s.* 5.—*Bridges built after 24th June*, 1803.]—And for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall and may be bound or liable to repair and maintain, be it further enacted that no bridge hereafter to be erected or built in any county by or at the expense of any individual or private person or persons, body politic or corporate shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled (*now by the county council*), or by the justices of the peace of the county of Lancaster at their annual general sessions; and which surveyor or person so appointed is hereby required to superintend and inspect the erection of such bridge when thereunto requested by the party or parties desirous of erecting the same: and in case the said party or parties shall be dissatisfied the matter shall be determined by the said justices respectively at their next general quarter sessions or at their annual general sessions in the county of Lancaster. (*See R.* v. *Derbyshire*, 3 B. & Ad. 147; 1 L. J. (M. C.) 15: *R.* v. *Same*, 2 Q. B. 745: *R.* v. *Oxfordshire*, 1 B. & Ad. 289, 297: *R.* v. *Lancashire*, 2 B. & Ad. 813: 1 L. J. (M. C.) 3: *R.* v. *Gloucestershire*, C. & Mar. 506. *See R.* v. *Southampton*, 18 Q. B. 841; 21 L. J. (M. C.) 201.)

Sect. 7.—Provided always . . . that nothing herein contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

5 & 6 *W.* 4, *c.* 50 (*Highways Act*, 1835), *s.* 21.—*Highways adjoining bridges built after Aug.* 31, 1835.]—If any bridge shall hereafter (after Aug. 31, 1835) be built, and such bridge shall be liable by law to be repaired by or at the expense of any county or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, body politic or corporate (*or trustees of a turnpike road*), who were by law before the erection of the said bridge bound to repair the said highway: Provided, nevertheless, that nothing herein contained shall extend to exonerate, or discharge any county or part of a county from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge or the land arches thereof.

(*As to effect of this section*, see R. *v.* Southampton, 17 Q. B. D. 424: *and as to hundred bridges*, R. *v.* Chart and Longbridge, L. R. 1 C. C. R. 237; 39 L. J. (M. C.) 107. See also 51 & 52 Vict. c. 41, s. 11, post, p. 1380).

33 & 34 *Vict. c.* 73, *s.* 12.—*Bridges in disturnpiked roads.*]—Where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of the turnpike road shall become county bridges and shall be kept in repair accordingly: Provided that for the purposes of this Act such bridges shall be treated as if they were bridges built subsequently to the passing of the *Highway Act*, 1835. (See 5 & 6 W. 4, c. 50, s. 21, *supra*.)

41 & 42 *Vict. c.* 77 (*Highways, etc., Amendment Act*, 1878), *s.* 21.]—Any bridge erected before the passing of this Act (16th August, 1878) in any county without such superintendence as is provided in s. 5 of the *Bridges Act*, 1803 (*ante*, p. 1378), and which is certified by the county surveyor or other person appointed in that behalf by the county authority to be in good repair and condition, shall, if the county authority see fit so to order, become and be deemed to be a bridge which the inhabitants of the county shall be liable to maintain and repair.

45 & 46 *Vict. c.* 50 (*Municipal Corporations Act*, 1882), *s.* 119.—*Bridges in boroughs.*]—(1) Every bridge which is either wholly or in part in a borough, and which the borough and not the county in which it is situate is legally bound to maintain or repair, shall as to the whole of the bridge if it is wholly in the borough or as to such part only as is in the borough be maintained, widened, repaired, improved, or rebuilt under the sole management and control of the (borough) council.

(2) For that purpose the council shall have all the powers which the justices of a county have with respect to a county bridge, but the notices required in the case of a county bridge shall not be required in the case of a borough bridge. . . . (*See R.* v. *Dorset*, 45 L. T. 308: *R.* v. *Southampton*, 17 Q. B. D. 424; 19 Q. B. D. 590).

51 & 52 *Vict. c.* 41 (*Local Government Act*, 1888), *s.* 3.]—There shall be transferred to the council of each county . . . the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions in respect of the several matters following, namely: . . .

(viii.) Bridges and roads repairable with bridges, and any powers vested by the *Highways and Locomotives Amendment Act*, 1878 (41 & 42 Vict. c. 77), in the county authority.

Sect. 6.—*Power of county council to purchase and take over bridges and to maintain, repair, and improve such bridges.*]—*As to this section*, see Bury St. Edmunds (Mayor, etc.) *v.* West Suffolk County Council [1898] 2 Q. B. 246; 67 L. J. (Q. B.) 750.

Sect. 11.—*Bridges in main roads.*]—(1) Every road in a county which is for the time being a main road within the meaning of the *Highways and Locomotives Amendment Act*, 1878 (41 & 42 Vict. c. 77), inclusive of every bridge carrying such road, if repairable by the highway authority, shall after the appointed day be wholly repaired by the council of the county in which the road is situate. . . . [*As to the nature and extent of the liability created by this sub-section, see* Att.-Gen. *v.* Staffordshire County Council [1905] 1 Ch. 336; 74 L. J. (Ch.) 153; 69 J. P. 97.]

(2), (3), *empower urban authorities to claim the right to retain the powers and duties of maintaining and repairing main roads within their districts, in which event the road vests in the urban authority, and the county council contributes a sum agreed, or settled by arbitration.*

Sect. 34 (2).—*Bridges in a county borough.*]—On the appointed day there shall be transferred to the mayor, aldermen, and burgesses of each county borough " all such bridges and approaches thereto or parts thereof situate within the borough as were previously repairable by the county or any hundred therein." . . . [*The cost of repair is payable out of the borough fund.*]

Sect. 78 (3).—*Presentments.*]— . . . a presentment by a grand jury in relation to any such powers, duties, or liabilities (*arising as to business transferred* (inter alia) *under* s. 3 (viii.), supra), shall cease to be made otherwise than by way of indictment.

Sect. 79 (2).—*Transfer to county council of liabilities of inhabitants.*]—All duties and liabilities of the inhabitants of a county shall become and be duties and liabilities of the council of such county. [*This seems to transfer liability to indictment from the inhabitants to the council.* See Pratt on Highways (15th ed.), 591; Glen on Highways (2nd ed.), 106.]

7 *Edw.* 7, *c.* 23, *s.* 20 (3).—*Appeals against conviction on indictment at common law for obstruction or non-repair of public bridges.*]—Ante pp. 1353, 1372.

8 *Edw.* 7, *c.* 15, *s.* 9 (3).—*Costs of indictment for non-repair or obstruction of public bridges.*]—Ante, pp. 1353, 1370.

SECT. 3.

POACHING.

TAKING GAME BY NIGHT AFTER TWO PREVIOUS CONVICTIONS.

Statutes.

9 *G.* 4, *c.* 69 (*Night Poaching Act*, 1828), *s.* 1.]—[*Whereas the practice of going out by night, for the purpose of destroying game has very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient to make more effectual provisions than now by law exist for repressing such practice* (*rep.*).]—If any person shall, by night, unlawfully take or destroy any game or rabbits

in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed, for the first offence, to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be *transported beyond seas* for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.

Sect. 2.—*Arrest of night poachers and punishment of assaults.*]—Ante, p. 966.

Sect. 4.—*Limitation of prosecution.*]— . . . The prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence. [*Rep. as to summary proceedings in England*, 47 & 48 Vict. c. 43, s. 4. *For cases on this section*, see ante, p. 66.]

Sect. 8.—*Conviction: Evidence.*]—On every conviction under this Act for a first or second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed: and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence: and the clerk of the peace shall immediately on such return make, or cause to be made, a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party. (*See ante*, p. 421.)

Sect. 9.—*Three or more persons armed taking game, etc.*]—If any persons, to the number of three or more together, shall by night unlawfully enter or be

in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and, being convicted thereof before the justices of gaol delivery [or of the court of great sessions (*abolished*)] of the county or place in which the offence shall be committed, shall be liable, at the discretion of the Court, to be *transported beyond seas* for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner. (*See ante*, pp. 236 *et seq.*)

Sect. 12.—"*Night*" *defined.*]—Provided always that, for the purpose of this Act, the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. [*The computation seems to be by the actual time of sunset at the place, and not by Greenwich mean time, under* 43 & 44 Vict. c. 9, s. 1 (ante, p. 655); see Gordon *v.* Cann, 68 L. J. (Q. B.) 434; 63 J. P. 234: Curtis *v.* Marsh, 28 L. J. (N. S.) Ex. 36; 3 H. & N. 866.]

Sect. 13.—"*Game*" *defined.*]—For the purposes of this Act, the word "*game*" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. [*This is the same as in the* Game Act, 1831 (1 & 2 W. 4, c. 32, s. 2), *but is narrower than the definition in the* Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 1, *which also includes woodcock, snipe and rabbits, and the eggs of pheasants, partridges, grouse and black game.*]

7 *&* 8 *Vict. c.* 29 (*Night Poaching Act*, 1844), *s.* 1.—*Taking game or rabbits on highways, etc.*]—All the pains, punishments, and forfeitures imposed by the said Act (9 G. 4, c. 69), upon persons by night unlawfully taking or destroying any game or rabbits in any land open or inclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates, from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path, where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by the said Act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act or this Act; and the said Act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this Act into execution, as if the same had been herein specially set forth. [*This seems to override* R. *v.* Meadham, 2 C. & K. 633.]

Indictment under 9 *G.* 4, *c.* 69, *s.* 1 (ante, p. 1380).

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Night poaching, contrary to section 1 of the Night Poaching Act, 1828.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by night unlawfully took or destroyed game in land occupied by C. D., or was in the said land by night with a gun for the purpose of unlawfully taking or destroying game.

A. B. has been twice previously convicted of an offence under section one of the Night Poaching Act, 1828, namely on ——, at ——, and on—— at ——.

[*Previous convictions under s.* 9 *will not suffice.* R. *v.* Lines [1902] 1 K. B. 199; 731 L. J. (K. B.) 125; 20 Cox, 142; 66 J. P. 24: *nor under s.* 2 R. *v.* McLauchlan, 75 J. P. 8.] *If the offence was committed on any public road, highway, or path, or the sides thereof, or at any opening, outlet, or gate from any land into any such road, etc., state it accordingly.* 7 & 8 Vict. c. 29, s. 1, ante, p. 1382.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour. 9 G. 4, c. 69, s. 1; 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante. pp. 238, 239).

Evidence.

Prove the offence as stated in the indictment. It must also be proved that the offence was committed within twelve months before the prosecution. *See* the evidence under the next precedent. In *R.* v. *Woodfield*, 16 Cox, 314, Hawkins, J., refused to allow evidence to be given of the previous convictions, until the jury had found the prisoner guilty of the third offence. The offence must have been committed in the night-time—that is, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise; 9 G. 4, c. 69, s. 12 (*and see ante*, pp. 967, 1382). Prove the two former convictions under s. 1 by the production of the originals, or by examined copies (*see ante*, p. 403, and 9 G. 4, c. 69, s. 8, *ante*, p. 1381), or in the manner prescribed by 14 & 15 Vict. c. 99, s. 13 (*ante*, p. 421), or by 34 & 35 Vict. c. 112, s. 18 (*ante*, p. 422). A conviction for an offence under s. 9 (*ante*, p. 1381), following on two convictions under s. 1, cannot be treated as a conviction under s. 1 so as to enable the Court to deal with the prisoner as for a third offence under s. 1. *R.* v. *Lines* [1902] 1 K. B. 199; 71 L. J. (K. B.) 125; 20 Cox, 142. *And see R.* v. *McLauchlan*, 75 J. P. 8. As to what is a sufficient averment of a previous conviction, *see R.* v. *Merry*, 2 Cox, 240: *Fletcher* v. *Calthrop*, 6 Q. B. 880; 14 L. J. (Q. B.) 95; *Cureton* v. *R.* (*post*, p. 1384). Prove the identity of the defendant.

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Indictment under 9 *G.* 4, *c.* 69, *s.* 9 (ante, p. 1381).

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Night poaching, contrary to section 9 of the Night Poaching Act, 1828.

PARTICULARS OF OFFENCE.

A. B., C. D., and E. F., and other persons unknown, on the —— day of ——, in the county of ——, by night unlawfully entered or were in land occupied by G. H. for the purpose of taking or destroying game or rabbits, A. B. being armed with a gun and C. D. being armed with a bludgeon.

A count for assaulting a gamekeeper may be added if necessary: see ante, p. 966; and *R.* v. *Handley*, 5 C. & P. 565.

This offence is of a local nature, and the indictment should describe the land by name or occupation; R. *v.* Ridley, R. & R. 515; *or ownership.* R. *v.* Riley, 3 C. & K. 116. *It is not, however, necessary to state both the name and the occupation of the land.*

Misdemeanor: penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than three years, with or without hard labour. 9 G. 4, c. 69, s. 9; 20 & 21 Vict. c. 3 (ante, p. 242); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239). *A court of quarter sessions has no jurisdiction over this offence.* 9 G. 4, c. 69, s. 9 (ante, p. 1382; and see p. 106).

Evidence.

Prove that the defendants, with others, in all three or more, entered and were, in the night-time (that is to say, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise; 9 G. 4, c. 69, s. 12, *ante*, p. 1382), in certain land in the occupation of G. H., and situate as described in the indictment.

Prove that they entered the land for the purpose of taking and destroying game (that is, hares, pheasants, partridges, grouse, heath or moor game, black game or bustards: 9 G. 4, c. 69, s. 13, *ante*, p. 1382) or rabbits there. Upon an indictment on 57 G. 3, c. 90 (*rep.*), for having entered a close, etc., with intent then and there illegally to destroy game, etc., the jury found that the defendant was in pursuit of game, but could not say whether in the close mentioned in the indictment or not; and the defendant having been convicted, the judges held the conviction wrong, because the entry with intent to kill was confined by the indictment to the close specified, and it was therefore necessary to prove the intent as to that close. *R.* v. *Barham*, 1 Mood. 151: *see R.* v. *Capewell*, 5 C. & P. 549: *R.* v. *Gainer*, 7 C. & P. 231: *Fletcher* v. *Calthrop*, 6 Q. B. 880; 14 L. J. (M. C.) 95: *sed quære; see Cureton* v. *R.*, 1 B. & S. 208; 30 L. J. (M. C.) 149, Hill, J. Where people are out at night in pursuit of game, intending to take it when they can find any, they are in pursuit of game in every field through which they pass. If they are out with a general intent to take game, there is an intent to take it in any field they may pass through where game may be expected to be found. *R.* v. *Higgs*, 10 Cox,

527, Willes, J.: *R.* v. *Sutton*, 13 Cox, 648, Lindley, J. And therefore where the prisoners were charged with being by night, armed, in a certain close for the purpose of destroying game therein, and the evidence was that they passed through the close without doing anything to it, and that after being lost sight of for two hours, they were found three miles off with game in their possession, it was held that there was evidence that they were in the close mentioned in the indictment for the purpose of destroying game. *R.* v. *Higgins* (*supra*). The intent is proved by circumstances from which the jury may infer it, as that the land was a preserve for game, or that the defendants discharged guns there, or had nets or dogs; *R.* v. *Turner*, 3 Cox, 304; or that they actually took game or rabbits there, which is the best possible evidence of the intent. All who are at the place, each acting his part with the common intent of taking game in the land mentioned in the indictment, are equally guilty, though some of them only are bodily on the land; if, therefore, some (though less than three) enter the land described in the indictment (whether it be open land, or consist of one or more closures or inclosures) armed, and others be watching on the outside of the land to give an alarm if necessary, they may equally be convicted with those who actually enter the land, on an indictment charging them all with having entered the land armed. *R.* v. *Passey*, 7 C. & P. 282: *R.* v. *Lockett*, *Id.* 300: *R.* v. *Andrews*, 2 M. & Rob. 37: *R.* v. *Whittaker*, 1 Den. 310; 2 C. & K. 636; 17 L. J. (M. C.) 127: *R.* v. *Scotton*, 5 Q. B. 493; 13 L. J. (N. S.) M. C. 58: *R.* v. *Uezzell*, 2 Den. 274; 3 C. & K. 150; 20 L. J. (M. C.) 192. *See now* 7 & 8 Vict. c. 29, s. 1 (*ante*, p. 1382). But not so if, some of them being on the land in question, another is poaching independently of them on adjoining land. *R.* v. *Nickless*, 8 C. & P. 757, Patteson, J. And where the indictment charged that the prisoners were with others on Redborough-hill Brake, and one only was seen there, the others being in a wood separated therefrom by a high-road, Patteson, J., held the indictment not proved. *R.* v. *Dowsell*, 6 C. & P. 398. The sending in of a dog to drive hares into a net set in the fence is not an entering of the land within the statute. *R.* v. *Nickless* (*supra*); *see R.* v. *Pratt*, 24 L. J. (N. S.) M. C. 113; 4 E. & B. 860; Dears. 502. It is not necessary, in order to prove that the defendants were on the land unlawfully, to negative any permission to them by the owner or tenant of the land to be there. *R.* v. *Wood*, Dears. & B. 1; 25 L. J. (M. C.) 96.

"Armed," etc.]—Prove that the defendants, or some or one of them, were armed with a gun or other offensive weapon, as stated in the indictment. *See ante*, p. 1381. A stick or bludgeon is not an offensive weapon, unless the jury find that the defendant took it with him for the purpose of offence. *R.* v. *Palmer*, 1 M. & Rob. 70: *R.* v. *Fry*, 2 M. & Rob. 42: *R.* v. *Turner*, 3 Cox, 304: *R.* v. *Williams*, 14 Cox, 59. Large stones are offensive weapons, if the jury are satisfied that they were of a description capable of inflicting serious injury if used offensively, and that they were brought and used by the defendants for that purpose. *R.* v. *Grice*, 7 C. & P. 803. Indeed, any instrument, however innocent in its ordinary use, may be an offensive weapon, if brought out by poachers for offensive purposes, although they may also intend to use it for other purposes. *R.* v. *Sutton*, 13 Cox, 648, Lindley, J. The words of

the statute are "*any* of such persons being armed," etc.: and if one of the party is armed with the knowledge of the rest, it will support the allegation that they were all armed; *R.* v. *Smith*, R. & R. 368: *R.* v. *Goodfellow*, 1 Den. 81; 1 C. & K. 724; and it is not necessary that any of the party should be actually armed at the moment they are discovered, if there is evidence to satisfy the jury that they were armed on the land. Upon an indictment on the repealed statute, for being *found* armed, it appeared that the flash of a gun was seen in a wood, but before the defendants were discovered, they had abandoned their arms, and were found creeping away upon their knees; the judges held that they were armed within the meaning of that statute. *R.* v. *Nash*, R. & R. 386. It would be within the *words* of this statute if one of the party was armed without the knowledge of his companions; but the contrary was decided upon the repealed statute; *R.* v. *Southern*, R. & R. 444; and it may be doubtful how far such a case would come within the intention of the legislature in this particular Act. Where the indictment charged that the defendants A. and B., together with another person, entered certain land, "the said A. and B. then and there being armed," it was held that this allegation was not supported by proof that the third person was armed, and that A. and B. were not so. *R.* v. *Davis*, 8 C. & P. 759: *but see R.* v. *Goodfellow*, 1 Den. 81; 1 C. & K. 724, *contra*.

Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 G. 4, c. 69, s. 4 (*ante*, p. 1381). See *the cases collected*, ante, p. 66.

SECT. 4.

REFUSING TO EXECUTE A PUBLIC OFFICE.

Common Law.

It is a misdemeanor indictable at common law to refuse to serve a public office. 2 Chit. Cr. L. 266: *R.* v. *Bower*, 1 L. J. (K. B.) 174; 1 B. & C. 585; 2 D. & R. 842: *R.* v. *Denison*, 2 Ld. Kenyon, 259. As to refusal of sheriff to serve, *R.* v. *Woodrow*, 2 T. R. 731; *and see ante*, p. 133. As to refusal to serve the offices of high constable or parish constable, *see R.* v. *Bower* (*supra*): *R.* v. *Mosley*, 3 A. & E. 488; 4 L. J. (M. C.) 106: *R.* v. *Brain*, 3 B. & Ad. 614; 1 L. J. (M. C.) 53. In the case of municipal office, a fine on non-acceptance is now provided in the case of county councils by 51 & 52 Vict. c 41, s. 75, in the case of town councils by 45 & 46 Vict. c. 50, s. 34, in the case of metropolitan borough councils by 62 & 63 Vict. c. 14, ss. 7 (1), 34, and in the case of the councils of urban and rural districts and of parishes by 56 & 57 Vict. c. 73, s. 48. But the fact of there being such a fine seems not to have been conclusive at common law against liability to indictment. *R.* v. *Denison* (*supra*): *R.* v. *Bower* (*supra*).

Upon an indictment against a defendant, for refusing to serve the office of overseer, it was held that he was a substantial householder (*i.e.*, a person

occupying as a tenant and not as a servant) within the *Poor Relief Act*, 1601 (43 Eliz. c. 2), and liable to serve such office, although he occupied a house and paid rent and taxes in the parish by means of a clerk only, and slept in another parish. *R.* v. *Poynder*, 1 B. & C. 178; 2 D. & R. 258: *and see R.* v. *Hall*, 1 B. & C. 123; 2 D. & R. 241: *R.* v. *Mosley*, 3 A. & E. 488; *Stephenson* v. *Langston*, 1 Hagg. Consist. Rep. 379.

For the defence it may be proved that the defendant is disqualified to serve, or exempt from serving. (*a*) The following persons are disqualified from serving as overseers: Assistant overseers (29 & 30 Vict. c. 113, s. 10); masters

(*a*) Immunity from service in a parochial office exists in favour of the following classes of persons:—

1. Peers and members of parliament. Gibson, 215: *Stephenson* v. *Langston*, 1 Hagg. Consist. Rep. 380.

2. Sheriffs. *Stephenson* v. *Langston*, 1 Hagg. Consist. Rep. 380 n.

3. Acting justices of the peace. *See R.* v. *Gayer*, 1 Burr. 245; 1 Ld. Raym. 492: *R.* v. *Pateman*, 2 T. R. 777, 779.

4. Officers of the Supreme Court. 1 Rolle Rep. 368: *Prouse's case*, Cro. Car. 389: *Poordage's case*, 1 Mod. 22; 2 Keb. 578; *Ex parte Jefferies*, 6 Bing. 195: *and see Gerard's case*, 2 W. Bl. 1123.

5. Officers of the navy, army, or marines, even if on half-pay. *See R.* v. *Gayer*, 1 Burr. 245.

6. Persons in the regular militia. 45 & 46 Vict. c. 49, s. 41. Non-commissioned officers and privates in the local militia. 52 G. 3, c. 38, s. 197.

7. Men in the army reserve (45 & 46 Vict. c. 48, s. 7), the royal naval volunteers (22 & 23 Vict. c. 40, s. 7), the royal naval coast volunteers (16 & 17 Vict. c. 73, s. 8), the royal naval volunteer reserve (3 Edw. 7, c. 6, s. 1), and the territorial force (7 Edw. 7, c. 9, s. 23 (4)).

8. The postmaster-general and officers of the post-office (8 Edw. 7, c. 48, s. 43).

9. Commissioners or officers of customs (39 & 40 Vict. c. 36, s. 9) or of inland revenue (53 & 54 Vict. c. 21, s. 8).

10. Income tax commissioners if certified. 5 & 6 Vict. c. 35, s. 35.

11. Clergymen. *Lee's case*, 1 Ventr. 105; 1 Mod. 282; 2 Keb. 693: *Chambers's case*, Andr. 353.

12. Protestant dissenting ministers who do not follow any trade or occupation for a livelihood except that of a schoolmaster. 52 G. 3, c. 155, s. 9. *See Kenward* v. *Knowles* [1744] Willes, 463.

13. Roman Catholic clergy who have taken the prescribed oaths. 31 G. 3, c. 32, s. 8; *see* 31 & 32 Vict. c. 72, s. 9; 34 & 35 Vict. c. 48.

14. Aldermen of London. 2 Hawk. c. 10, s. 40. They would be exempt as justices.

15. Practising barristers and solicitors. 2 Hawk. c. 10, s. 39; 1 Rolle Rep. 368. *See R.* v. *Derbyshire JJ.* [1909] 1 K. B. 449.

16. Practising members of the College of Physicians. 32 H. 8, c. 40, s. 1; 2 Hawk. c. 10, s. 44; *and see* 3 H. 8, c. 11; 5 H. 8, c. 6.

17. Practising members of the Royal College of Surgeons. 5 H. 8, c. 16; 32 H. 8, c. 42: *R.* v. *Pond*, Comyns, 312: *R.* v. *Chapple*, 3 Camp. 91.

18. Registered medical practitioners. 21 & 22 Vict. c. 90, s. 35; *and see* 2 Hawk. c. 10, ss. 41-43.

19. Practising apothecaries free of the Company of Apothecaries in London, or if resident in the country, having served seven years' apprenticeship. 6 & 7 W. 3, c. 4.

20. Registered dentists. 41 & 42 Vict. c. 33, s. 30.

21. Registrars of births, deaths, and marriages. 7 W. 4 & 1 Vict. c. 22, s. 18.

22. Factory inspectors. 1 Edw. 7, c. 22, s. 118 (*b*).

23. Aliens who have not been naturalized. *R.* v. *Mierre*, 5 Burr. 2787; 33 & 34 Vict. c. 14, s. 7.

24. Persons who have a special exemption from the Crown. *R.* v. *Clarke*, 1 T. R. 79.

of workhouses and relieving officers (13 & 14 Vict. c. 101, s. 18); persons directly or indirectly concerned in a contract for the supply of goods for the workhouse or the relief of the poor of the union in which the parish is (12 & 13 Vict. c. 103, s. 6); undischarged bankrupts (46 & 47 Vict. c. 52, s. 32), and persons convicted of felony, fraud, or perjury (4 & 5 W. 4, c. 76, s. 48), or on indictment for corrupt practices at elections (46 & 47 Vict. c. 51, s. 6 (3); 47 & 48 Vict. c. 70, ss. 2, 3, 36).

SECT. 5.

SENDING UNSEAWORTHY SHIP TO SEA.

Statute.

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *s.* 457.—*Sending unseaworthy ship to sea a misdemeanor.*]—(1) If any person sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offence, be guilty of a misdemeanor, unless he proves either that he used all reasonable means to ensure her being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving that proof he may give evidence in the same manner as any other witness. (*As to limits of owner's liability*, see Massey *v.* Morriss [1894] 2 Q. B. 412; 63 L. J. (M. C.) 185.)

(2) If the master of a British ship knowingly takes the same to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offence, be guilty of a misdemeanor, unless he proves that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving that proof he may give evidence in the same manner as any other witness. (*See R.* v. *Freeman*, Ir. Rep. 9 C. L. 527; *and as to evidence by the defendant*, ante, pp. 458 et seq.)

(3) A prosecution under this section shall not, except in Scotland, be instituted otherwise than by, or with the consent of, the Board of Trade, or of the governor of the British possession in which the prosecution takes place.

(4) A misdemeanor under this section shall not be punishable upon summary conviction. [*This section is a re-enactment, with verbal alterations, of* 39 & 40 Vict. c. 80, s. 4 (rep.). *As to what constitutes seaworthiness*, see Hedley *v.* Pinkney SS. Co. [1894] A. C. 222; 63 L. J. (Q. B.) 419.]

Sects. 680, 684.—*Punishment, procedure, venue, etc.*]—Ante, pp. 958, 959.

SECT. 6.

CORRUPT PRACTICES AND OTHER INDICTABLE OFFENCES AT PARLIAMENTARY ELECTIONS.

Common Law.

Treating appears to be indictable at common law. *Hughes* v. *Marshall*, 2 Cr. & J. 118; 5 C. & P. 150: *R.* v. *Hollis*, 20 St. Tr. 1225. In *R.* v. *Pitt*, 3 Burr. 1335; 1 W. Bl. 380, there is said to be no precedent of an indictment at common law for bribery at a parliamentary election; but in *R.* v. *Hollis* (*supra*), will be found a precedent of an information, and in *R.* v. *Pitt*, 3 Burr. at 1338, Lord Mansfield said that bribery at parliamentary elections must undoubtedly always have been a crime at common law. *See* 1 Russ. Cr. (7th ed.) 627, 638. In *R.* v. *Bent*, 1 Den. 157; 2 C. & K. 179, it was held that fraudulent personation at a municipal election was not an offence at common law. In *R.* v. *Clarke* [1900] 2 Ir. Rep. 304, Palles, C.B., refused to follow *R.* v. *Bent*.

Statutes.

46 & 47 *Vict. c.* 51.—*Corrupt and Illegal Practices Prevention Act*, 1883.]—*This Act was temporary, but has been made permanent by* 7 & 8 Geo. 5, c. 64, s. 35.

Sect. 64.—"*Election*" *and* "*indictment*" *defined.*]—In this Act, unless the context otherwise requires—The expression "election" means the election of a member or members to serve in parliament; . . . The expression "indictment" includes information. . . .

Sect. 1.—"*Treating*" *defined.*]—(1) Any person who corruptly by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be guilty of treating.

(2) And every elector who corruptly accepts or takes any such meat, drink, entertainment, or provision shall be guilty of treating.

Sect. 2.—"*Undue influence*" *defined.*]—Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce or prevail upon any elector either to give or to refrain from giving his vote at any

election, shall be guilty of undue influence. (*See H.M. Advocate* v. *Douglas*, 5 Irvine, 265; *Borough of Lisburn*, Wolf. & B. 221.)

Sect. 3.—"*Corrupt practice*" *defined.*]—The expression "corrupt practice" as used in this Act means any of the following offences; namely, treating and undue influence, as defined by this Act, and bribery, and personation, as defined by the enactments set forth in Part III. of the third schedule to this Act (*post*, p. 1396), and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the *Parliamentary Elections Act*, 1868 (31 & 32 Vict. c. 125). [*By 7 & 8 Geo. 5. c. 64* (Representation of the People Act, 1918), *s.* 34, *the incurring of election expenses by any unauthorised person is a corrupt practice other than personation.*]

Sect. 6.—*Punishment of person convicted on indictment of corrupt practices.*]—(1) A person who commits any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation, shall be guilty of a misdemeanor and on conviction on indictment shall be liable to be imprisoned, with or without hard labour, for a term not exceeding one year, or to be fined any sum not exceeding two hundred pounds.

(2) A person who commits the offence of personation (*see post*, p. 1397), or of aiding, abetting, counselling, or procuring the commission of that offence, shall be guilty of felony, and any person convicted thereof on indictment shall be punished by imprisonment for a term not exceeding two years, together with hard labour.

(3) A person who is convicted on indictment of any corrupt practice shall (in addition to any punishment as above provided) be not capable during a period of seven years from the date of his conviction :—

(*a*) of being registered as an elector or voting at any election in the United Kingdom, whether it be a parliamentary election or an election for any public office within the meaning of this Act; or

(*b*) of holding any public or judicial office within the meaning of this Act, and if he holds any such office the office shall be vacated.

(4) Any person so convicted of a corrupt practice in reference to any election shall also be incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his conviction, and if at that date he has been elected to the House of Commons his election shall be vacated from the time of such conviction.

Sect. 33, sub-s. 7.—*False declaration respecting election expenses.*]—If any candidate or election agent knowingly makes the declaration [*respecting election expenses*] required by this section falsely, he shall be guilty of an offence, . . . such offence shall also be deemed to be a corrupt practice within the meaning of this Act. [*The words omitted have been repealed by* 1 & 2 Geo. 5, c. 6 (*Perjury Act*, 1911).]

Sect. 38, sub-s. 8.—*Bribery or treating by licensed person on licensed premises.*]—With respect to a person holding a licence or certificate under the *Licensing Acts* (in this section referred to as a licensed person) the following provisions shall have effect :—

(*a*) If it appears to the Court by which any licensed person is convicted of the offence of bribery or treating that such offence was committed on his licensed premises, the Court shall direct such conviction to be entered in the proper register of licences. . . .

[*The expression "Licensing Acts" is defined by s.* 64 *to mean the* Licensing Acts, 1872 to 1874. *As to the register of licences*, see 10 Edw. 7 and 1 Geo. 5, c. 24, s. 50.]

Sect. 41, sub-s. 4.—*Fraudulent withdrawal of election petition.*]—If any person makes any agreement or terms, or enters into any undertaking, in relation to the withdrawal of an election petition, and such agreement, terms, or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits [i.e., *the affidavits mentioned in the former part of this section*], he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding twelve months, and to a fine not exceeding two hundred pounds.

Sect. 43.—*Attendance of director of public prosecutions on trial of election petition, and prosecution by him of offenders.*]—(1) On every trial of an election petition the director of public prosecutions shall by himself, or by his assistant, or by such representative as hereinafter mentioned, attend at the trial, and it shall be the duty of such director to obey any directions given to him by the election court with respect to the summoning and examination of any witness to give evidence on such trial, and with respect to the prosecution by him of offenders, and with respect to any person to whom notice is given to attend with a view to report him as guilty of any corrupt or illegal practice.

(2) It shall also be the duty of such director, without any direction from the election court, if it appears to him that any person is able to give material evidence as to the subject of the trial, to cause such person to attend the trial, and with the leave of the Court to examine such person as a witness.

(3) It shall also be the duty of the said director, without any direction from the election court, if it appears to him that any person who has not received a certificate of indemnity has been guilty of a corrupt or illegal practice, to prosecute such person for the offence before the said Court, or if he thinks it expedient in the interests of justice before any other competent court.

(4) Where a person is prosecuted before an election court for any corrupt or illegal practice, and such person appears before the Court, the Court shall proceed to try him summarily for the said offence, and such person, if convicted thereof upon such trial, shall be subject to the same incapacities as he is rendered subject to under this Act upon conviction, whether on indictment or in any other proceeding for the said offence; and further, may be adjudged by the Court, if the offence is a corrupt practice, to be imprisoned with or without hard labour, for a term not exceeding six months, or to pay a fine not exceeding two hundred pounds, and if the offence is an illegal practice, to pay such fine as is fixed by this Act for the offence:

Provided that, in the case of a corrupt practice, the Court, before proceeding

to try summarily any person, shall give such person the option of being tried by a jury.

(5) Where a person is so prosecuted for any such offence, and either he elects to be tried by a jury, or he does not appear before the Court, or the Court thinks it in the interests of justice expedient that he should be tried before some other court, the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment or before a court of summary jurisdiction, as the case may require, for the said offence; and in either case may order him to be prosecuted before such court as may be named in the order; and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the Court so named. (*See R.* v. *Ripley*, 17 Cox, 120 (C. C. R.), *post*, p. 1404).

(6) Upon such order being made,

(*a*) If the accused person is present before the Court, and the offence is an indictable offence, the Court shall commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence; and

(*b*) If the accused person is present before the Court, and the offence is not an indictable offence, the Court shall order him to be brought before the Court of summary jurisdiction before whom he is to be prosecuted, or cause him to give bail to appear before that court; and

(*c*) If the accused person is not present before the Court, the Court shall as circumstances require issue a summons for his attendance, or a warrant to apprehend him and bring him before a court of summary jurisdiction, and that court, if the offence is an indictable offence, shall on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence, or if the offence is punishable on summary conviction, shall proceed to hear the case, or if such court be not the Court before whom he is directed to be prosecuted, shall order him to be brought before that court.

(7) The director of public prosecutions may nominate, with the approval of the attorney-general, a barrister or solicitor of not less than ten years' standing to be his representative for the purpose of this section, and that representative shall, receive such remuneration as the . . . Treasury may approve. There shall be allowed to the director and his assistant or representative, for the purposes of this section, such allowance for expenses as the Treasury may approve.

(8) The costs incurred in defraying the expenses of the director of public prosecutions under this section (including the remuneration of his representative) shall, in the first instance, be paid by the . . . Treasury, and so far as they are not in the case of any prosecution paid by the defendant (*see ante*, p. 284) shall be deemed to be expenses of the election court; but if for any reasonable cause it seems just to the Court so to do, the Court shall order all or part of the said costs to be repaid to the . . . Treasury by the parties to the petition, or such of them as the Court may direct.

Sect. 45.—*Duty of director of public prosecutions to institute prosecutions for corrupt practices.*]—Where information is given to the director of public prosecutions that any corrupt or illegal practices have prevailed in reference to any election, it shall be his duty, subject to the regulations under the *Prosecution of Offences Act*, 1879 (42 & 43 Vict. c. 22), to make such inquiries and to institute such prosecutions as the circumstances of the case appear to him to require. (*For these regulations* see Statutory Rules and Orders Revised (ed. 1904), vol. 4, tit. Criminal Procedure, E., pp. 7, 9.)

Sect. 50.—*Trial in Central Criminal Court or at Royal Courts of Justice of indictment for corrupt practices at instance of attorney-general.*]—Where an indictment, as defined by this Act (*see* s. 64, *ante*, p. 1389), for any offence under the *Corrupt Practices Prevention Acts* (*a*) or this Act is instituted in the High Court or is removed into the High Court by a writ of *certiorari* issued at the instance of the attorney-general, and the attorney-general suggests on the part of the Crown that it is expedient for the purposes of justice that the indictment should be tried in the Central Criminal Court, or if a special jury is ordered, that it should be tried before a judge and jury at the Royal Courts of Justice, the High Court may, if it think fit, order that such indictment shall be so tried upon such terms as the Court may think just, and the High Court may make such orders as appear to the Court necessary or proper for carrying into effect the order for such trial.

Sect. 51.—*Limitation of time for prosecution.*]—(1) A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the *Corrupt Practices Prevention Acts* or this Act shall be commenced (*see ante*, p. 66) within one year after the offence was committed, or if it was committed in reference to an election with respect to which an inquiry is held by election commissioners shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the *Summary Jurisdiction Acts* for any such offence, whether before an election court or otherwise, be substituted for any limitation of time contained in the last-mentioned Acts.

(2) For the purposes of this section the issue of a summons, warrant, writ, or other process shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but save as aforesaid the service or execution of the same on or against the

(*a*) By s. 65, the enactments described in the third schedule to this Act (*post*, p. 1396) are in this Act referred to as the "*Corrupt Practices Prevention Acts.*" The enactments described in that schedule are 17 & 18 Vict. c. 102; 26 & 27 Vict. c. 29; 31 & 32 Vict. c. 125; 35 & 36 Vict. c. 33, part 3; and 42 & 43 Vict. c. 75, *so far as they are unrepealed*; and 30 & 31 Vict. c. 102, ss. 11, 49, 50. So far as those statutes relate to indictable offences and are still in force, they will be found set out in sched. 3, part 3 (*post*, pp. 1396 *et seq.*), and in the series of enactments beginning with 17 & 18 Vict. c. 102, s. 10 (*post*, p. 1398), and ending with 35 & 36 Vict. c. 33, s. 24 (*post*, 1399).

alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.

Sect. 52.—*Verdict of guilty of illegal practice on indictment for corrupt practice.*]—Any person charged with a corrupt practice may, if the circumstances warrant such finding, be found guilty of an illegal practice [*as to what are illegal practices punishable on summary conviction under s.* 10 *of this Act*, see *ss.* 7 *to* 12 *of this Act, and ss.* 1, 2 *of the* Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), and *s.* 1 (1) *of the* Public Meetings Act, 1908 (8 Edw. 7, c. 66) and *s.* 22 *of the* Representation of the People Act, 1918 (7 & 8 Geo. 5, c. 64)] (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment, or hiring, may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt or illegal-practice.

Sect. 53.—*Application of enactments of* 17 & 18 Vict. c. 102, *and* 26 & 27 Vict. c. 29, *relating to prosecutions for bribery.—Evidence.*]—(1) Sect. 10 of the *Corrupt Practices Prevention Act*, 1854 (17 & 18 Vict. c. 102, *post*, p. 1398), and s. 6 of the *Corrupt Practices Prevention Act*, 1863 (26 & 27 Vict. c. 29, *post*, p. 1398) (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said s. 10 may be made on the defendant; but the director of public prosecutions or any persons instituting any prosecution in his behalf or by direction of an election court shall not be deemed to be a private prosecutor, nor required under the said sections to give any security.

(2) On any prosecution under this Act, whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the person prosecuted or sued, and the husband or wife of such person, may, if he or she think fit, be examined as an ordinary witness in the case. (*See ante*, pp. 458 *et seq.*)

(3) On any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring within the meaning of this Act, as the case may be, and the certificate of the returning officer at an election that the election mentioned in the certificate was duly held, and that the person named in the certificate was a candidate at such election, shall be sufficient evidence of the facts therein stated. [*Sects.* 10, 12, *and* 13 *of* 17 & 18 Vict. c. 102, *were repealed as to costs in England by* 8 Edw. 7, c. 15, s. 10. *As to costs*, see ante, p. 284.]

Sect. 56.—*Exercise of jurisdiction of High Court.*]—(1) Subject to any rules of court, any jurisdiction vested by this Act in the High Court may, so far

as it relates to indictments or other criminal proceedings, be exercised by any judge of the King's Bench Division. . . .

Sect. 57.—*Director of public prosecutions and expenses of prosecutions.*]—(1) The director of public prosecutions in performing any duty under this Act shall act in accordance with the regulations under the *Prosecution of Offences Act*, 1879 (42 & 43 Vict. c. 22 : *the regulations are printed in* Statutory Rules and Orders Revised (ed. 1904), vol. 4, tit. Criminal Procedure, E., pp. 7, 9), and subject thereto in accordance with the directions (if any) given to him by the attorney-general; and any assistant or representative of the director of public prosecutions in performing any duty under this Act shall act in accordance with the said regulations and directions, if any, and with the directions given to him by the director of public prosecutions.

(2) *Costs.*]—*Rep.* 8 Edw. 7, c. 15, s. 10. *As to recovery of costs by person acquitted*, see 8 Edw. 7, c. 15, s. 6 (2) (ante, p. 284).

Sect. 58.—*Recovery of costs ordered to be paid by any person.*]—(2) Where any costs or other sums are, under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the Treasury shall be a debt to his Majesty, and in either case may be recovered accordingly [*see* s. 53, ante, p. 1394; 8 Edw. 7. c. 15, s. 6 (*ante*, p. 284), which takes the place of 17 & 18 Vict. c. 102, ss. 10, 12, 13, as to costs in England].

Sect. 59.—*Obligation of witness to answer and certificate of indemnity.—Evidence.*]—(1) A person who is called as a witness respecting an election before any election court shall not be excused from answering any question relating to any offence at or connected with such election, on the ground that the answer thereto may criminate or tend to criminate himself or on the ground of privilege;

Provided that—

(*a*) A witness who answers truly all questions which he is required by the election court to answer shall be entitled to receive a certificate of indemnity under the hand of a member of the Court, stating that such witness has so answered : and

(*b*) An answer by a person to a question put by or before any election court shall not, except in the case of any criminal proceeding for perjury in respect of such evidence, be in any proceeding, civil or criminal, admissible in evidence against him :

(2) Where a person has received such a certificate of indemnity in relation to an election, and any legal proceeding is at any time instituted against him for any offence under the *Corrupt Practices Prevention Acts* or this Act committed by him previously to the date of the certificate at or in relation to the said election, the Court having cognizance of the case shall on proof of the certificate stay the proceeding, and may in their discretion award to the said person such costs as he may have been put to in the proceeding :

(3) Nothing in this section shall be taken to relieve a person receiving a certificate of indemnity from any incapacity under this Act or from any proceeding to enforce such incapacity (other than a criminal prosecution) :

(4) This section shall apply in the case of a witness before any election commissioners, in like manner as if the expression "election court" in this section included election commissioners.

(5) Where a solicitor or person lawfully acting as agent for any party to an election petition respecting any election for a county or borough has not taken any part or been concerned in such election, the election commissioners inquiring into such election shall not be entitled to examine such solicitor or agent respecting matters which came to his knowledge by reason only of his being concerned as solicitor or agent for a party to such petition.

Sect. 60.—*Submission of report of election court or commissioners to attorney-general.*]—An election court or election commissioners, when reporting that certain persons have been guilty of any corrupt or illegal practice, shall report whether those persons have or have not been furnished with certificates of indemnity; and such report shall be laid before the attorney-general (accompanied in the case of the commissioners with the evidence on which such report was based) with a view to his instituting or directing a prosecution against such persons as have not received certificates of indemnity, if the evidence should, in his opinion, be sufficient to support a prosecution.

Third Schedule.—Part III.

Enactments defining the offences of Bribery and Personation.

The Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), ss. 2, 3.

Sect. 2.—*Bribery.*]—The following persons shall be deemed guilty of bribery, and shall be punished accordingly :—

(1) Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election :

(2) Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce such voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of any voter having voted or refrained from voting at any election :

(3) Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person, in order to induce such person to procure or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election :

(*As to former law*, see Henslow *v.* Fawcett, 4 L. J. (N. S.) K. B. 147; 3 A. & E. 51: Harding *v.* Stokes, 6 L. J. (N. S.) Ex. 76; 2 M. & W. 233.)

(4) Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election:

(5) Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election. Provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election. (*As to the meaning of the section*, see Cooper *v.* Slade, 27 L. J. (N. S.) Q. B. 449; 6 H. L. C. 746.)

Sect. 3.—*Bribery.*]—The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly:—

(1) Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election:

(2) Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting at any election. (*See* 46 & 47 Vict. c. 51, s. 28.)

30 & 31 *Vict. c.* 102 (*Representation of the People Act*, 1867), *s.* 49.—*Bribery.*]—Any person, either directly or indirectly, corruptly paying any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, and any candidate or other person, either directly or indirectly, paying any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of bribery, and be punishable accordingly; and any person on whose behalf and with whose privity any such payment as in this section is mentioned is made, shall also be guilty of bribery, and punishable accordingly.

35 & 36 *Vict. c.* 33 (*Ballot Act*, 1872), *s.* 24.—*Personation.*]—A person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offence of personation who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or

dead, or of a fictitious person, or who, having voted once at any such election, applies at the same election for a ballot paper in his own name. . . . (*As to extension of this enactment to other elections*, see post, p. 1407.)

OTHER ENACTMENTS REFERRED TO IN 46 & 47 VICT. C. 51.

17 & 18 *Vict. c.* 102 (*Corrupt Practices Prevention Act*, 1854), *s.* 10.—*Indictment for bribery or undue influence not triable at quarter sessions.*]—No indictment for bribery or undue influence shall be triable before any court of quarter sessions. [*The rest of the section is repealed as to England by* 8 Edw. 7, c. 15, s. 10; see ante, pp. 267 et seq.]

Sects. 12, 13.—*Costs.*]—*Repealed as to England by* 8 Edw. 7, c. 15, s. 10 (see ante, p. 272).

26 & 27 *Vict. c.* 29 (*Corrupt Practices Prevention Act*, 1863), *s.* 6.—*Evidence.*]—. . . in any criminal or civil proceedings in relation to any such offence [*viz., bribery, treating, or undue influence, (the earlier part of the section having been repealed by the* Indictments Act, 1915)], the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat. [See 46 & 47 Vict. c. 51, s. 53 (ante, p. 1394). *As to proof of register of voters*, see Reed *v.* Lamb, 6 H. & N. 75 : R. *v.* Clarke, 1 F. & F. 654.]

30 & 31 *Vict. c.* 102 (*Representation of the People Act*, 1867), *s.* 50.—*Returning officer, his deputy, partner, or clerk, acting as agent, a misdemeanor.*]—No returning officer for any county or borough, nor his deputy, nor any partner or clerk of either of them, shall act as agent for any candidate in the management or conduct of his election as a member to serve in parliament for such county or borough; and if any returning officer, his deputy, the partner or clerk of either of them, shall so act, he shall be guilty of a misdemeanor. (*See also* 35 & 36 Vict. c. 33, s. 11, post, p. 1400.)

6 & 7 *Vict. c.* 18 (*Parliamentary Registration Act*, 1843), *s.* 81.]—In all elections whatever of a member or members to serve in parliament for any county, riding, parts or division of a county, or for any city or borough, in England or Wales, no inquiry shall be permitted at the time of polling as to the right of any person to vote, except only as follows; (that is to say) that the returning officer or his respective deputy shall, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions or either of them :

1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county of ——— [or for the riding, parts or division of the county of] or for the city [or borough] of [as the case may be]?

2. Have you already voted, either here or elsewhere at this election for the county of [or for the riding, parts or division of the county of] or for the city [or borough] of [as the case may be]?

. . . [*these words have been repealed by* 1 & 2 Geo. 5, c. 6 (*Perjury Act*,

1911)]; and the returning officer or his deputy . . . shall, if required on behalf of any candidate at the time aforesaid, administer an oath to any voter in the following form :

You do swear [or affirm as the case may be] that you are the same person whose name appears as A. B. on the register of voters now in force for the county of [or for the riding, parts or division of the county of], or of the city [or borough] of [as the case may be], and that you have not before voted, either here or elsewhere, at the present election for the county of [or for the riding, parts or division of the county of] or for the city [or borough] of [as the case may be.].

So help you God.

[*As to persons entitled to administer the oath*, see 35 & 36 Vict. c. 33, s. 10. (*a*) *As to form of indictment*, cf. R. *v.* Bowler, C. & Mar. 559 : R. *v.* Ellis, Id. 564 : R. *v.* Spalding, Id. 568, *decided upon similar provisions contained in s.* 58 *of the* Reform Act, 1832 (2 W. 4, c. 45), *in which cases judgment was arrested on the ground that the fact that the defendants appeared and voted was stated in the indictments by way of recital only, and not by express averment:* and cf. R. *v.* Lucy, Id. 511.]

35 *&* 36 *Vict. c.* 33 (*Ballot Act*, 1872), *s.* 24.—*Definition of personation.—Institution of prosecution.*]—The following enactments shall be made with respect to personation at parliamentary and municipal elections :

A person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offence of personation (*ante*, pp. 1390, 1396), who at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted at any such election applies at the same election for a ballot paper in his own name. [*Provisions as to punishment rep.* 46 & 47 Vict. c. 51, s. 66, *and replaced by s.* 6 (2) *of that Act*, ante, p. 1390.] It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, at the election for which he is returning officer. [*Words omitted rep. as to England*, 8 Edw. 7, c. 15, s. 10; see ante, p. 272.]

[*This section supersedes* 6 & 7 Vict. c. 18, ss. 83, 84, *but not ss.* 85-89. *For cases on former law*, see R. *v.* Hague, 4 B. & S. 715; 33 L. J. (M. C.) 81 (*parliamentary elections*) : R. *v.* Thompson, 2 M. & Rob. 355 : R. *v.* Bent, 1 Den. 157; 2 C. & K. 179 : R. *v.* Haslam, 1 Den. 73 : R. *v.* Goodman, 1 F. & F. 502 (*municipal elections*). *For precedents of indictments under this section*, see R. *v.* Fox, 16 Cox, 166 : R. *v.* Turner, 12 Cox, 313. *Two witnesses are necessary to prove the offence.* 6 & 7 Vict. c. 18, s. 88 (ante, p. 480).

If a person applies for a ballot paper in a name other than his own, or the name by which he is generally known, but in a name which appears on the register of voters, and which was inserted therein by the overseers in the belief

(*a*) Made permanent by 7 & 8 Geo. 5, c. 64, s. 35.

that it was the name of the applicant, and for the purpose of putting him on the register, he is entitled to vote and is not guilty of the offence of personation within this section. R. *v.* Fox, 16 Cox, 166, Hawkins, J. *It is not necessary to state in an indictment for personation or to prove at the trial that the presiding officer at the booth where the offence was committed was duly appointed.* R. *v.* Garvey, 16 Cox, 252 (C. C. R. Ir.) : cf. R. *v.* Thompson, 2 M. & Rob. 355 : R. *v.* Turner, 12 Cox, 313. *On a trial for personation at the election of a municipal councillor, judicial notice will be taken of the municipal charter.* R. *v.* Turner (supra).

OTHER ENACTMENTS RELATING TO OFFENCES AT PARLIAMENTARY ELECTIONS.

35 & 36 *Vict. c.* 33 (*a*) (*Ballot Act*, 1872), *s.* 3.—*Offences in respect of nomination papers, ballot papers, and ballot boxes.—Attempts to commit such offences.—Form of indictment.*]—Every person who—(1) . . . fraudulently defaces or fraudulently destroys any nomination paper, . . .; or (2) . . . counterfeits, or fraudulently defaces, or fraudulently destroys any ballot paper or the official mark on any ballot paper; or (3) Without due authority supplies any ballot paper to any person; or (4) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorized by law to put in; or (5) Fraudulently takes out of the polling station any ballot paper; or (6) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election, shall be guilty of a misdemeanor, and be liable, if he is a returning officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour.

Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils.

[*The words omitted have been repealed by* 3 & 4 Geo. 5, c. 27 (*Forgery Act*, 1913). *For precedent of indictment under this section, and as to the meaning of the word "packet,"* see R. *v.* Chaplin, 74 J. P. 71.

As to the mode of securing the production of ballot papers, etc., for the purpose of a prosecution, see 35 & 36 Vict. c. 33, sched. 1, Part I., rules 40 and 41, and sched. 1, Part II., rule 64 (*b*), and R. *v.* Beardsall, 1 Q. B. D. 452; 45 L. J. (M. C.) 157; 13 Cox, 193.]

Sect. 11 (*a*).—*Extension of s.* 50 of 30 & 31 Vict. c. 102.]—Sect. 50 of the *Representation of the People Act*, 1867 (*ante*, p. 1398) (which relates to the acting of any returning officer, or his partner or clerk, as agent for a candidate),

(*a*) Made permanent by 7 & 8 Geo. 5, c. 64, s. 35.

shall apply to any returning officer or officer appointed by him in pursuance of this Act, and to his partner or clerk.

7 & 8 *Geo.* 5, *c.* 64 (*Representation of the People Act*, 1918), *s.* 38.—*Punishment of offences committed outside the United Kingdom.*]—Where any person commits out of the United Kingdom any act which if that act had been committed in the United Kingdom would have rendered that person liable to prosecution and punishment under the *Ballot Act*, 1872, or the *Corrupt and Illegal Practices Prevention Act*, 1883 (as amended by any subsequent Act) or under this Act, that person shall be liable to be proceeded against and punished as though the act had been committed in the United Kingdom at any place where that person may for the time being be. For the purposes of any such prosecution any period prescribed as the period within which proceedings may be commenced shall be reckoned as from the date on which the person charged returned to the United Kingdom next after the commission of the offence.

SECT. 7.

CORRUPT PRACTICES AND OTHER INDICTABLE OFFENCES AT MUNICIPAL AND CERTAIN OTHER ELECTIONS.

Common Law.

Bribery in municipal elections is a misdemeanor indictable at common law. *R.* v. *Plympton*, 2 Ld. Raym. 1377. So is payment or promise of payment for votes at the election of an assistant overseer of a parish. *R.* v. *Lancaster*, 16 Cox, 377, Wills, J.; *see* 1 Russ. Cr. (7th ed.) 627.

Statutes.

47 & 48 *Vict. c.* 70, *s.* 1.—*Short Title.*]—This Act may be cited as the *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884.

Sect. 34.—*Definitions.*]—In this Act expressions have the same meaning as in the *Municipal Corporations Act*, 1882, and in the *Corrupt and Illegal Practices Prevention Act*, 1883 (*ante*, p. 1390); except that the words "borough," "election petition," "election court," and "candidate," shall, unless the context otherwise requires, have the meaning given by the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), and not the meaning given by the *Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 Vict. c. 51); and except that "election" shall, unless the context otherwise requires, mean a municipal election.

Sect. 35.—*Application of Act to city of London.*]—This Act and Part IV. of the *Municipal Corporations Act*, 1882, shall apply to a municipal election in the city of London, subject as follows . . . (*See now* 50 & 51 Vict. c. xiii., *as to elections in the city of London.*)

Sect. 36.—*Application of Act to certain other elections.*]—(1) Subject as hereinafter mentioned, the provisions of this Act and of Part IV. of the *Muncipal Corporations Act*, 1882, as amended by this Act, shall extend to elections for the offices mentioned in the first column (*post*, p. 1405) of the first schedule to this Act as if re-enacted herein and in terms made applicable thereto, and petitions may be presented and tried, and offences prosecuted and punished, and incapacities incurred in reference to each such election accordingly.

Sect. 2.—*Definition and punishment of corrupt practices at municipal elections.*]—(1) The expression "corrupt practice" in this Act means any of the following offences, namely, treating, undue influence, bribery, and personation as defined by the enactments set forth in Part I. of the third schedule to this Act (*post*, p. 1406), and aiding, abetting, counselling, and procuring the commission of the offence of personation. (*As to the common law*, see post, p. 1443. *As to the law in Ireland*, see R. *v.* Clarke [1900] 2 Ir. 304.)

(2) A person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and shall on conviction be liable to the like punishment, and subject to the like incapacities, as if the corrupt practice had been committed in reference to a parliamentary election.

Sect. 21, sub-s. 5.—*Candidate knowingly making false declaration respecting election expenses.*]—If the candidate without such authorized excuse as is mentioned in this Act fails to make the said return and declaration he shall be guilty of an illegal practice, and if he knowingly makes the said declaration [*respecting election expenses*] falsely he shall be guilty of an offence, . . . and such offence shall also be deemed to be a corrupt practice within the meaning of this Act. [*The words omitted have been repealed* by 1 & 2 G. 5, c. 6 (Perjury Act, 1911).]

Sect. 23.—*Application of ss.* 37 *and* 38 *of* 46 *&* 47 *Vict. c.* 51.]—So much of ss. 37 and 38 of the *Corrupt and Illegal Practices Prevention Act*, 1883, as is set forth in Part II. of the third schedule to this Act (*post*, p. 1406) shall apply as part of this Act.

Sect. 26, sub-s. 4.—*Fraudulent wirthdrawal of election petition.*]—If any person makes any agreement or terms, or enters into any undertaking, in relation to the withdrawal of an election petition, and such agreement, terms or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits [i.e., *the affidavits mentioned in the former part of this section*], he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding twelve months, and to a fine not exceeding two hundred pounds.

Sect. 28.—*Attendance by director of public prosecutions on trial of election petition, and prosecution by him of offenders.*]—(1) On every trial of a municipal election petition the director of public prosecutions shall by himself or by his assistant, or by such representative as hereinafter mentioned, attend at the

trial, and it shall be the duty of such director to obey any directions given to him by the election court with respect to the summoning and examination of any witness to give evidence on such trial, and with respect to the prosecution by him of offenders, and with respect to any person to whom notice is given to attend with a view to report him as guilty of any corrupt or illegal practice.

(2) It shall also be the duty of such director, without any direction from the election court, if it appears to him that any person is able to give material evidence as to the subject of the trial, to cause such person to attend the trial, and with the leave of the Court to examine such a person as a witness.

(3) It shall also be the duty of the said director, without any direction from the election court, if he thinks it expedient in the interests of justice so to do, to prosecute, either before the said Court or before any other competent court, any person who has not received a certificate of indemnity, and who appears to him to have been guilty of a corrupt or illegal practice at a municipal election.

(4) Where a person is prosecuted before an election court for any corrupt or illegal practice, and such person appears before the Court, the Court shall proceed to try him summarily for the said offence, and such person, if convicted thereof upon such trial, shall be subject to the same incapacities as he is subject to under this or any other Act, upon conviction, whether on indictment or in any other proceeding for the said offence; and further, may be adjudged by the Court, if the offence is a corrupt practice, to be imprisoned, with or without hard labour, for a term not exceeding six months, or to pay a fine not exceeding two hundred pounds, and if the offence is an illegal practice, to pay such fine as is fixed by this Act for the offence:

Provided that, in the case of a corrupt practice, the Court, before proceeding to try summarily any person, shall give such person the option of being tried by jury.

(5) Where a person is so prosecuted for any such offence, and either he elects to be tried by a jury or he does not appear before the Court, or the Court thinks it in the interests of justice expedient that he should be tried before some other court, the Court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment or before a court of summary jurisdiction, as the case may require, for the said offence; and in either case may order him to be prosecuted before such court as may be named in the order; and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to be have been committed within the jurisdiction of the Court so named.

(6) Upon such order being made,

(a) if the accused person is present before the Court, and the offence is an indictable offence, the Court shall commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence; and

(b) if the accused person is present before the Court, and the offence is not an indictable offence, the Court shall order him to be brought before the Court of summary jurisdiction before whom he is to be prosecuted, or cause him to give bail to appear before that court; and

(c) if the accused person is not present before the Court, the Court shall as circumstances require issue a summons for his attendance, or a warrant to apprehend him and bring him before a court of summary jurisdiction, and that court, if the offence is an indictable offence, shall, on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence, or if the offence is punishable on summary conviction, shall proceed to hear the case, or if such court be not the Court before whom he is directed to be prosecuted shall order him to be brought before that court.

(7) Any order or act of an election court under this section shall not be subject to be discharged or varied under sub-s. 6 of s. 92 of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50).

(8) The director of public prosecutions may nominate, with the approval of the attorney-general, any barristers or solicitors of not less than ten years' standing, one of whom shall, when required, act as the representative for the purposes of this section of such director, and when so acting shall receive such remuneration as the Treasury may approve. There shall be allowed to the director and his assistant or representative, for the purposes of this section, such allowance for expenses as the Treasury may approve.

(9) The costs incurred in defraying the expenses of the director of public prosecutions under this section (including the remuneration of his representatives) shall, in the first instance, be paid by the Treasury, and so far as they are not in the case of any prosecution paid by the defendant, shall be deemed to be expenses of the election court, and shall be paid as the expenses of that court are directed by s. 101 of the *Municipal Corporations Act*, 1882, to be paid; but if for any reasonable cause it seems just to the Court so to do, the Court shall order all or part of the said costs to be repaid to the Treasury by the parties to the petition or such of them as the Court may direct.

[*In the case of the trial of a petition against a municipal election, the election court may, under sub-s. 5 of s. 28, order a person, against whom it directs a prosecution, to be tried in a county other than that in which the borough out of which the petition arises is situate, and the venue in the margin of the indictment is properly laid in the county in which the election court directs the trial to take place, and the mere fact that in the body of the indictment the offence is alleged to have been committed, as it actually was, in another county than that mentioned in the venue in the margin, is immaterial.* R. *v.* Ripley, 17 Cox, 120 (C. C. R.). *The indictment in such a case is properly preferred before the grand jury of the county in which the election court orders the trial to take place, and it is unnecessary that it should set out in the face of it facts which conferred the power to indict and try in that county.* Id. *Where the order of the election court directs the prosecution of the defendant for "a corrupt practice," this is sufficient to authorize the charging of the defendant in several counts of the indictment with several separate and distinct corrupt practices.* Id. *An indictment for corrupt practices at a municipal election need not state the date of the election.* R. *v.* Yeoman, 20 T. L. R 266.]

Sect. 30.—*General provisions as to prosecution of offences under this Act.*]—Subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice or any illegal payment, employment, or hiring committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the director of public prosecutions in relation to any such offence, and all other proceedings in relation thereto (including the grant to a witness of a certificate of indemnity), shall be the same as if such offence had been committed in reference to a parliamentary election; and ss. 45 (*ante*, p. 1393) and 46 and ss. 50 to 57 (*ante*, pp. 1393—1395) (both inclusive) and ss. 59 and 60 (*ante*, pp. 1395, 1396) of the *Corrupt and Illegal Practices Prevention Act*, 1883, shall apply accordingly as if they were re-enacted in this Act with the necessary modifications, and with the following additions:—

(a) Where the director of public prosecutions considers that the circumstances of any case require him to institute a prosecution before any court other than an election court for any offence other than a corrupt practice committed in reference to a municipal election in any borough, he may, by himself or his assistant, institute such prosecution before any court of summary jurisdiction in the county in which the said borough is situate or to which it adjoins, and the offence shall be deemed for all purposes to have been committed within the jurisdiction of such court; and

(b) General rules for the purposes of Part IV. of the *Municipal Corporations Act*, 1882, shall be made by the same authority as rules of court under the said sections; and

(c) The giving or refusal to give a certificate of indemnity to a witness by the election court shall be final and conclusive.

[*This section applied to prosecutions for a corrupt practice at a municipal election: the provisions as to costs of* 17 & 18 Vict. c. 102. R. *v.* Law [1900] 1 Q. B. 605; 69 L. J. (Q. B.) 348; 19 Cox, 452. *These provisions are now repealed and replaced by* 8 Edw. 7, c. 15, s. 6, ante, p. 284. The rules *referred to in sub-s.* (*b*) *were made April* 17, 1883, *and are printed in* Statutory Rules and Orders Revised (ed. 1904), vol. 12, tit. Supreme Court, E., p. 656. *They were applied to county council elections by* 51 & 52 Vict. c. 41, s. 75 (post, p. 1407); *and* 54 & 55 Vict. c. 68, *and were extended to elections under the* Local Government Act, 1894, *by rules of January* 14, 1895. Ann. Pr.]

Sect. 32, sub-s. 2.—*Recovery of costs ordered to be paid by any person.*]—Where any costs or other sums are, under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the Treasury shall be a debt to his Majesty, and in either case may be recovered accordingly.

FIRST SCHEDULE.—COLUMN I.

Member of Local Board, as defined by the *Public Health Act*, 1875. (*See* 56 & 57 Vict. c. 73, s. 48, post, p. 1407.)

Member of Improvement Commissioners, as defined by the *Public Health Act*, 1875. (*See* 56 & 57 Vict. c. 73, s. 48, post, p. 1407.)

Guardian elected under the *Poor Law Amendment Act*, 1834 (4 & 5 W. 4, c. 76).

Member of School Board. [*School boards have been abolished in England by* 2 Edw. 7, c. 42, *and* 3 Edw. 7, c. 24.]

THIRD SCHEDULE.—PART I.

Enactments defining Corrupt Practices.—Enactments defining the offence of Bribery.

The *Corrupt Practices Prevention Act*, 1854 (17 & 18 Vict. c. 102), ss. 2 and 3 (ante, pp 1396, 1397).

The *Representation of the People Act*, 1867 (30 & 31 Vict. c. 102), s. 49 (ante, p. 1397).

Enactment defining the offence of Personation.

The *Ballot Act*, 1872 (35 & 36 Vict. c. 33), s. 24 (ante, p. 1399).

Enactment defining the offences of Treating and Undue Influence.

The *Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 Vict. c. 51), ss. 1 and 2 (ante, p. 1389).

Enactment defining the offences of Bribery, Treating, Undue Influence, and Personation.

The Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 77.]—"Bribery," "treating," "undue influence," and "personation" include respectively anything done before, at, after, or with respect to a municipal election, which, if done before, at, after, or with respect to a parliamentary election, would make the person doing the same liable to any penalty, punishment, or disqualification for bribery, treating, undue influence, or personation as the case may be, under any Act for the time being in force with respect to parliamentary elections. . . . [*The definition of corrupt practice was rep. by* 47 & 48 Vict. c. 70, s. 38. *For present definition*, see ante, p. 1390.]

THIRD SCHEDULE.—PART II.

46 & 47 *Vict. c.* 51, *s.* 38, *sub.-s.* 8 (ante, p. 1390).

1 & 2 *G.* 5, *c.* 7. (*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1911), *s.* 1.—*Certain false statements concerning a candidate to be an illegal practice.*]—(1) Any person who, or the directors of any body or association corporate which, before or during any municipal election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate shall be guilty of an illegal practice within the meaning

of the provisions of the *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884, and shall be subject to all the penalties for and consequences of committing an illegal practice in the said Act mentioned, and the said Act shall be taken to be amended as if the illegal practice defined by this Act had been contained therein.

(2) No person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true. [*This offence, being an illegal practice, is punishable on summary conviction under* 47 & 48 Vict. c. 70, s. 7, but see *s.* 52 *of* 46 & 47 Vict. c. 51 (ante, p. 1394), *which is applied to offences at municipal elections by s.* 30 *of* 47 & 48 Vict. c. 70 (ante, p. 1405).]

35 *& 36 Vict. c.* 33 (*Ballot Act*, 1872), *s.* 3.—*Offences in respect of nomination papers, ballot papers, and ballot boxes.—Attempts to commit such offences.—Provisions as to form of indictment.*]—Ante, p. 1400. [*This section occurs in Part I. of* 35 & 36 Vict. c. 33, *which bears the general heading of "Parliamentary Elections," but it seems to be applicable to municipal elections also by virtue of s.* 20 *of the same statute.*]

County, District, and Parish Council Elections.

51 *& 52 Vict. c.* 41 (*Local Government Act*, 1888), *s.* 75.]—(1) For the purposes of this Act, with respect to county councils, and to the chairmen, members, committees, and officers of such councils, and otherwise for the purpose of carrying this Act into effect, the following portions of the *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), namely, . . . Part IV., as amended by the *Municipal Elections Corrupt Practices Act*, 1884 (47 & 48 Vict. c. 70), . . . shall, so far as the same are unrepealed, apply as if they were herein re-enacted, with the enactments amending the same, in such terms and with such modifications as are necessary to make them applicable to the said councils and their chairmen, committees, and officers, and to the other provisions of this Act. [*This has the effect of applying* 47 & 48 Vict. c. 70, *to county council elections.* Ex parte Walker, 22 Q. B. D. 384; 58 L. J. (Q. B.) 190.]

56 *& 57 Vict. c.* 73 (*Local Government Act*, 1894), *s.* 48.]—(3) At every election regulated by rules framed under this Act the poll shall be taken by ballot, and the *Ballot Act*, 1872 (*ante*, p. 1400), and the *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (*ante*, p. 1401), and ss. 74 and 75 and Part IV. of the *Municipal Corporations Act*, 1882, as amended by the last-mentioned Act, including the penal provisions of these Acts, shall, subject to adaptations, alterations, and exceptions made by such rules, apply in like manner as in the case of a municipal election. [*Orders have been made under* 56 & 57 Vict. c. 73, ss. 3, 20, 23, 48, 74, *regulating the elections of parish councillors* (1901, *January* 14, Statutory Rules and Orders Revised (ed. 1904), vol. 9, tit. Parish Council, E., p. 77), *rural district councillors* (1908, *January* 1, Id., vol. 4, tit. District Council, E., p. 46), *urban district councillors* (1898, *January* 1, Id., vol. 4, tit. District Council, E., p. 8), *guardians of the poor*

in urban parishes and London (1898, *January* 1, 21, Id., vol. 10, tit. Poor, E., pp. 2, 41). *The orders apply certain provisions of the above Acts; but reference must be made to each order for the extent and mode of incorporation of the penal clauses. As to the portions of these Acts incorporated in the Irish County and District Councillors Election Orders*, see R. *v.* Clarke [1900] 2 Ir. Rep. 304.]

62 & 63 *Vict. c.* 14 (*London Government Act*, 1899), *s.* 2.—*Municipal elections in London boroughs.*]—(5) Except as otherwise provided by or under this Act, the law relating to the constitution, election, and proceedings of administrative vestries, and to the electors and members thereof, shall apply in the case of the borough councils under this Act, and the electors and councillors thereof. . . . [*The elections under this Act are regulated by an order dated Feb.* 26, 1903, *and published in* Statutory Rules and Orders Revised (ed. 1904), vol. 8, tit. London County, p. 43.]

SECT. 8.

BRIBERY AND CORRUPTION OF OR BY MEMBERS AND SERVANTS OF CERTAIN PUBLIC BODIES.

Common Law.

As to the cases in which the bribery of public officials is punishable at common law, *see ante*, pp. 130, 1205, *and* 1 Russ. Cr. (7th ed.), 601, 627.

Statute.

52 & 53 *Vict. c.* 69 (*Public Bodies Corrupt Practices Act*, 1889), *after reciting that it is expedient more effectually to provide for the prevention and punishment of bribery and corruption of and by members, officers, or servants of corporations, councils, boards, commissions, or other public bodies*, enacts that :—

Sect. 1.—*Corruption of or by members or servants of public bodies a misdemeanor.*]—(1) Every person who shall by himself or by or in conjunction with any other person corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined (*see post*, p. 1410), doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanor.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or

of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor. (*See Mayor, etc., of Salford* v. *Lever*, 25 Q. B. D. 363; [1891] 1 Q. B. 168; 60 L. J. (Q. B.) 39.)

Sect. 2.—*Punishment of misdemeanors mentioned in s.* 1.]—Any person on conviction for offending as aforesaid shall, at the discretion of the Court before which he is convicted, (*a*) be liable to be imprisoned for any period not exceeding two years, with or without hard labour, or to pay a fine not exceeding five hundred pounds, or to both such imprisonment and such fine; and (*b*) in addition be liable to be ordered to pay to such body, and in such manner as the Court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and (*c*) be liable to be adjudged incapable of being elected or appointed to any public office for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and (*d*) in the event of a second conviction for a like offence he shall, in addition to the foregoing penalties, be liable to be adjudged to be for ever incapable of holding any public office, and to be incapable for seven years of being registered as an elector, or voting at an election either of members to serve in parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and (*e*) if such person is an officer or servant in the employ of any public body upon such conviction he shall, at the discretion of the Court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled. [*As to the punishment where the offence relates to a contract with his Majesty or any Government Department*, see the Prevention of Corruption Act, 1916 (6 & 7 Geo. 5), c. 64, post, p. 1412.]

Sect. 3.—*Right to prosecute at common law or under any other enactment preserved.—Invalidity of appointment to office no bar to prosecution.*]—(1) Where an offence under this Act is also punishable under any other enactment, or at common law, such offence may be prosecuted and punished either under this Act, or under the other enactment, or at common law, but so that no person shall be punished twice for the same offence (*cf.* 52 & 53 Vict. c. 63, s. 33, *ante*, p. 160). (2) A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.

Sect. 4.—*Attorney-general's consent necessary to institution of prosecution.*]—(1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the attorney-general. (2) In this section the expression "attorney-general" means the Attorney or Solicitor General for England and as respects Scotland means the Lord Advocate, and as respects Ireland means the Attorney or Solicitor General for Ireland.

Sect. 5.—*Costs.—Repealed as to England*, 8 Edw. 7, c. 15, s. 10. See ante, pp. 272 et seq.

Sect. 6.—*Jurisdiction of quarter sessions.*]—A court of general or quarter sessions shall in England have jurisdiction to inquire of, hear, and determine an offence under this Act. *(See ante*, p. 106.)

Sect. 7.—*Interpretation.*]—In this Act—

The expression "*public body*" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act [*including* the Metropolitan Police Acts (R. *v.* Silberston [1899] 129 Cent. Crim. Ct. Sess. Pap. 372; 34 L. J. (Newsp. 232)], but does not include any public body as above defined existing elsewhere than in the United Kingdom :

The expression "*public office*" means any office or employment of a person as a member, officer, or servant of such public body :

The expression "*person*" includes a body of persons, corporate or unincorporate :

The expression "*advantage*" includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

[*As to presumption of corruption in certain cases*, see the Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c. 64), s. 2, post, p. 1412.]

Indictment for corrupt practice. *(52 & 53 Vict. c. 69, s. 1, ante*, p. 1408.)

Commencement as ante, p. 1293.

STATEMENT OF OFFENCE.

Corruption, contrary to section 1 (1) of the Public Bodies Corrupt Practices Act, 1889.

PARTICULARS OF OFFENCE.

A. B., being a food and drugs inspector of the town council of the borough of ——, on the —— day of ——, 19—, in the county of ——, did corruptly solicit or receive or agree to receive for himself the sum of £10 as a fee or reward for forbearing to prosecute C. D. for adulteration of milk.

SECT. 9.

CORRUPTION OF AND BY AGENTS.

6 *Edw.* 7, *c.* 34 (*Prevention of Corruption Act*, 1906 (*a*)), *s.* 1.]—(1) If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal: he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine.

[*The giver of a false document commits an offence under the section, although the agent to whom the document is given is not corrupted nor intended to be corrupted, nor is it essential that the agent should know of the falsity of the statement in the document.* Sage *v.* Eicholz [1919] 2 K. B. 171; 83 J. P. 170; 121 L. T. 151.]

(2) For the purposes of this Act the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(3) A person serving under the Crown or under any corporation or any municipal, borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.

Sect. 2.—*Prosecution of offences.*]—(1) A prosecution for an offence under this Act shall not be instituted without the consent, in England of the attorney-general or solicitor-general, and in Ireland of the Attorney-General or Solicitor-General for Ireland. [*See ante*, pp. 68, 122.]

(*a*) For colonial decisions on similar Acts *see R.* v. *Scott* [1907] Vict. L. R. 471: *R.* v. *Stevenson* [1907] Vict. L. R. 475: *and see Bewdley case*, 19 L. T. 676.

(2) The *Vexatious Indictments Act*, 1859 (22 & 23 Vict. c. 17), as amended by any subsequent enactment, shall apply to offences under this Act as if they were included among the offences mentioned in s. 1 of that Act (*see ante*, p. 67).

(3) Every information for any offence under this Act shall be upon oath.

(4) *Costs.*]—*Repealed as to England by* 8 Edw. 7, c. 15, s. 10 (see ante, pp. 272 et seq).

(5) A court of quarter sessions shall not have jurisdiction to inquire of, hear and determine prosecutions on indictments for offences against this Act. [*This seems to prevent the finding of a bill at quarter sessions;* see ante, p. 106.]

(6) *Appeals against summary convictions.*

[*An indictment under this statute can easily be framed from the precedent on* p. 1410.]

6 *& 7 Geo.* 5, *c.* 64 (*Prevention of Corruption Act*, 1916), *s.* 1.—*Increase of maximum penalty in certain cases.*]—A person convicted on indictment of a misdemeanor under the *Prevention of Corruption Act*, 1906 [*ante*, p. 1411], or the *Public Bodies Corrupt Practices Act*, 1889 [*ante*, p. 1408], shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with his Majesty or any Government Department or any public body or a sub-contract to execute any work comprised in such a contract, be liable to penal servitude for a term not exceeding seven nor less than three years: Provided that nothing in this section shall prevent the infliction in addition to penal servitude of such punishment as under the above-mentioned Acts may be inflicted in addition to imprisonment, or prevent the infliction in lieu of penal servitude of any punishment which may be inflicted under the said Acts.

Sect. 2.—*Presumption of corruption in certain cases.*]—Where in any proceedings against a person for an offence under the *Prevention of Corruption Act*, 1906, or the *Public Bodies Corrupt Practices Act*, 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of his Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from his Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.

Sect. 3.—*Time for taking proceedings.*]—Notwithstanding anything in the *Summary Jurisdiction Acts* proceedings under the *Prevention of Corruption Act*, 1906, instituted with a view to obtaining a summary conviction for an offence thereunder may be commenced at any time before the expiration of six months after the first discovery of the offence by the prosecutor.

Sect. 4.—*Short title and interpretation.*]—(1) This Act may be cited as the *Prevention of Corruption Act*, 1916, and the *Public Bodies Corrupt Practices Act*, 1889, the *Prevention of Corruption Act*, 1906, and this Act may be cited together as the *Prevention of Corruption Acts*, 1889 to 1916.

(2) In this Act and in the *Public Bodies Corrupt Practices Act*, 1889, the

expression "public body" includes in addition to the bodies mentioned in the last-mentioned Act, local and public authorities of all descriptions. [*See ante*, p. 1411.]

(3) A person serving under any such public body is an agent within the meaning of the *Prevention of Corruption Act*, 1906, and the expressions "agent" and "consideration" in this Act have the same meaning as in the *Prevention of Corruption Act*, 1906, as amended by this Act. [*See ante*, p. 1411.]

PART III.

CONSPIRACY: ATTEMPT, AND INCITEMENT, TO COMMIT CRIME.

SECT. 1.

CONSPIRACY.

Statutes.

33 *Edw.* 1.—*Ordinacio de Conspiratoribus.*]—Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance that every of them shall aid and sustain the enterprise of the other, falsely and maliciously to indict or cause to be indicted or falsely to acquit people, or falsely to move or maintain pleas (*and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved*), and such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth: and this extendeth as well to the takers as to the givers, and stewards and bailiffs of great lords which by their seigniory, office or power undertake to maintain or support pleas or quarrels for parties other than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and finally accorded by the King and his council in this parliament the 33rd year of his reign, and it was further ordained that justices assigned to the hearing and determining of felonies and trespasses in the several counties of England should have the transcript hereof. [*The definition of conspiracies in this ordinance is not exhaustive.* R. *v.* Tibbits and Windust [1902] 1 K. B. 77, 89; 71 L. J. (K. B.) 5; 20 Cox, 70, Alverstone, C.J. *The ordinance was repealed by* 6 G. 4, c. 129, s. 2, *so far as it related to combinations to obtain an advance, or to fix the rate, of wages.*]

5 *& 6 Vict. c.* 38, *s.* 1.—*Jurisdiction of quarter sessions over certain conspiracies.*]—Ante, p. 106.

7 & 8 *Vict. c.* 24, *s.* 1.]—. . . After the passing of this Act (4th July, 1844) the several offences of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and . . . no information, indictment, suit, or prosecution shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences.

Sect. 4.]—Provided always, and be it enacted, that nothing in this Act shall be construed to apply to the offence of knowingly spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise (*post*, pp. 1419, 1420), or to the offence of preventing or endeavouring to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market, but that every such offence may be inquired of, tried and punished as if this Act had not been made.

[*These sections were repealed by* 55 & 56 Vict. c. 19 (S. L. R.), *but the repeal does not revive the offences or affect the proviso.* See 52 & 53 Vict. c. 63, s. 38 (2); 55 & 56 Vict. c. 19, s. 1.]

14 & 15 *Vict. c.* 55, *s.* 2.—*Costs.*]—*Repealed as to England by* 8 Edw. 7, c. 15, s. 10; see ante, pp. 267 et seq.

14 & 15 *Vict. c.* 100, *s.* 29.—*Imprisonment with hard labour for certain conspiracies.*]—Ante, p. 242.

22 & 23 *Vict. c.* 17.—*Conspiracies to be within* Vexatious Indictments Act, s. 1.]—Ante, pp. 67 et seq.

24 & 25 *Vict. c.* 100, *s.* 4.—*Conspiracy to murder, felony.*]—Ante, p. 906.

34 & 35 *Vict. c.* 31, *s.* 2.—*Trade unions.*]—Ante, p. 1280.

38 & 39 *Vict. c.* 86, *s.* 3.—*Conspiracy in trade disputes.*]—Ante, p. 1281.

39 & 40 *Vict. c.* 22, *s.* 16.—*Trade unions.*]—Ante, p. 1280.

6 *Edw.* 7, *c.* 47.—*Trade disputes.*]—Ante, p. 1285.

Common Law.

Conspiracy is an indictable misdemeanor, consisting in the agreement of two or more persons (1 Hawk. c. 72, s. 8) to do an unlawful act, or to do a lawful act by unlawful means. Unless two persons are found to have combined there can be no conviction. *R.* v. *Thorp*, 5 Mod. 221; Comb. 458: *R.* v. *Plummer* [1902] 2 K. B. 339; 71 L. J. (K. B.) 805; 20 Cox, 269; 66 J. P. 647. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect the very plot is an act itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, is punishable if for a criminal object or the use of criminal means.

Willes, J., in *Mulcahy* v. *R.*, L. R. 3 H. L. 306, 317: *and see R.* v. *Warburton*, L. R. 1 C. C. R. 274; 40 L. J. (M. C.) 22 (*post*, p. 1419): *R.* v. *Tibbits and Windust* [1902] 1 K. B. 77, 89; 71 L. J. (K. B.) 5; 20 Cox, 70. The offence cannot exist without the consent of two or more persons (not being husband and wife, 1 Hawk. c. 72, s. 8), and their agreement is an advancement of the intention which each has conceived in his mind, which then passes from a *secret* intention to the *overt* act of mutual consultation and agreement. *R.* v. *Mulcahy*, L. R. 3 H. L. 328, Lord Chelmsford. Thus an engagement by two or more is conspiracy, even if the conspirators do nothing in pursuance of the engagement. *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1; 11 Cl. & F. 155; 8 Eng. Rep. 155; 1 Cox, 413.

Some forms of conspiracy were indictable as early as 1293 (*see* 1 Rot. Parl. 96). The origin of the offence is by some traced to the *Ordinacio de Conspiratoribus* (33 Edw. 1. *ante*, p. 1415), which deals with certain forms of combination to abuse or pervert justice, and forms the foundation of the action of malicious prosecution. The history of the offence is fully dealt with in Wright on Conspiracies; 3 Steph. Hist. Cr. Law, 201; Encycl. Eng. Law (2nd ed.), vol. 3, tit. Conspiracy; Halsbury's Laws of England, vol. ix., tit. Criminal Law, 260, 500, 708; *and see* 3 Chit. Cr. Law, 1138. The term "unlawful" in the definition has been held to include civil wrongs as well as acts punishable criminally if done by one person. *R.* v. *Rowlands*, 17 Q. B. 671; 21 L. J. (N. S.) M. C. 81: *R.* v. *Parnell*, 14 Cox, 508 (Ir.): *O'Connell* v. *R.* (*supra*). But so far as this rule affected combinations in restraint of trade, it has been abrogated by 34 & 35 Vict. c. 31, and 38 & 39 Vict. c. 86 (*ante*, pp. 1280, 1281).

The forms of indictable conspiracy may be classified under the following heads :—

1. *Conspiracy to commit an offence punishable by law* (infra).
2. *Conspiracy to cheat and defraud* (post, p. 1419).
3. *Conspiracy to injure individuals by wrongful acts otherwise than by fraud* (post, p. 1421).
4. *Conspiracy to prevent, obstruct, pervert, or defeat justice* (post, p. 1422).
5. *Conspiracy or combination affecting trade* (post, p. 1422).

1. Conspiracy to commit any offence punishable by law.]—Every agreement between two or more persons to commit any offence is conspiracy, and indictable whether the offence is punishable on indictment or on summary conviction. *R.* v. *Pollman*, 2 Camp. 229: *R.* v. *Whitchurch*, 24 Q. B. D. 420; 59 L. J. (M. C.) 77; 16 Cox, 743: *R.* v. *Connolly*, 79 L. J. (K. B.) 90; 3 Cr. App. R. 27; 26 T. L. R. 31. It is immaterial that the offence agreed on is one which one of the conspirators could not singly commit. Thus a woman who, believing herself but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion, although if she had merely done the acts to herself with like intent, and had not been party to any conspiracy, she could not have been convicted under 24 & 25 Vict. c. 100, s. 58, of the felony created by that section, she not being with child. *R.* v. *Whitchurch* (*supra*): *and see R.* v. *Mackenzie and Higginson*, 75 J. P.

159; 27 T. L. R. 152; 6 Cr. App. R. 64. So it has been held that no immunity of one of the parties to a conspiracy to do an unlawful act would prevent the other party from being convicted of such conspiracy. *R.* v. *Duguid*, 75 L. J. (K. B.) 470; 21 Cox, 200; 70 J. P. 294. And the further question whether a person who is exempt from prosecution for an offence committed alone can be convicted of conspiring to commit the offence with another person not similarly exempt has been declared to be "well worthy of argument." *R.* v. *Crossman*, *Ex parte Chetwynd*, 72 J. P. 250; 24 T. L. R. 507. Conspiracy to commit treason is an *overt* act of treason, and may be tried as treason (*ante*, p. 1053), or as treason felony under 11 & 12 Vict. c. 12 (*ante*, p. 1077): *see Mulcahy* v. *R.*, L. R. 3 H. L. 306: *R.* v. *Stone*, 6 T. R. 527; 25 St. Tr. 1155: *R.* v. *O'Donnell*, 7 St. Tr. (N. S.) 637: *R.* v. *Davitt*, 11 Cox, 676; but the fact that the overt acts of an offence charged as a conspiracy amount to treason does not make the indictment bad. *R.* v. *O'Donnell* (*supra*): *R.* v. *Deasy*, 15 Cox, 334. As to seditious conspiracy, *see R.* v. *Cooper*, 4 St. Tr. (N. S.) 1249: *O'Connell* v. *R.* (*ante*, p. 1417). As to conspiracy to commit a breach of the peace, *see R.* v. *Holberry*, 4 St. Tr. (N. S.) 1347, *and ante*, pp. 1127, 1218. Conspiracies to commit murder are now statutory misdemeanors. *See* 24 & 25 Vict. c. 100, s. 4 (*ante*, p. 906). As to conspiracy to kill an unborn child, *see R.* v. *Banks*, 12 Cox, 393. It is an indictable conspiracy to combine to violate the provisions of a statute or a bye-law made under statutory authority, or of a proclamation made under like authority (*R.* v. *O'Connell*, 2 St. Tr. (N. S.) 629: *R.* v. *Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183), if the violation of the statute or bye-law would be a misdemeanor at common law, or is criminally punishable in some specific manner. *See R.* v. *Bunn*, 12 Cox, 316: *R.* v. *Whitchurch* (*ante*, p. 1417). In many cases it has been held indictable to conspire to do acts which at the time of the decision were probably offences at common law or under ecclesiastical law, but which are now offences by statute. (*See* 1 Hawk. c. 72, s. 2: *R.* v. *Best*, 2 Ld. Raym. 1167; 1 Salk. 174). Thus it is indictable to conspire to obtain money by procuring an appointment to an office in the customs. *R.* v. *Pollman*, 2 Camp. 229; *and see R.* v. *Vaughan*, 4 Burr. 2494; 49 G. 3, c. 126 (*ante*, p. 1205); or to conspire by violence, threats, contrivances, or other sinister means to induce a pauper in one parish to marry a pauper in another parish in order to saddle one of the parishes with the maintenance of both paupers. *R.* v. *Tarrant*, 4 Burr. 2106: *R.* v. *Seward*, 1 A. & E. 706; 3 L. J. (M. C.) 103: *R.* v. *Herbert*, 2 Ld. Ken. 466: *R.* v. *Watson*, 1 Wils. (K. B.) 41; *and see* 1 East, P. C. 461; 8 Mod. 320. As to other conspiracies to bring about a marriage, *see R.* v. *Wakefield*, 2 Lew. 1: *Wade* v. *Broughton*, 3 V. & B. 172. By 7 & 8 Vict. c. 101, s. 8, the endeavour, by any officer of any union, parish, or place, to induce any person to contract a marriage, by threat or promise respecting any application to be made, or any order to be enforced, with respect to the maintenance of any bastard child, is in itself a misdemeanor.

Conspiracies to do acts against public morals or decency may be said to fall under this head, because the acts would at one time have been punishable in the ecclesiastical courts, if not in the common law courts. Thus it has been held indictable to conspire to entice a woman under age from her father's house

to live in fornication, or even to carry her off with her own approval for that purpose; *R.* v. *Lord Grey*, 9 St. Tr. 127; 1 East, P. C. 460; or to conspire to induce a woman, whether chaste or not, to become a common prostitute; *R.* v. *Howell*, 4 F. & F. 160; or to defile a girl; *R.* v. *Mears*, 2 Den. 79; 20 L. J. (M. C.) 59; 4 Cox, 423; or to assign a female apprentice, even by her own consent, for purposes of prostitution. *R.* v. *Delaval*, 3 Burr. 1434; 1 W. Bl. 410, 439. Most, if not all, of these acts are offences by statute if done by one person. *See* 48 & 49 Vict. c. 69, ss. 2, 3 (*ante*, p. 1034). Conspiracy to marry under a false name, with a view to obtaining property by personation, was held indictable at common law. *R.* v. *Robinson*, 1 Leach, 37; 2 East, P. C. 1010. Marriage under a false name is now criminal. 1 & 2 Geo. 5, c. 6, s. 3 (*ante*, p. 1188).

2. Conspiracy to cheat and defraud.]—Many of the decisions that a conspiracy to cheat or defraud is indictable turn on facts which proved that the cheat or fraud itself was indictable at common law or by statute. Thus it has been held that although it may not be a criminal offence at common law for a person to cheat his partner, yet where one of two partners combines, during the continuance of the partnership, with a third party to enable the one partner to cheat the other with regard to the division of the partnership property on a contemplated dissolution of the partnership, this combination is a conspiracy. *R.* v. *Warburton*, L. R. 1 C. C. R. 274; 40 L. J. (M. C.) 22; 11 Cox, 584. And where two persons agreed that the one should purchase, and the other should aid him in purchasing, goods on credit, apparently as an ordinary purchaser, but the purchaser did not intend to pay for such goods, and the other person knew that he did not intend to pay for them, this was held to be a conspiracy, because buying goods with intention not to pay was an unlawful act, though possibly not (before the passing of 32 & 33 Vict. c. 62, s. 13 (1): see *R.* v. *Jones* [1898] 1 Q. B. 119; 67 L. J. (Q. B.) 41; *ante*, p. 1269) criminally punishable. *R.* v. *Orman*, 14 Cox, 381, Bramwell, L.J.

And if the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a *contract*. *R.* v. *Kenrick*, 5 Q. B. 49; Dav. & M. 208; 12 L. J. (M. C.) 135.

The following conspiracies have been held indictable:—A conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods; *R.* v. *Mackarty*, 2 Ld. Raym. 1179; 3 *Id.* 325; a conspiracy by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; *R.* v. *Carlisle*, Dears. 337; 23 L. J. (M. C.) 109; a conspiracy to raise the prices of the public funds (or of any vendible commodity: *see* the judgment of Brett, J.A., in *Aspinall* v. *R.*, 2 Q. B. D. 48, at p. 59; 46 L. J. (M. C.) at 150) by false rumours, as being a fraud upon the public; *R.* v. *De Berenger*, 3 M. & Sel. 67; an agreement to induce would-be buyers of shares to believe there is a market for the shares; *Scott* v. *Brown* [1892] 2 Q. B. 724; 61 L. J. (Q. B.) 738; a conspiracy by the promoters of a joint-stock company to cheat and defraud, by means of false

pretences, those liege subjects who might buy shares in the company; *Aspinall* v. *R.*, 1 Q. B. D. 730; 45 L. J. (M. C.) 129; 2 Q. B. D. 48; 46 L. J. (M. C.) 145 : *and see R.* v. *Gurney*, 11 Cox, 414 : *R.* v. *Parker and Bulteel*, 25 Cox, 145; a conspiracy to produce a public mischief by obtaining a passport by false pretences; *R.* v. *Brailsford* [1905] 2 K. B. 730; 75 L. J. (K. B.) 64; 69 J. P. 370; a conspiracy by persons to cause themselves to be reputed persons of property in order to defraud tradesmen and lodging-house keepers; *R.* v. *Roberts*, 1 Camp. 399 : *R.* v. *Whitehouse*, 6 Cox, 38; a conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment; *R.* v. *Esdaile*, 1 F. & F. 213 : *S. C. sub nom. R.* v. *Brown*, 7 Cox, 442; a conspiracy to make and put forth false statements as to the affairs of a bank; *R.* v. *Burch*, 4 F. & F. 407; a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm; *R.* v. *Hevey*, 2 East, P. C. 858 n.; 1 Leach, 229; a conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; *R.* v. *Hall*, 1 F. & F. 33 : *Heymann* v. *R.*, L. R. 8 Q. B. 102; a conspiracy to fabricate shares in a company in addition to those lawfully issuable; *R.* v. *Mott*, 2 C. & P. 521; a conspiracy between a money-lender and a solicitor by abuse of legal process to enforce payment of a sum known not to be legally due; *R.* v. *Taylor*, 15 Cox, 265, 268; a conspiracy to defeat a judgment creditor of the fruits of his judgment; *R.* v. *Richardson*, 1 M. & Rob. 402 : *R.* v. *Cox and Railton*, 14 Q. B. D. 153; 54 L. J. (M. C.) 41; 15 Cox, 611; a conspiracy by false representations to induce a person to forego a legal claim; *R.* v. *Carlisle*, Dears. 337; 23 L. J. (M. C.) 109; 6 Cox, 366; a conspiracy to contravene the *Servants' Character Act*, 1792 (32 G. 3, c. 56) : *R.* v. *Connolly*, 74 J. P. 15; 3 Cr. App. R. 27; 26 T. L. R. 31. As to conspiracies to deal fraudulently in railway tickets, *see R.* v. *Absolon*, 1 F. & F. 498. As to conspiracies to defraud of houses, *see R.* v. *Whitehouse*, 6 Cox, 129. As to conspiracy to diminish the King's revenue, *see R.* v. *Starling*, 1 Sid. 174; 1 Lev. 125.

Mock auctions and "knock-outs."]—In *R.* v. *Lewis*, 11 Cox, 404, Willes, J., held it to be indictable to conspire to defraud the public by means of a mock auction, *i.e.*, an auction with sham bidders who pretend to be real bidders, for the purpose of selling goods at prices grossly above their real value. In *Levi* v. *Levi*, 6 C. & P. 239, Gurney, B., said that a proceeding known as a "knock-out," whereby several brokers agree before an auction that only one of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among them, was indictable. But in *Doolubdass* v. *Ram Loll*, 5 Moore, Ind. App. 109; 18 Eng. Rep. 836, this ruling was declared by the Judicial Committee (*per* Parke, B.) to be an unreliable nisi prius dictum. In *Leopard* v. *Litoun*, K. B. D., May 31, 1897 (Hart on Auctioneers, pp. 135-140), Wright, J., in adopting the view of Parke, B., as above stated, said that he had withdrawn from circulation his treatise on Criminal Conspiracies (1873) because after publication he had found that his acceptance (*see* p. 34) of *Levi* v. *Levi* (*supra*) was not warranted by *Doolubdass* v. *Ram Loll*, which he had not found at the time of publication.

In *Galton* v. *Emuss*, 13 L. J. (Ch.) 388, B. and C. agreed not to oppose each other in bidding for the estate of A., at an auction, on the terms that if B. was declared the purchaser he would give C. an option to buy it at a certain price. This agreement was held legal and enforceable. In *Re Carew's Estate*, 26 Beav. 187, and *Heffer* v. *Martyn*, 15 W. R. 390, similar agreements were held not to be inequitable. At a sale by public auction of surplus stores belonging to the Government the plaintiff and defendant agreed, in order to avoid competition, that the defendant alone should bid for certain goods, and that the goods, if purchased, should be divided equally between them. Accordingly, the plaintiff abstained from bidding, and the goods were knocked down to the defendant, who subsequently repudiated the agreement. In an action by the plaintiff to recover half of the goods purchased or their value over and above the price paid at the auction, Shearman, J., held that, at any rate where the goods sold were the property of the public, it was against public policy that persons should combine at an auction to procure the goods to be sold at a price below the fair value, with the necessary result that the public were defrauded, and he ruled that the agreement was unenforceable. On appeal, however, it was held by Bankes and Atkin, L.JJ. (Scrutton, L.J., dissenting), that the agreement was not illegal, and that judgment must be entered for the plaintiff. *Rawlings* v. *General Trading Co.* [1921] 1 K. B. 635; 90 L. J. (K. B.) 404; 124 L. T. 562; 27 T. L. R. 252.

3. Conspiracy to injure individuals by wrongful acts otherwise than by fraud.]—It has been held that an indictment will not lie for a conspiracy to commit a mere civil trespass; *R.* v. *Turner*, 13 East, 228; or for a conspiracy to deprive a man of an office under an illegal trading company. *R.* v. *Stratton*, 1 Camp. 549 n. In *R.* v. *Rowlands*, 17 Q. B. 671, Lord Campbell said that *R.* v. *Turner* was wrongly decided, and it was held that a conspiracy to injure a man in his civil rights by wrongful as distinct from criminal means is indictable. *Id.*, at p. 686. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i.e.*, amount to a civil wrong. *R.* v. *Warburton*, L. R. 1 C. C. R. 274; 40 L. J. (M. C.) 22; 10 Cox, 584: *R.* v. *Whitaker* [1914] 3 K. B. 1283; 84 L. J. (K. B.) 225; 24 Cox, 272; 79 J. P. 28; 30 T. L. R. 627; 10 Cr. App. R. 245. The House of Lords in *Mogul Steamship Co.* v. *MacGregor, Gow & Co.* [1892] A. C. 25; 61 L. J. (Q. B.) 295, and *Allen* v. *Flood* [1898] A. C. 1, decided that a man may do acts prejudicial to the civil rights of others so long as no unlawful act is done or unlawful means employed, and that the fact that he does the acts with actual malice does not subject him to any civil consequence. The effect of these two cases was fully considered in *Quinn* v. *Leathem* [1901] A. C. 495: 70 L. J. (P. C.) 76. *Allen* v. *Flood* was there stated by Lord Halsbury, L.C. (at p. 507), to have been decided upon the view of the facts that what was alleged to be done was the independent and single action of the defendant: and it would seem that the *Mogul case* and *Allen* v. *Flood* do not affect the law as laid down in *R.* v. *Rowlands* (*supra*): *Mulcahy* v. *R.* (*ante*, pp. 1416, 1418),

and *R.* v. *Warburton* (*supra*); *see per* Lord Brampton, at p. 529: *Glamorgan Coal Co.* v. *South Wales Miners' Federation* [1903] 1 K. B. 118; 2 K. B. 545; affirmed [1905] A. C. 239; 74 L. J. (K. B.) 528. A conspiracy to make pirated music for sale, and so to obtain profits out of that music to which the conspirators have no right, is indictable as a conspiracy to deprive the owner of the copyright of his property. *R.* v. *Willetts*, 70 J. P. 127, Bosanquet, Common Serjeant.

4. Conspiracy to prevent, obstruct, pervert, or defeat the course of public justice.]—These conspiracies appear to some extent to have been made punishable by or in consequence of 33 Edw. 1, *ante*, p. 1415. They were recognized by parliament as existing by the provision as to imposing a sentence of hard labour for such conspiracies contained in 14 & 15 Vict. c. 100, s. 29 (*ante*, p. 242). They include conspiracies to charge a man falsely with any crime. *Poulterer's case*, 9 Co. Rep. 55 b: *R.* v. *Spragg*, 2 Burr. 993, 1027: *R.* v. *Macdaniel*, Fost. 121, 130; 1 Leach, 44; 19 St. Tr. 745: *and see R.* v. *Rispal*, 3 Burr. 1320; 1 W. Bl. 368, which was a conspiracy to indict for robbery with a view to obtaining a statutory reward. It seems immaterial whether the conspiracy proceeds so far as actually indicting the person falsely accused; and if the object of the conspiracy is extortion, the truth or falsity of the charge is immaterial. *R.* v. *Hollingberry*, 4 B. & C. 329.

The publication of matter calculated to interfere with a fair trial being indictable (*R.* v. *Fisher*, 2 Camp. 563; *and see ante*, p. 1215), a combination to publish such matter is an indictable conspiracy, *R.* v. *Tibbits and Windust* [1902] 1 K. B. 77; 71 L. J. (K. B.) 5; 20 Cox, 70.

The following have also been held indictable: a conspiracy by justices of the peace to certify a highway to be in repair when they did not know it to be so; *R.* v. *Mawbey*, 6 T. R. 619; conspiracy to prevent a witness from giving evidence; *R.* v. *Steventon*, 2 East, 362: *cf.* 2 Chit. Cr. L. 235; 3 Chit. Cr. L. 1151; conspiracy by a witness bound over to attend a trial with others to absent himself from the trial. *R.* v. *Hamp*, 6 Cox, 167. If the necessary effect of the agreement is to defeat the ends of justice, that must be taken to be the object. *Id.*, *per* Campbell, C.J. A conspiracy to indemnify bail is indictable as a conspiracy to cause a public mischief, even without alleging or proving intent to defeat justice or enable the principal to abscond. *R.* v. *Porter* [1910] 1 K. B. 369; 79 L. J. (K. B.) 241; 74 J. P. 159; 3 Cr. App. R. 237. (*a*)

As to conspiracy falsely to charge a man as a father of a bastard, *see* 1 Hawk. c. 72, s. 2; 1 Russ. Cr. (7th ed.) 157.

5. Conspiracy or combination affecting trade.]—So far as these arise out of disputes between employer and workmen, they have been dealt with *ante*, pp. 1279 *et seq.* Many forms of combination to interfere with trade appear no longer to be indictable, owing to the repeal by 7 & 8 Vict. c. 24, s. 1 (*ante*, p. 1416), of the old laws against forestalling, regrating, etc., except where they

(*a*) This case follows *R.* v. *Brailsford* [1905] 2 K. B. 730, and overrules *R.* v. *Broome*, 18 L. T. (O. S.) 19, and *R.* v. *Stockwell*, 66 J. P. 376.

involve the use of fraud (7 & 8 Vict. c. 24, s. 4, *ante*, p. 1416) or of force or intimidation (*see ante*, pp. 1283 *et seq.*).

A combination by two or more without justification or excuse to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him, nor continue in his employment, is actionable if it results in damage to him. *Quinn* v. *Leathem* [1901] A. C. 495; 70 L. J. (P. C.) 76: *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A. C. 239; 74 L. J. (K. B.) 525. As to criminal remedies, this statement of the law must be read subject to the provisions of the *Trade Union Act*, 1871, the *Conspiracy and Protection of Property Act*, 1875 (*ante*, pp. 1281 *et seq.*), and the *Trade Disputes Act*, 1906 (*ante*, p. 1285); but it is submitted that such a combination as above stated is still indictable. *Id.* 526, 527, Ld. Brampton. At common law it certainly was indictable. *See Re Heaphy*, 22 L. R. Ir. 500, 524, Palles, C.B.: *R.* v. *Rowlands* (*infra*): *R.* v. *Eccles*, 1 Leach, 274.

See *precedents, of conspiracies to withdraw customers from a brewer*, 4 Went. 106; *to injure gunmakers in their trade*, 4 Went. 439; *to ruin or injure a man in his trade or profession*, 6 Went. 443; *R.* v. *Eccles*, 1 Leach, 274.

Indictment for Conspiracy.

1. The indictment must in the first place charge the conspiracy. In stating the object of the conspiracy, the same certainty is not required as in an indictment for the offence, etc., conspired to be committed; *see R.* v. *Rispal*, 3 Burr. 1320; 1 W. Bl. 368: *R.* v. *Blake*, 6 Q. B. 126; 13 L. J. (M. C.) 131: *Sydserff* v. *R.*, 11 Q. B. 245. So, an indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A. of his moneys" was held good; *R.* v. *Gompertz*, 9 Q. B. 824; 16 L. J. (Q. B.) 121; 2 Cox, 145: *R.* v. *Gill*, 2 B. & Ald. 204: *Aspinall* v. *R.*, 2 Q. B. D. 48, 60; and it is not necessary, in order to sustain such an indictment, to prove such a false pretence as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretences. *R.* v. *Hudson*, Bell, 263; 29 L. J. (M. C.) 145; 8 Cox, 305. In an indictment for conspiracy at common law, to effect objects prohibited by a statute, it is sufficient to follow the words of the statute. Therefore, an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages, etc., by "molesting," by "threats," by "intimidation," by "obstructing," etc., in violation of 6 G. 4, c. 129 (*rep.*), was held sufficient, as it followed the words of the statute though it did not set out the *means* used to molest, intimidate, or obstruct, or the threats held out. *R.* v. *Rowlands*, 17 Q. B. 671; 2 Den. 364; 21 L. J. (M. C.) 81. The strictness of the former practice with regard to indictments has been greatly relaxed by the *Indictments Act*, 1915 (5 & 6 G. 5, c. 90). *See ante*, pp. 27 *et seq.*

2. Overt acts.—Particulars.]—The overt acts need not now be set out. The conspiracy is the offence, and it is immaterial whether anything has been done in pursuance of it. *R.* v. *Gill*, 2 B. & Ald. 204 : *R.* v. *Gompertz*, 9 Q. B. 824; 16 L. J. (Q. B.) 121; 2 Cox, 145 : *R.* v. *Whitehouse*, 6 Cox, 38, 45, 47 : *R.* v. *Seward*, 1 A. & E. 706; 3 L. J. (M. C.) 103 : *R.* v. *Richardson*, 1 M. & Rob. 402 : *R.* v. *Kenrick*, 5 Q. B. 49; Dav. & M. 208; 12 L. J. (M. C.) 135 : *and see* 2 Ld. Raym. 1167 : *R.* v. *Spragg*, 2 Burr. 993 : *R.* v. *Rispal*, 3 Burr. 1320; 1 W. Bl. 368 : *R.* v. *Eccles*, 1 Leach, 274; 13 East, 230 n. : *Wright* v. *R.*, 14 Q. B. 148; 16 L. J. (Q. B.) 10; 2 Cox, 91. On a general count not alleging any overt act the Court can order particulars if satisfied by affidavit that the defendant will not without them have sufficient information for his defence (*see ante*, pp. 27, 45). The provisions of the *Vexatious Indictments Act*, 1859 (*ante*, p. 67), which apply to all conspiracies, render particulars unnecessary in most cases. As to the effect of the particulars in limiting the case for the prosecution, *see R.* v. *Stapylton*, *R.* v. *Esdaile*, *R.* v. *Brown*, 8 Cox, 69. Overt acts, which are proved against some of the defendants, may be looked at as against all of them, to show the nature and objects of the conspiracy. *R.* v. *Esdaile* (*supra*). An indictment for conspiracy to defraud should state the means by which the fraud is to be carried out. *R.* v. *Peck*, 9 A. & E. 686 : *Peck* v. *R.*, 1 Per. & D. 508; 8 L. J. (M. C.) 22; and *see post*, p. 1426.

3. Conspiracy to accuse of crime.]—In an indictment for a conspiracy to indict or charge a man with an offence, it is not necessary to aver that the man is innocent of the offence; *R.* v. *Kinnersley*, 1 Str. 193; for he shall be presumed to be innocent until the contrary appear. *See R.* v. *Best*, 2 Ld. Raym. 1167; 1 Salk. 174 : *R.* v. *Spragg*, 2 Burr. 993. According to *R.* v. *Best*, it is immaterial whether the offence to be charged is temporal or ecclesiastical. In an indictment for conspiring to pervert the course of justice, by producing a false certificate of justices of peace that a road was in repair, in order to influence the judgment of the Court, it is not necessary to allege that the defendants knew the certificate to be false; it is sufficient that they agreed to certify the fact as true without knowing it to be so. *R.* v. *Mawbey*, 6 T. R. 619.

4. Venue.]—The venue may be laid in the county in which the conspiracy actually took place, or in any county in which any one of the defendants did an act in furtherance of the common object of the conspirators (*ante*, p. 37). A foreigner may be indicted in this country for conspiring here to cast away a foreign ship, provided that the conspiracy be not limited to doing the act abroad. *R.* v. *Kohn*, 4 F. & F. 68 : *see R.* v. *Bernard*, 8 St. Tr. (N. S.) 887. As to trial of a conspiracy alleged to have been entered into on the high seas, *see R.* v. *Brisac*, 4 East, 164 (*ante*, p. 38), *and R.* v. *Kohn*, 4 F. & F. 68 (*ante*, p. 34).

5. Trial.]—It has already been stated (*ante*, p. 1416), that a conspiracy must be between two persons at least. And where two persons are indicted for

conspiring together, and they are tried together, both must be acquitted or both convicted; *R.* v. *Manning*, 12 Q. B. D. 241; 53 L. J. (M. C.) 85: *R.* v. *Plummer* [1902] 2 K. B. 339; 71 L. J. (K. B.) 805; unless they are also charged with conspiring with persons unknown, in which case the conspiracy must be alleged to be with a certain person (or persons) to the jurors unknown (*see ante*, p. 49; *and see* 3 Chit. Cr. L. 1141). And one person alone may be tried for a conspiracy, provided that the indictment charges him with conspiring with others who have not appeared; *R.* v. *Kinnersley*, 1 Str. 193: *R.* v. *Plummer* (*supra*); or who are since dead; *R.* v. *Nichols*, *or Niccolls*, 13 East, 412 n.; 2 Str. 1227; or whose names are to the jurors unknown; and persons jointly indicted may be severally tried; *R.* v. *Ahearne*, 6 Cox, 6 (Ir.) (*and see ante*, p. 200). The death of one of two conspirators does not affect the right to try the other, whether the death happens before indictment or during trial. *R.* v. *Nichols*, 13 East, 412 n.; *R.* v. *Kenrick*, 5 Q. B. 49; 12 L. J. (M. C.) 135. Where the indictment charged that A., B. and C. conspired together, and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B. or C., but they could not say which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. *R.* v. *Thompson*, 16 Q. B. 832; 20 L. J. (M. C.) 183; 5 Cox, 166. And where a count in an indictment charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiracy to effect some of these objects, and not guilty as to the residue, was held bad and repugnant. *O'Connell* v. *R.*, 5 St. Tr. (N. S.) 1; 11 Cl. & F. 155; 8 Eng. Rep. 155; 1 Cox, 413. But where several persons are charged with conspiring together, a verdict is not repugnant which finds that some, but not all, conspired as alleged; *R.* v. *Quinn*, 19 Cox, 78 (Ir.), Fitzgibbon, L. J.; the principle underlying that decision being that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count and cannot be separated into parts. *R.* v. *Manning*, 12 Q. B. D. 241: 53 L. J. (M. C.) 85, Coleridge, C.J.; *and see R.* v. *Plummer* [1902] 2 K. B. 339; 71 L. J. (K. B.) 805.

Indictment for conspiracy to defraud.

THE KING *v.* A. B. AND C. D.

Berks Assizes held at Reading.

PRESENTMENT OF THE GRAND JURY.

A. B. and C. D. are charged with the following offence:—

STATEMENT OF OFFENCE.

Conspiracy to defraud.

PARTICULARS OF OFFENCE.

A. B. and C. D., on divers days between the —— day of ——, and the —— day of ——, in the county of ——, conspired together, and with other persons unknown, to defraud such persons as should thereafter be induced to part with money to the said A. B. and C. D. by false representations, that A. B. and C. D. were then carrying on a genuine business as jewellers at ——, and that they were then willing and prepared to supply articles of jewellery to such persons.

Misdemeanor: fine and (or) imprisonment, with or without hard labour (ante, pp. 239, 241, 246). *Where a person is convicted of any agreement or combination by two or more persons to do or procure to be done any act which is punishable only on summary conviction in contemplation or furtherance of a trade dispute, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.* 38 & 39 Vict. c. 86, s. 3 (ante, p. 1281). *As to present definition of trade dispute, see ante*, p. 1282.

Indictments for conspiracy are subject to the Vexatious Indictments Acts (see ante, p. 67).

Venue: the county in which the conspiracy was formed or in which any act was done by the conspirators in furtherance of the common design. R. *v.* Brisac, 4 East, 164; and see ante, p. 1425.

Persons indicted together for conspiracy may be separately tried, and are not entitled to have judgment stayed on conviction till the others are tried. R. *v.* Ahearne, 6 Cox, 6 (Ir.); but see R. *v.* Plummer [1902] 2 K. B. 339, 344; 71 L. J. (K. B.) 805.

Courts of quarter sessions have no jurisdiction to try an indictment for conspiracy unless the conspiracy is to commit any offence which they have jurisdiction to try when committed by one person. 5 & 6 Vict. c. 38, s. 1 (ante, p. 106).

Evidence.

Prove the conspiracy as described in the indictment, and that the defendants were engaged in it; or prove circumstances from which the jury may presume it. *R.* v. *Parsons*, 1 W. Bl. 392: *R.* v. *Murphy*, 8 C. & P. 297. Proof of the existence of a conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." *R.* v. *Brisac*, 4 East, 164, 171, Grose, J., cited with approval by Willes, J., in delivering the opinion of the judges in *Mulcahy* v. *R.*, L. R. 3 H. L. 306, 317. In order to convict of conspiracy, it is not necessary that the defendants should have concocted the scheme the subject of the charge, nor that they should have originated it. If a conspiracy is formed and a person joins it afterwards, he is equally guilty with the original conspirators. *R.* v. *Murphy* (*supra*, at p. 311), Coleridge, J. The prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendant with it. *R.* v. *Hammond*, 2 Esp. 719; *and see R.* v. *Salter*, 5 Esp. 125: *R.* v. *Brittain*,

3 Cox, 76 : *Queen Caroline's case*, 2 B. & B. 284, 302; 1 St. Tr. (N. S.) 1348. But conspiracy involves concert, and it is a misdirection to discuss the case of each defendant separately without reference to the alleged concert. *R.* v. *Bailey and Underwood*, 9 Cr. App. R. 94.

The acts and declarations, also, of any of the conspirators *in furtherance of the common design*, may be given in evidence against all (*ante*, p. 354) : *see R.* v. *Shellard*, 9 C. & P. 277; 4 St. Tr. (N. S.) 1386 : *R.* v. *Blake*, 6 Q. B. 126; 13 L. J. (M. C.) 131; and this principle applies when the charge is one of a crime committed in pursuance of a conspiracy, whether the indictment contains a count for conspiracy or not. *Cf. R.* v. *Jessop*, 16 Cox, 204 : *R.* v. *Charles*, 17 Cox, 499 : *R.* v. *Desmond*, 11 Cox, 146. This rule extends to admit printed handbills or placards of speeches of co-conspirators and resolutions at their meetings. *R.* v. *Duffield*, 5 Cox, 404; *and see R.* v. *Hunt*, 1 St. Tr. (N. S.) 171; 3 B. & Ald. 566 : *R.* v. *Vincent*, 9 C. & P. 275. As to the use of correspondence between the defendants to exculpate one of them, *see R.* v. *Whitehead*, 1 C. & P. 67.

If any one overt act is proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties. (*Ante*, p. 37). *R.* v. *Bowes*, 4 East, 171, *cit.* In *R.* v. *Boulton*, 12 Cox, 87, Cockburn, C.J., refused to allow the acts of alleged conspirators in a foreign country (Scotland) to be given in evidence, on the ground that the English courts have no jurisdiction as to what may have taken place in Scotland; *and see R.* v. *Ellis* [1899] 1 Q. B. 230; 68 L. J. (Q. B.) 105, Wright, J. In a charge of conspiracy between M. and H. to commit a misdemeanor against the *Criminal Law Amendment Act*, 1885, evidence was given that M., a woman, issued advertisements in Scotland for a lady's maid, and that X., having answered an advertisement and been engaged by M. in Dundee, came to London, and was taken to a house where M. and H. resided, and that H. subsequently had unlawful carnal connection with X. It was held that the act of procuration was not complete in Scotland outside the jurisdiction, but that the offence was a continuing one. No objection appears to have been taken to the admissibility in evidence of the acts of M. in Scotland. *R.* v. *Mackenzie and Higginson*, 75 J. P. 159; 27 T. L. R. 152; 6 Cr. App. R. 54. Before evidence can be given of the acts of one conspirator against another, the existence of the conspiracy must be proved that the parties were members of the same conspiracy, and that the act done in question was done in furtherance of the common design. (*Ante*, p. 354).

On an indictment for conspiracy to defraud certain persons named therein, evidence of attempts of a similar nature to defraud other persons not named is admissible, on the general principles stated *ante*, p. 355, and it has been so held in *R.* v. *Stenson*, 12 Cox, 111 (C. C. R.).

An indictment for conspiracy to defraud A. of bills accepted by him has been held to be proved where the evidence was that the bills were never delivered to A., but were always in the hands of the defendants, and merely presented to A. for signature. *R.* v. *Gompertz*, 9 Q. B. 824; 16 L. J. (Q. B.) 121; 2 Cox, 145. *See R.* v. *Gill*, 2 B. & Ald. 204 (ante, p. 1424).

On a conspiracy to cheat by false representations of the solvency of another, it is not necessary to prove a representation in writing. *R.* v. *Timothy*, 1 F. & F. 39.

Although the evidence in support of an indictment for a conspiracy shows the object of the conspiracy to have been felonious, and even that a felony was actually committed in the course of it, the defendants were not, even before 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 213), entitled to be acquitted on the ground that the misdemeanor had merged in the felony; nor was or is it any ground for arresting the judgment that, on the face of the indictment itself, the object of the conspiracy amounts to a felony, the gist of the offence charged being a conspiracy. *R.* v. *Button*, 11 Q. B. 929; 18 L. J. (M. C.) 19; 3 Cox, 229: *see R.* v. *Neale*, 1 Den. 36; 1 C. & K. 591.

A count for conspiracy is not bad because one of the overt acts charged would support an indictment for treason. *R.* v. *O'Donnell*, 7 St. Tr. (N. S.) 637.

Where two defendants are jointly indicted for conspiracy, and one of them pleads guilty and the other not guilty, the defendant who has pleaded guilty is admissible as a witness against the other defendant. *R.* v. *Gallagher*, 15 Cox, 291 (C. C. R.); *and see R.* v. *Plummer* [1902] 2 K. B. 339; 71 L. J. (K. B.) 805.

The fact that persons charged with conspiracy to defraud derived no personal benefit from the transactions impugned is not conclusive evidence of an absence of intent to defraud. *See* the summing up of Campbell, C.J., in the *Royal British Bank case*, *R.* v. *Brown*, 7 Cox, 442: *sub nom. R.* v. *Esdaile*, 1 F. & F. 213: *R.* v. *Beall*, 34 L. J. Newsp. 623, Channell, J.; and *ante*, pp. 630, 710.

SECT. 2.

SOLICITING OR INCITING TO COMMIT A CRIME.

Common Law.

To solicit or incite another to commit a felony or misdemeanor is an indictable misdemeanor at common law, even though the solicitation or incitement has no effect. *R.* v. *Higgins*, 2 East, 5: *R.* v. *Scofield*, Cald. 397: *R.* v. *Quail*, 4 F. & F. 1076: *R.* v. *Gregory*, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60; 10 Cox, 459; *and see* 3 Chit. Cr. L. 688; Steph. Dig. Cr. L. (6th ed.) 39. This includes an offer of a bribe to a person to commit an offence. *Wade* v. *Broughton*, 3 V. & B. 172: and an attempt to incite to the commission of felony or misdemeanor is also an indictable misdemeanor at common law. *R.* v. *Ransford*, 13 Cox, 9 (C. C. R.). It is immaterial whether the principal offence is one existing by the common law or is created by statute. *See also* 1 Russ. Cr. (7th ed.) 203: *R.* v. *Campbell* [1908] Victoria L. R. 136. As to incitement to murder, *see ante*, p. 906.

Statutes.

37 *G.* 3, *c.* 70.—*Inciting to mutiny, felony.*]—Ante, p. 1132.

24 *& 25 Vict. c.* 100, *s.* 4.—*Inciting to commit murder, misdemeanor.*]—Ante, p. 906.

8 *Edw.* 7, *c.* 48, *s.* 69.—*Soliciting or endeavouring to procure commission of felony or misdemeanor against the Post Office Laws.*]—Ante, p. 583.

10 *& 11 G.* 5, *c.* 75, *s.* 7.—*Inciting, counselling, or attempting to procure another to commit an offence against the Official Secrets Acts*, 1911 *and* 1920.]—Ante, p. 1150.

Indictment for soliciting and inciting a Person to commit an Offence. (Common Law.)

Commencement as ante, p. 1425.

STATEMENT OF OFFENCE.

Inciting to Steal.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully incited C. D., a servant of E. F., to steal the goods of the said E. F.

A count may be added charging an attempt to solicit and incite, which is a misdemeanor at common law; R. *v.* Ransford, 13 Cox, 9 (post, p. 1430); *or the defendant may be convicted of the attempt on the above indictment.*

Misdemeanor at common law: fine and (or) imprisonment, with or without hard labour (see ante, pp. 239, 241, 246). R. *v.* Higgins, ante, p. 1428. *Soliciting or inciting a person to commit a felony, where no felony is in fact committed by the person so solicited, is a misdemeanor only, notwithstanding* 24 & 25 Vict. c. 94, s. 2 (post, p. 1446). R. *v.* Gregory, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60. *Where a defendant is indicted for a misdemeanor committed by the soliciting another to do an act which, if done, would amount to a felony, and render the defendant, as an accessory before the fact, also guilty of felony, it is unnecessary to negative the doing of the act, for it cannot be intended that a felony has been committed where none is charged.* 1 Stark. Cr. Pl. 148, 149 (2nd ed.): R. *v.* Higgins, ante, p. 1428. See 1 Russ. Cr. (7th ed.) 204. *For a form of count for soliciting to conspire to cheat and defraud*, see R. *v.* De Kromme, 17 Cox, 492; 56 J. P. 682 (C. C. R.).

Evidence.

Prove the soliciting or inciting as alleged in the indictment. Prove it in the same manner as you would prove the offence of accessory before the fact, except that this offence is committed, although the larceny was not in fact committed. It is no defence to the above indictment that the servant purposely submitted himself to the incitement with intent to betray his master. *R.* v. *Quail*, 4 F. & F. 1076.

Attempting to incite a person to commit an offence.]—An attempt to solicit a person to commit an offence, or to attempt or conspire to commit an offence, is an indictable misdemeanor; *R.* v. *Ransford*, 13 Cox, 9 (C. C. R.).

Intercepted letters.]—Where a letter is sent soliciting and inciting the addressee to commit a crime, but is not proved to have reached the intended recipient, the sender may be properly convicted of an attempt to incite to the commission of the crime. *R.* v. *Banks*, 12 Cox, 393 : *R.* v. *Ransford*, 13 Cox, 9 : *R.* v. *Krause*, 66 J. P. 121. Where the crime the commission of which is so solicited is murder it was held that there must be some evidence of communication between the sender and recipient of the letter to render the sender guilty of the statutory offence of "soliciting to murder" under 24 & 25 Vict. c. 100, s. 4; and that in the absence of such evidence he is guilty only of the common law misdemeanor of attempting to commit that offence. *R.* v. *Krause* (*supra*), Alverstone, C.J. : *cf. R.* v. *Banks* (*supra*).

Inciting a person to attempt to commit an offence.]—On an indictment charging the defendants that they "unlawfully did incite, counsel, procure, and aid one H. S., she the said H. S. then being a woman with child, to commit a certain misdemeanor, to wit, unlawfully to attempt feloniously and unlawfully to administer to herself certain noxious things, to wit, divers drugs, capable of procuring the abortion of pregnant women, the names of which drugs are to the jurors aforesaid unknown, with intent thereby to procure her own miscarriage" (*see* 24 & 25 Vict. c. 100, s. 58 (*ante*, p. 922)), and with conspiracy to incite her to attempt feloniously and unlawfully to administer, etc., it was held (*a*) that if the woman believing that she was taking a noxious thing within the meaning of the statute did, with intent to procure her own abortion, take a thing in fact harmless, she was guilty of an attempt to commit an offence against 24 & 25 Vict. c. 100, s. 58; but (*b*) that if the defendants in supplying the drug to the woman, though they well knew that she would take it in the belief that it was a "noxious thing," and with intention of procuring her own abortion, did not themselves believe that it was capable of procuring her own abortion, they could not be convicted of *inciting* her to commit the said offence, although if they had so believed it would have been otherwise. *R.* v. *Brown*, 63 J. P. 790; 34 L. J. Newsp. 644, Darling, J. : *cf.* the fifth count in *R.* v. *Ransford*, *supra*; *and see post*, p. 1432.

As to incitement to commit perjury or give false evidence, *see ante*, p. 1190.

SECT. 3.

ATTEMPT TO COMMIT CRIME.

Mere intention to commit an offence is not indictable, except in the case of high treason, as to which it is said that under 25 Edw. 3, st. 5, c. 2, *voluntas reputatur pro facto;* but in all cases where the intent to commit a crime is manifested by any overt act, the party may be indicted for an attempt to commit the offence. 1 Deacon, Cr. L. 643 : *R.* v. *Scofield*, Cald. 397 : *R.* v. *Higgins*, 2 East, 5, 21 : *R.* v. *Chapman*, 1 Den. 432; 18 L. J. (M. C.) 152; 3 Cox, 467 : *R.* v. *Taylor*, 1 F. & F. 511 : *R.* v. *Duckworth* [1892] 2 Q. B. 83; 17 Cox, 495; *and see* 1 Russ. Cr (7th ed.) 140. And every attempt (not every intention) to commit a felony or misdemeanor is a misdemeanor at common law, whether the crime attempted is one by statute or at common law. *R.* v. *Hensler*, 11 Cox, 570 (C. C. R.) : *R.* v. *Roderick*, 7 C. & P. 795, Parke, B. : *R.* v. *Martin*, 2 Mood. 123; 9 C. & P. 213, 215 : *R.* v. *Ransford*, 13 Cox, 9 (C. C. R.) : *R.* v. *Cartwright*, R. & R. 107 n. : *R.* v. *Butler*, 6 C. & P. 368. This doctrine has been applied to an attempt to commit suicide. *R.* v. *Doody*, 6 Cox, 463 : *R.* v. *Burgess*, L. & C. 258; 9 Cox, 302; 32 L. J. (M. C.) 185. As to the necessity of distinguishing between an attempt and an intention, *see R.* v. *Landow*, 23 Cox, 457; 109 L. T. 48; 77 J. P. 364; 29 T. L. R. 375.

It is said that there cannot, *ex vi termini*, be an attempt to commit perjury : but an attempt to suborn perjury is indictable (*see ante*, p. 1190); so are certain attempts to bribe (*ante*, p. 1205).

To constitute an attempt the act done must be immediately connected with the commission of the offence. *R.* v. *Eagleton*, Dears. 515; 24 L. J. (M. C.) 158 : *R.* v. *Cheeseman*, L. & C. 140; 31 L. J. (M. C.) 89; 9 Cox, 100 : *R.* v. *Roberts*, Dears. 539; 25 L. J. (M. C.) 17 : *R.* v. *Robinson* [1915] 2 K. B. 342 (*ante*, p. 718). (*a*) Thus, the *procuring* of indecent prints with intent to sell them is an indictable misdemeanor; but the merely *keeping and preserving* them with that intent is not. *Dugdale* v. *R.*, 1 E. & B. 435; Dears. 64; 22 L. J. (M. C.) 50. So the procuring of base coin with intent to utter is indictable at common law (*R.* v. *Fuller*, R. & R. 308), but the mere *possession* of base coin with intent to utter it is not indictable at common law. *R.* v. *Stewart*, R. & R. 288 : *R.* v. *Heath*, R. & R. 184; 1 Russ. Cr. (7th ed.) 142, 143, 148, though under certain circumstances it is indictable under 24 & 25 Vict. c. 99, s. 11 (*ante*, p. 1107).

Attempts to commit certain crimes are also punishable by statute: *e.g.*, attempts to murder (24 & 25 Vict. c. 100, ss. 11-15, *ante*, pp. 907—917); to

(*a*) In *R.* v. *Baker*, 28 N. Z. L. R. 536, the Court had to consider the criminal responsibility of a man who had written to another a letter explaining how to open a safe by the use of explosives. No particular safe was in the contemplation of either man when the letter was written; but the recipient subsequently tried to open a safe in accordance with the directions in the letter. The Court held both men equally guilty, the writer of the letter apparently as having counselled or procured the particular attempt.

commit unnatural offences (*ante*, p. 1048); or offences against girls under thirteen, or between thirteen and sixteen (*ante*, p. 1024); or incest (*ante*, p. 1042).

Under 14 & 15 Vict. c. 100, s. 9 (*ante*, p. 215), any person indicted for felony or misdemeanor may be convicted of the attempt to commit the offence charged, if the jury is satisfied that the offence was not completed. *See* *R.* v. *McPherson*, Dears. & B. 197; 26 L. J. (M. C.) 134; 7 Cox, 281: *R.* v. *Hapgood*, L. R. 1 C. C. R. 221; 38 L. J. (M. C.) 83. It is therefore unusual to prefer an indictment for the attempt to commit an offence (*e.g.*, to obtain money by false pretences) where the full offence is charged.

In *R.* v. *White* [1910] 2 K. B. 124; 79 L. J. (K. B.) 854; 26 T. L. R. 466; 4 Cr. App. R. 257, on an indictment for murder, Darling, J., directed the jury that they might convict of an attempt to murder, and on their finding a verdict of guilty of attempt to murder the prisoner was sentenced to penal servitude as for a statutory felony within 24 & 25 Vict. c. 100, ss. 11-15. This ruling was upheld on appeal on the ground that the offences described in ss. 11-15 fell within the definition of attempts to murder, and that on an indictment for murder it was admissible under 14 & 15 Vict. c. 100, s. 9, to convict of such attempt. (*a*).

Indictment for an Attempt to commit an Offence.

An indictment for the common law misdemeanor of an attempt to commit a felony or misdemeanor can be framed on the precedents for the full offence by inserting the words "attempted to" before the words charging the full offence.

An indictment for attempting to obtain money by false pretences must set out the pretences. R. *v.* Marsh, 1 Den. 505.

Misdemeanor: fine and (or) imprisonment (ante, pp. 239, 241, 246), *with or without hard labour.*

Evidence.

Mere intention to commit an offence does not constitute an attempt; some act must be proved to have been done by the defendant immediately connected with the offence. *R.* v. *Eagleton*, Dears. 515, 538; 24 L. J. (M. C.) 158; 6 Cox, 559 (*ante*, p. 718): *R.* v. *Roberts*, Dears. 539; 25 L. J. (M. C.) 17: *R.* v. *Cheeseman*, L. & C. 140, 145; 31 L. J. (M. C.) 89; 9 Cox, 100: *R.* v. *Robinson* [1915] 2 K. B. 342 (*ante*, p. 718). It is not necessary to prove that if no interruption had taken place, the accused could have completed the offence attempted; for it is no defence to an indictment for attempting to commit a crime to prove that it was physically impossible to commit the complete offence. *R.* v. *Brown*, 24 Q. B. D. 357; 59 L. J. (M. C.) 47;

(*a*) *R.* v. *Connell*, 6 Cox, 178, was distinguished and was held not to apply to the offences under 24 & 25 Vict. c. 100, ss. 11-15. It had already been criticized in *R.* v. *Cook*, 20 N. S. W. Rep. (Law) 264; 2 Russ. Cr. (7th ed.) 1967.

16 Cox, 715 (C. C. R.) : *R.* v. *Ring*, 61 L. J. (M. C.) 116; 17 Cox, 491. It is submitted that these decisions overrule *R.* v. *Collins*, L. & C. 471; 33 L. J. (M. C.) 177; 9 Cox, 497. (*a*) *See also R.* v. *Duckworth* [1892] 2 Q. B. 83; 17 Cox, 495; and the observations of Hawkins and Cave, JJ., in *R.* v. *Williams* [1893] 1 Q. B. 320; 62 L. J. (M. C.) 29. In the Draft Criminal Code, prepared by Lord Blackburn, and Barry, Lush, and Stephen, JJ., the following definition appears (art. 74) :—" An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause. (*b*) *Every one who, believing that a certain state of facts exists, does or omits an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible.* The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law." (*c*) To this definition the commissioners appended a note to the effect that the passage between the asterisks " declares the law differently from *R.* v. *Collins* " (*supra*), which at the date of the drafting of the code had not been overruled. *Cf.* Steph. Dig. Crim. Law (6th ed.), p. 39. As to what is " too remote " *see R.* v. *Eagleton, and the cases cited ante*, pp. 1431, 1432. from which it would seem that it is material to consider on this point whether there is any further act *on the defendant's part* remaining to be done before the completion of the crime. *See R.* v. *Eagleton*, Dears. at p. 538 : *R.* v. *Cheeseman*, L. & C. at p. 145; 31 L. J. (N. S.) M. C. 89; and the observations of Alderson, B., in *R.* v. *Roebuck*, Dears. & B. 24; 23 L. J. (M. C.) 101; 7 Cox, 126, 127; *and cf. R.* v. *Hensler*, 11 Cox, 570 (C. C. R.) (*ante*, p. 713). In accordance with the above definition, it was held that if a pregnant woman believing she is taking a " noxious thing " within the meaning of 24 & 25 Vict. c. 100, s. 58, does with intent to procure her own abortion take a thing in fact harmless, she is guilty of attempting to commit an offence against the first part of that section. *R.* v. *Brown*, 63 J. P. 790; 34 L. J. Newsp. 644, Darling, J. (*ante*, p. 1430).

(*a*) In which it was ruled that it was not indictable to attempt to pick a pocket which turned out to be empty. The learned editors of the second edition of Pritchard's Quarter Sessions, at pp. 900-903, contend that *R.* v. *Brown* and *R.* v. *Ring* have not completely overruled *R.* v. *Collins*.

(*b*) The first part of this definition was accepted in *R.* v. *Laitwood*, 4 Cr. App. R. 248, 252.

(*c*) The completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not unless followed by the other acts result in killing. *R.* v. *White* [1910] 2 K. B. 124; 79 L. J. (K. B.) 854; 4 Cr. App. R. 257; 26 T. L. R. 466. In this case the Court seem to have regarded as doubtful the distinction drawn by Kennedy, J. in *R.* v. *Linneker* [1906] 2 K. B. 99; 75 L. J. (K. B.) 385, between acts done with intent to murder and attempts to murder.

PART IV.

PRINCIPALS IN THE SECOND DEGREE: ACCESSORIES, ABETTORS, ETC.

SECT. 1.

PRINCIPALS IN THE SECOND DEGREE IN FELONY.

Common Law.

Principals in the first degree.]—A principal in the first degree is one who is the actor, or actual perpetrator of the fact. 1 Hale, 233, 615. It is not necessary that he should be actually present when the offence is consummated; for if one lays poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. *Vaux's case*, 4 Co. Rep. 44 b; Fost, 349: *R.* v. *Harley*, 4 C. & P. 369. Nor is it necessary that the act should be perpetrated with his own hands; for if an offence is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. *See R.* v. *Giles*, 1 Mood. 166: *R.* v. *Michael*, 2 Mood. 120: 9 C. & P. 356: *R.* v. *Mazeau*, 9 C. & P. 676: *R.* v. *Bull*, 1 Cox, 281: *R.* v. *Manley*, *Id.* 104: *R.* v. *Clifford*, 2 C. & K. 202: *R.* v. *Bleasdale*, *Id.* 765: *R.* v. *Butt*, 15 Cox, 564 (C. C. R.). Thus, if a child, under the age of discretion, or any other person who is not criminally responsible, by defect of understanding, ignorance of the facts or other cause, is incited to the commission of any crime, the inciter, though absent when the act was committed, is liable for the act of his agent, and is a principal in the first degree. Fost. 349; 1 Hawk. c. 31, s. 7: *R* v. *Palmer*, 1 B. & P. (N. R.) 96; 2 Leach, 978: *R.* v. *Butcher*, Bell, 6; 28 L. J. (M. C.) 14; 8 Cox, 77; 1 Russ. Cr. (7th ed.) 104. But if the agent is aware of the nature, etc., of his act, he is a principal in the first degree, and the employer, if absent when the act is committed, is an accessory before the fact: *R.* v. *Stewart*, R. & R. 363: *R.* v. *Williams*, 1 Den. 39: 1 C. & K. 589; or, if present, is liable as a principal in the second degree; Fost. 349; unless the agent concurs in the act merely for the purpose of detecting and punishing his principal, in which case the agent is considered to be innocent. *R.* v. *Bannen*, 2 Mood. 309; 1 C. & K. 295: *R.* v. *Johnson*, C. & Mar. 218: *and see R.* v. *Dannelly*, R. & R. 310, where one of three persons who had

agreed to commit a burglary informed the police, and though present at the burglary was held not liable to conviction.

Principals in the second degree.]—Principals in the second degree are those who are present at the commission of the offence, and aid and abet its commission.

A person may be a principal in the second degree even if from sex or age incapable of being a principal in the first degree. *R.* v. *Ram*, 17 Cox, 609, Bowen, L.J. : *Lord Baltimore's case*, 4 Burr. 2179 : *R.* v. *Eldershaw*, 3 C. & P. 396.

Presence, in this sense, may be either *actual* or *constructive*. It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he is outside the house, watching, to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. Fost. 347, 350; 2 Hawk. c. 29, ss. 7, 8; 1 Hale, 555; 1 Russ. Cr. (7th ed.) 108 : *see R.* v. *Borthwick*, 1 Doug. 207 : *Coalheavers' case*, 1 Leach, 64; 1 East, P. C. 343 : *R.* v. *Gogerly*, R. & R. 343 : *R.* v. *Owen*, 1 Mood. 96. But he must be near enough to give assistance; *R.* v. *Stewart*, R. & R. 363; and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he was within such a distance as to be *able* to assist in it. *R.* v. *Kelly*, R. & R. 421; 1 Russ. Cr. (7th ed.) 110. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner, who being apprised of the robbery, assisted in carrying away the property, it was held that he was not a principal, but only an accessory. *R.* v. *King*, R. & R. 332. *See R.* v. *M'Makin*, R. & R. 333 n. : *R.* v. *Dyer*, 2 East, P. C. 767. And even where a felonious act is committed in pursuance of a preconcerted plan between the parties, those who are not present, or near enough to be able to afford aid and assistance at the time when the act is done, are not principals, but accessories before the fact. *R.* v. *Soares*, R. & R. 25 : *R.* v. *Davis*, *Id.* 113 : *R.* v. *Else*, *Id.* 142 : *R.* v. *Badcock*, *Id.* 249 : *R.* v. *Hurse*, 2 M. & Rob. 360 : *R.* v. *Manners*, 7 C. & P. 801 : *R.* v. *Howell*, 9 C. & P. 437; 3 St. Tr. (N. S.) 1087 : *R.* v. *Tuckwell*, C. & Mar. 215. So, if one of two who are acting in concert is apprehended before the other commits the offence, he can be considered only as an accessory before the fact. *R.* v. *Johnson*, C. & Mar. 218. Presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R.* v. *Bingley*, R. & R. 446 : *R.* v. *Atwell*, 2 East, P. C. 768. Thus, if A. counsels B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that

purpose, B., C., and D. may be indicted for the forgery, and A. as an accessory; *R.* v. *Dade*, 1 Mood. 307; for, if several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *R.* v. *Kirkwood*, 1 Mood. 304. *See R.* v. *Kelly*, 2 C. & K. 379. "Although the prisoner might not be able to write himself, yet if he got any one to write the name, he is as much guilty of forgery as if he wrote it himself." *R.* v. *James*, 4 Cox, 90, Erle, J.

There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or failed to apprehend the felon. 1 Hale, 439; Fost. 350; *R.* v. *Fretwell*, L. & C. 161; 31 L. J. (M. C.) 145; 9 Cox, 152. *See post*, p. 1455, "Misprision." It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance, in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal goods, and the owner is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entices the owner away in order that he who has the goods may carry them off, all are guilty as principals. *R.* v. *Standley*, R. & R. 305; 1 Russ. Cr. (7th ed.) 112: *R.* v. *Passey*, 7 C. & P. 282: *R.* v. *Lockett*, *Id.* 300. So it has been held, that to aid and assist a person, to the jurors unknown, to obtain money by ring-dropping, is felony, if the jury find that the prisoner was a confederate of the person unknown to obtain the money by means of the practice. *R.* v. *Moore*, 1 Leach, 314: 2 East, P. C. 679. And where "the servant opens a window to let in a thief, who comes in and steals, burglary in the stranger, but robbery in the servant." Hale's Summary of the Pleas of the Crown, 81; *Cornwall's case*, 2 Str. 881: *Saqui* v. *Stearns* [1911] 1 K. B. 426; 80 L. J. (K. B.) 451. So, if two persons driving carriages incite each other to drive furiously, and one of them runs over and kills a man, it is manslaughter in both. *R.* v. *Swindall*, 2 C. & K. 230; 2 Cox, 141. So, also if three persons amuse themselves by shooting with a rifle at a target, without taking proper precautions to prevent injury to others, and one of the shots kills a man, all three are guilty of manslaughter, although there is no proof which of the three fired the fatal shot. *R.* v. *Salmon*, 6 Q. B. D. 79; 50 L. J. (M. C.) 25: 14 Cox, 494. If one encourages another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, the latter is a principal in the murder of the other. *R.* v. *Dyson*, R. & R. 523; *R.* v. *Alison*, 8 C. & P. 418: *R.* v. *Jessop*, 16 Cox, 204, Field, J.; *R.* v. *Stormonth*, 61 J. P. 729; Ridley, J.: *R.* v. *Abbott*,

67 J. P. 151, Kennedy, J. So, if several persons combine for an unlawful purpose, or for a lawful purpose to be effected by unlawful means; *see* Fost. 351, 352; particularly, if it is to be effected notwithstanding any opposition that may be offered against it; Fost. 353, 354; and one of them, in the prosecution of it, kills a man, it is murder in all who are present, whether they actually aid or abet or not (*Sissinghurst-house case*, 1 Hale, 462) provided that the death was caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 Hawk. c. 31, s. 52: *R.* v. *Hodgson*, 1 Leach, 6; 1 East, P. C. 258: *R.* v. *Plummer*, Kel. (J.) 109; Fost. 352: *R.* v. *Rubens*, 2 Cr. App. R. 213. But it is not sufficient that the common purpose should be merely unlawful: it must either be felonious, or, if it is to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R.* v. *Skeet*, 4 F. & F. 931: *see R.* v. *Luck*, 3 F. & F. 483: *R.* v. *Doddridge*, 8 Cox, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kills a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, R. & R. 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book, and money, Park, J., held, that this was robbery in Williams only. *R.* v. *Hawkins*, 3 C. & P. 392. (*a*) The means must also be unlawful; for, if the original object is lawful, and is prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet, the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree. Fost. 354, 355; 2 Hawk. c. 29, s. 9.

A mere participation in the act, without a felonious participation in the design, will not be sufficient. 1 East, P. C. 258: *R.* v. *Plummer*, Kel. (J.) 109. Thus, if a master assaults another with malice prepense, and the servant, ignorant of his master's felonious design, takes part with him and kills the other, it is only manslaughter in the servant, though it is murder in the master. 1 Hale, 446; *and see Wilson* v. *Stewart*, 32 L. J. (M. C.) 198.

In the case of murder by duelling, both of the seconds are principals in the second degree, as they give aid and assistance by their countenance and encouragement of the principals in the first degree, the actual fighters. *R.* v. *Young*, 8 C. & P. 644: *R.* v. *Cuddy*, 1 C. & K. 210, although Lord Hale considered, that, as far as relates to the second of the party killed, the rule of law in this respect had been too far strained; and he seems to doubt whether a second be deemed a principal in the second degree. 1 Hale, 452, 453. A prize-fight is illegal, and all persons present, aiding and abetting therein, are guilty of assault as principals in the second degree. *R.* v. *Coney*, 8 Q. B. D. 534;

(*a*) *R.* v. *Price*, 8 Cox, 96, in which Byles, J., stated the proper directions for the jury in such a case, is said to be inaccurately reported. *See* 1 Russ. Cr. (7th ed.) 762 (*k*).

51 L. J. (M. C.) 66. It was once held, that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace, and guilty of an assault; *R.* v. *Perkins*, 4 C. & P. 537, Patteson, J.; *see R.* v. *Murphy*, 6 C. & P. 103. But it is now settled that mere voluntary presence as spectators at a prize-fight, does not as a matter of law necessarily render persons so present guilty of an assault as aiders and abettors of the fight: *R.* v. *Coney*, *ante*, p. 1438; although, *semble*, that the mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of aiding and abetting in the fight. *Id.*

It has been ruled that if the principal was insane at the commission of the act, no person can be convicted as an aider and abettor of his act. *R.* v. *Tyler*, 8 C. & P. 616. In *R.* v. *Coombes* [1895] Cent. Crim. Court (Wood-Renton on Lunacy, 913), Kennedy, J., ruled that a man could not be convicted as accessory *after* the fact to a murder committed by an insane boy. It is submitted that in consequence of the alteration of the verdict in cases of insanity by the *Trial of Lunatics Act*, 1883 (*ante*, p. 217), these two rulings are not in accordance with the present law. And in *R.* v. *Tyler*, (*supra*), where an insane man collected together a number of persons, who armed themselves with a common purpose of resisting the lawful authorities, and in their presence he shot a peace-officer who came to apprehend him under a warrant, it was held that they were guilty of murder as principals in the first degree; and that no apprehension of personal danger to themselves from him furnished any excuse to them for assisting in his illegal acts. *Cf. McGrowther's case*, Fost. 13, 217; 18 St. Tr. 391.

It was at one time considered that aiders and abettors (also described as accessories *at the fact*) could not be tried until the principal had been convicted or outlawed. Fost. 347. But it has long been established that those present aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty: 2 Hale, 323; and may be convicted, though the party charged as principal in the first degree is acquitted. *R.* v. *Taylor*, 1 Leach, 360; 1 East, P. C. 351: *Banson* v. *Offley*, 2 Show, 510; 3 Mod. 121: *R.* v. *Wallis*, 1 Salk. 334: *R.* v. *Towle*, R. & R. 314; 2 Marsh. 465; 3 Price, 145.

In Stephen's Digest of the Criminal Law (6th ed.), p. 36, it is stated that principals in the second degree in felony, may *in all cases* be indicted as principals in the first degree. But where by particular statutes the punishment is different (of which it would be difficult now to find an instance), then principals in the second degree must be indicted specially as aiders and abettors. 1 East, P. C. 348, 350: *R.* v. *Sterne*, 1 Leach, 473; 2 East, P. C. 701. *See*, *however*, *R.* v. *Manning*, 2 C. & K. 903 n. If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C. and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted. *R.* v. *Borthwick*, 1 Doug. 207; 1 East, P. C. 350. *See R.* v. *Swindall*, 2 C. & K. 230; 2 Cox,

141. And the legal result is the same even where the jury say that they are not satisfied who gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting. *R.* v. *Downing*, 1 Den. 52; 2 C. & K. 382: *and see R.* v. *Salmon* (*ante*, p. 1437). Where a prisoner was convicted upon an indictment which charged him with rape as a principal in the first count, and as an aider and abettor in the second, it was held that the conviction upon the first count was good. *R.* v. *Folkes*, 1 Mood. 354: *R.* v. *Gray*, 7 C. & P. 164. *See R.* v. *Crisham*, C. & Mar. 187: *R.* v. *Downing*, *supra*.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree; 2 Hawk. c. 25, s. 64: *Mackalley's case*, 9 Co. Rep. 67 b: *R.* v. *Rogers*, L. R. 1 C. C. R. 136; 37 L. J. (M. C.) 83; provided the offence permits of a participation; Fost. 345; or specially as aiders and abettors. *R.* v. *Crisham*, *supra*. Where a man is charged as a principal in the first degree evidence of his being a principal in the second degree will support the indictment. *Id.*; *and see* Fost. 351; Plowd. 98. By the *Accessories, etc. Act*, 1861 (24 & 25 Vict. c. 94), s. 8, "whoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law, or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender." Where, therefore, upon the trial of an indictment charging A. with feloniously wounding, and B. with feloniously aiding and abetting him in the felony, the jury found A. guilty of the misdemeanor of unlawful wounding, it was held that B. was properly convicted of aiding and abetting in the misdemeanor. *R.* v. *Waudby* [1895] 2 Q. B. 482; 64 L. J. (M. C.) 251. If the abettor and principal in a misdemeanor are indicted together as principals, the abettor may be convicted, although the principal is acquitted. *R.* v. *Burton*, 13 Cox, 71 (C. C. R.).

Statutes.

12 *G.* 3, *c.* 24, *s.* 1.—*Aiding and abetting the burning or destroying of ships, dockyards, etc.*]—Ante, p. 748.

37 *G.* 3, *c.* 123, *s.* 3.—*Aiding and abetting the taking of unlawful oaths.*]—Ante, p. 1127.

52 *G.* 3, *c.* 104, *s.* 4.—*Aiding and abetting the taking of oaths to commit treason or felony.*]—Ante, p. 1131.

7 *W.* 4 & 1 *Vict. c.* 88 (*Piracy Act*, 1837), *s.* 4.—*Punishment of principals in the second degree and accessories, for piracy.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this Act punishable and every accessory after the fact to any felony punishable under this Act

shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

11 & 12 *Vict. c.* 12, *s.* 8.—*Punishment of principals in the second degree in treason felony.*]—Ante, p. 1077.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 98.—*Punishment of principals in the second degree, accessories, and abettors.*]—In case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour; . . . and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender.

6 & 7 *G.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 35.—*Accessories and abettors.*]—Every person who knowingly and wilfully aids abets counsels procures or commands the commission of an offence punishable under this Act shall be liable to be dealt with, indicted, tried and punished as a principal offender.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 56.—*Punishment of principals in the second degree, accessories, and abettors, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour; . . . and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 49.—*Punishment of principals in the second degree, accessories and abettors.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour; . . . and every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender.

3 & 4 *G.* 5, *c.* 27 (*Forgery Act*, 1913), *s.* 11.—*Accessories and abettors.*]—Any person who knowingly and wilfully aids, abets, counsels, causes, procures

or commands the commission of an offence punishable under this Act shall be liable to be dealt with, indicted, tried, and punished as a principal offender.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 35.—*Punishment of principals in the second degree and accessories.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 67.—*Punishment of principals in the second degree, accessories, and abettors.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender.

46 & 47 *Vict. c.* 3 (*Explosive Substances Act*, 1883), *s.* 5.—*Punishment of aiders and abettors.*]—Ante, p. 757.

1 & 2 *G.* 5, *c.* 6 (*Perjury Act*, 1911), *s.* 7.—*Aiders, abettors, suborners, etc., in perjury, etc.*]—Ante, p. 1190.

Indictment of Principal in the Second Degree.

After stating the offence of the principal in the first degree, and immediately before the conclusion of the indictment, charge the principal in the second degree, thus :

C. D., on the same date, was present, aiding, abetting, and assisting the said A. B. to commit the said crime.

Punishment. (*a*) By 7 & 8 G. 4, c. 28, s. 7, "*no person convicted of felony*

(*a*) Apart from the statutes printed on pp. 1440-1442, and before abolition of benefit of clergy by the *Criminal Law Act*, 1827 (7 & 8 G. 4, c. 28), s. 6, the rule adopted seems to have been that where a statute created a felony and punished with death persons guilty thereof, or imposed the penalty of death for a specified common law felony,

shall suffer death unless it be for some offence which was excluded from the benefit of clergy before or on the first day of the present session of parliament, or which hath been or shall be made punishable by death by some statute passed after that day" (see ante, p. 235).

Where, upon the construction of any statute, principals in the second degree are not punishable with death, and no punishment is prescribed by the statute, then principals in the second degree may be sentenced to penal servitude for not more than seven nor less than three years, or to imprisonment for not more than two years, with or without hard labour. 7 & 8 G. 4, c. 28, s. 8 (ante, p. 236); 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

In the case of a felony at common law not punishable with death, and in cases of felony at common law or by statute, where the principal in the first degree is expressly, and the principal in the second degree is by construction of law, punishable with death (vide supra), *the pleader may charge the principal in the second degree either as principal in the first degree, for proof that he was present aiding and abetting will in such a case maintain an indictment charging him with having actually committed the offence;* see Mackalley's case, 9 Co. Rep. 67 b; 1 Hale, 438: R. *v.* Towle, R. & R. 314: *or as being present aiding and abetting, as in the form above given, at his option.* R. *v.* Crisham, C. & Mar. 187 (ante, p. 1440): R. *v.* Downing, 1 Den. 52; 2 C. & K. 382 (ante, p. 1440). *A., B. and C. were indicted for murder: in the first count, as principals in the first degree; and in the second, A. was indicted as a principal in the first degree; and B. and C. as principals in the second degree; the grand jury ignored the first count as to B. and C., and found a true bill on the second count against all; it seems that B. and C. might be convicted on the second count, though A. was acquitted.* R. *v.* Phelps, C. & Mar. 180. *It has never been necessary that the principal in the first degree should be joined in the indictment with the principal in the second degree or have been made amenable to justice.* Plowd. 97.

SECT. 2.

ACCESSORIES BEFORE THE FACT TO FELONY.

Common Law.

An accessory before the fact is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony. 1 Hale, 615: *R.* v. *Macdaniel*, 19 St. Tr. 745; Fost. 121;

without making specific provisoes as to persons present aiding and abetting, they were liable to the death penalty, though not named in the statute. *R.* v. *Midwinter*, Fost. App. 415: *The Coalheavers' case*, 1 Leach, 64; 1 East, P. C. 413: *and see* 1 Hale, 537; Fost. 359. But a distinction was drawn where the penalty was imposed on the person committing the offence, and not on the offence by name (Fost. 356, 357), unless the accessory were expressly within the statute. *R.* v. *Gogerly*, R. & R. 343. Under 12 G. 3, c. 24, s. 1, *ante*, p. 748, aiders and abettors are liable to capital punishment.

1 East, P. C. 352; 1 Chit. Cr. L. 262; *and see* Steph. Dig. Cr. L. (6th ed.) 33. There must be a procurement for the particular felony charged in the indictment. *R.* v. *Lomas*, 23 Cox, 765; 30 T. L. R. 125; 9 Cr. App. R. 220.

The term "accessory" is used only with reference to felonies: in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor; Fost. 341-346; and he must be indicted as such. 1 Hale, 233. In point of law there is no such person as an accessory to misdemeanor. *R.* v. *Burton*, 13 Cox, 71, Blackburn, J.: *Du Cros* v. *Lambourne* [1907] 1 K. B. 40, 43; 76 L. J. (K. B.) 50; *but see Gould & Co., Ltd.* v. *Houghton* [1921] 1 K. B. 509, at p. 520, per Darling, J.; and all those who in felony would be accessories before the fact, in offences under felony are principals and indictable as such. 4 Bl. Com. 36; 1 Russ. Cr. (7th ed.) 138: *R.* v. *Clayton*, 1 C. & K. 128: *R.* v. *Moland*, 2 Mood. 276: *R.* v. *Greenwood*, 2 Den. 453; *Gould & Co., Ltd.* v. *Houghton* (*supra*); 24 & 25 Vict. c. 94, s. 8 (*post*, p. 1456).

If the party is actually or constructively present when the felony is committed, he is, as we have seen (*ante*, pp. 1436 *et seq.*), an aider and abettor, and not an accessory *before* the fact; for it is essential, to constitute the offence of accessory, that the party should be *absent* at the time the offence is committed. 1 Hale, 615: *R.* v. *Gordon*, 1 Leach, 515; 1 East, P. C. 315, 352. Acting upon this rule, Coleridge, C.J., directed the acquittal of a woman indicted as accessory before the fact to a murder, it being proved that she was present at the time when the murder was committed, and was therefore liable, if at all, as a principal. *R.* v. *Brown*, 14 Cox, 144. It is submitted that she might properly have been convicted as a principal.

The procurement may be personal, or through the intervention of a third person; Fost. 125: *R.* v. *Earl of Somerset*, 2 St. Tr. 965; 19 St. Tr. 804, *cit.*: *R.* v. *Cooper*, C. & P. 535.

It may also be direct, by hire, counsel, command, or conspiracy: or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony; 2 Hawk. c. 29, s. 16; but the bare concealment of a felony contemplated by another will not make the party concealing it an accessory before the fact; 2 Hawk. c. 29, s. 23; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. 1 Hale, 616.

The procurement must be continuing; for if the procurer of a felony repents, and before the felony is committed, actually countermands his order, and the principal notwithstanding commits the felony, the original contriver will not be an accessory. 1 Hale, 618; 1 Russ. Cr. (7th ed.) 125.

If the accessory orders or advises one crime, and the principal intentionally commits another; as, for instance, if he is ordered or advised to burn a house, and instead thereof commits larceny; or, to commit a crime against A., and instead of so doing commits the same against B.,—the accessory will not be answerable; 1 Hale, 617; but if the principal commits the same offence against B. by mistake, instead of A., it seems it would be otherwise. Fost. 370 *et seq.*; *but see* 1 Hale, 617; 3 Co. Inst. 51; Steph. Dig. Cr. L. (6th ed.) 35; 1 Russ. Cr. (7th ed.) 124. But it is clear that the accessory is liable for all that ensues

upon the execution of the unlawful act commanded; as, for instance, if A. commands B. to beat C., and he beats him so that he dies, A. is accessory to the murder. 4 Bl. Com. 37; 1 Hale, 617. Or if A. commands B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house. *R.* v. *Saunders*, Plowd. 473. So, if the offence commanded is in fact committed, although by different means from those commanded: as, for instance, if J. W. hires J. S. to poison A., and instead of poisoning him, he shoots him, J. W. is, nevertheless, liable as accessory. Fost. 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act. *R.* v. *Cooper*, 5 C. & P. 535. If the agent is innocent the person procuring his act is a principal and not an accessory. *R.* v. *Bull*, 1 Cox, 281: *R.* v. *Manley*, 1 Cox, 104; 1 Russ. Cr. (7th ed.) 104.

To support an indictment for being accessory before the fact, there must be some active proceeding on the part of the defendant; *i.e.*, he must procure, incite, or in some other way encourage the act done by the principal. Therefore where T. acted as stakeholder on the occasion of a prize-fight which ended in the death of one of the fighters, but was not present at the fight and took no other part in the circumstances attending it than to hold the stakes and afterwards hand them over to the winner, it was held that he was not liable to be convicted as accessory before the fact to the manslaughter. *R.* v. *Taylor*, L. R. 2 C. C. R. 147; 44 L. J. (M. C.) 67; 13 Cox, 68.

Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *R.* v. *Barber*, 1 C. & K. 442.

In manslaughter, it has been said, there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore where A. is indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 Hale, 437, 466, 615; 1 Hawk. c. 30, s. 2. The doctrine rests on *Bibithe's case*, 4 Co. Rep. 43 b: *Goose's case*, Moore (K. B.), 461: *Goff* v. *Byby*, Cro. Eliz. 540; and is controverted by the late Mr. Greaves. Crim. Cons. Acts (1st ed.), p. 23. And where a man procured and gave a woman poison in order that she might take it and so procure abortion, and she did take it in his absence, and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime of manslaughter. *R.* v. *Gaylor*, Dears. & B. 288; 7 Cox, 253. In the course of the argument in that case, Bramwell, B., said, "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, that another had counselled him to do it, would not he who counselled be an accessory before the fact?"

At common law an accessory could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 Anne, st. 2, c. 9, s. 1, *rep.*) or outlawry. Plowden, 97: Fost. 360: 1 Hale, 623. The matter is now regulated by 24 & 25 Vict. c. 94, s. 2, *post*, p. 1446. An indictment will not lie under this section

where no felony is in fact committed. *R.* v. *Gregory*, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60. *See also* ss. 5, 7, post, p. 1447. A person who induces a servant of the post-office to intercept and hand over to him a letter, which is in course of transmission by post, is either guilty, together with the post-office servant, of larceny as a principal, or is accessory before the fact to the larceny committed by the post-office servant, and in either view can be convicted on an indictment charging him with larceny of the letter. *R.* v. *James*, 24 Q. B. D. 439; 59 L. J. (M. C.) 96. Where the principal and accessory are tried together, one being charged as principal and the other as accessory before the fact (which now rarely, if ever, occurs), if the principal pleaded otherwise than the general issue, the accessory was not bound to answer until the principal's plea had been determined. 9 H. 7, c. 19 (*rep.*) : 1 Hale, 624 : 2 Co. Inst. 184. Where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny; it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also. *R.* v. *Dannelly*, R. & R. 310; 2 Marsh, 571.

If a man is indicted as accessory to several persons in the same felony, and is found accessory to one, it is a good verdict, and judgment may be passed upon him. *R.* v. *Lord Sanchar*, 9 Co. Rep. 119; Fost. 361; 1 Hale, 624.

Statutes.

24 & 25 *Vict. c.* 94 (*Accessories and Abettors Act*, 1861), *s.* 1.—*Accessories before the fact indictable as principals.*]—Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted, tried, convicted and punished in all respects as if he were a principal felon. [*Under this section, which re-enacts* 11 & 12 Vict. c. 46, s. 1 (*as to which see* R. *v.* Hughes, 8 Cox, 278), *the conviction of the principal is no longer a condition precedent to the conviction of the accessory. Where an offence is declared felony, it appears clear that such a common law incident as that of the liability of accessories is implied.* R. *v.* Sadi, 1 Leach, 468. *A similar provision is made by s.* 5 *of the* Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), *as to offences punishable on summary conviction. The enactment applies to all felonies, and the doubts raised as to murder under* 11 & 12 Vict. c. 46, s. 1 (rep.), *seem to have no substance.* R. *v.* Chadwick, Staff. Summer Assizes, 1850, Williams, J.; Greaves, Crim. Law Cons. Acts (2nd ed.), 20.]

Sect. 2.—*Accessories before the fact may be indicted as such, or as substantive felons.*]—Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon,

or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. [*This section re-enacts* 7 G. 4, c. 64, s. 9, *which altered the common law rule on the subject, stated* ante, p. 1445; and see Saqui *v.* Stearns, 26 T. L. R. 501. *This section only applies where the accessory might at common law have been indicted with, or after the conviction of, the principal. It does not extend to a case where one person incites another to commit suicide;* see R. *v.* Gregory (ante, p. 1429): R. *v.* Leddington, 9 C. & P. 79: R. *v.* Russell, 1 Mood. 356. *The words* "not amenable to justice" *appear to overrule* R. *v.* Ashmall, 9 C. & P. 236, *where it was held that the principal not having appeared to take his trial the accessory was not compellable to plead.*]

Sect. 5.—*Prosecution of accessory after principal has been convicted, but not attainted.*]—If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted. [*This section re-enacts* 7 G. 4, c. 64, s. 11. *Attainder was abolished in* 1870; see ante, p. 164.]

Sect. 6.—*Trial of accessories.*]—Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice. [*This section re-enacts* 14 & 15 Vict. c. 100, s. 15, *with the additions italicized. As to receivers*, see ante, pp. 697 et seq.]

Sect. 7.—*Trial of accessories.*]—Where any felony shall have been wholly (*a*) committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed: and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony *or any felonies committed in any county or place in which such person shall be apprehended or be in custody*, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within

(*a*) *Quære* as to the jurisdiction to try any person in England as accessory before the fact to a crime completed abroad. *See R. v. Walkem* [1908] 14 Canada Cr. Cas. 122, where it was held that Canadian courts had no jurisdiction in such a case, 2 Steph. Hist. Cr. L. 12; *and see Kenny*, Cr. L. 413.

his Majesty's dominions or without, or partly within his Majesty's dominions and partly without: provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence. [*This section is taken from* 7 G. 4, c. 64, ss. 9, 10; 11 & 12 Vict. c. 46, s. 2, *with the additions italicized;* and see ante, pp. 31 et seq.]

Sect. 8.—*See post*, p. 1456.

Sect. 9.—*Accessories to offences in admiralty jurisdiction.—Venue.*]—Where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces. [*This section was new in* 1861 *as a general provision but was framed on similar clauses in* 9 G. 4, c. 69, s. 9, *and* 7 & 8 Vict. c. 2, *as to particular offences. For the present law as to trial of offences committed within the admiralty jurisdiction*, see ante, pp. 31 et seq.]

37 *G.* 3, *c.* 123, *s.* 3.—*Accessories to taking unlawful oaths.*]—Ante, p. 1127.

52 *G.* 3, *c.* 104, *s.* 4.—*Accessories to taking oaths to commit treason or felony.*]—Ante, p. 1131.

7 *W.* 4 *& 1 Vict. c.* 88, *s.* 4.—*Punishment of accessories before the fact felonies within the Piracy Act*, 1837.]—Ante, p. 1440.

11 *& 12 Vict. c.* 12, *s.* 8.—*Punishment of accessories before the fact to treason felony.*]—Ante, p. 1077.

24 *& 25 Vict. c.* 96, *s.* 98.—*Punishment of accessories before the fact to felonies within the Larceny Act*, 1861.]—Ante, p. 1441.

6 *& 7 G.* 5, *c.* 50, *s.* 35.—*Accessories and abettors within the Larceny Act*, 1916.]—Ante, p. 1441.

24 *& 25 Vict. c.* 97, *s.* 56.—*Punishment of accessories before the fact to felonies within the Malicious Damage Act*, 1861.]—Ante, p. 1441.

24 *& 25 Vict. c.* 98, *s.* 49.—*Punishment of accessories before the fact to felonies within the Forgery Act*, 1861.]—Ante, p. 1441.

3 & 4 G. 5, c. 27, s. 11.—*Punishment of accessories before the fact to felonies within the Forgery Act*, 1913.]—Ante, p. 1441.

24 & 25 *Vict. c.* 99, *s.* 35.—*Punishment of accessories before the fact to felonies within the Coinage Offences Act*, 1861.]—Ante, p. 1442.

24 & 25 *Vict. c.* 100, *s.* 67.—*Punishment of accessories before the fact to felonies within the Offences against the Person Act*, 1861.]—Ante, p. 1442.

46 & 47 *Vict. c.* 3, *s.* 5.—*Punishment of accessories to crimes under the Explosive Substances Act*, 1883.]—Ante, p. 757.

1 & 2 G. 5, c. 6, s. 7.—*Punishment of accessories before the fact to offences within the Perjury Act*, 1911.]—Ante, p. 1190.

Indictment of Accessory before the Fact together with the Principal.
(24 & 25 *Vict. c.* 94, *s.* 2, ante, p. 1446.)

Commencement as ante, p. 1425.

STATEMENT OF OFFENCE.

A. B., *arson*, contrary to section 3 of the Malicious Damage Act, 1861.
C. D., accessory before the fact to same offence.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, set fire to a house with intent to injure or defraud.

C. D., on the same day, in the county of ——, did counsel, procure, and command the said A. B. to commit the said offence.

A man may be indicted as accessory to one of several principals, or to all: and if he is indicted as accessory to all, he may be convicted on such indictment as accessory to one or some of them. Lord Sanchar's case, 9 Co. Rep. 119; Fost. 361; 1 Hale, 624. (See ante, p. 1446.) *As to the venue*, see ante, pp. 41, 1447.

The offence of accessory before the fact is felony, and such accessory now in all cases may be indicted, tried, convicted and punished in all respects as if he were a principal felon. 24 & 25 Vict. c. 94, s. 1 (ante, p. 1446). See R. *v.* Chadwick, Stafford Sum. Ass., 1850 (ante, p. 1446): R. *v.* James, 24 Q. B. D. 439; 59 L. J. (M. C.) 96 (ante, p. 1446). *Punishment: as directed by the statute if any specifically providing for the punishment, or where no specific punishment is provided, by penal servitude for not more than seven nor less than three years, or imprisonment for not more than two years, with or without hard labour for the whole or any part of the imprisonment.* 7 & 8 G. 4, c. 28, s. 8 (ante, p. 236): 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

Evidence.

Prove first the commission of the principal felony by A. B.; secondly, that C D. had *previously* to its commission counselled, procured, [incited, moved, aided, hired,] or commanded A. B. to commit the principal felony: whether he did so directly or through a third person is immaterial. *See R.* v. *Macdaniel*, Fost, 121, 125; 19 St. Tr. 745, *and ante*, p. 1444.

To support an indictment for being accessory before the fact to manslaughter (as to which *see R.* v. *Gaylor*, Dears. & B. 288, *and ante*, p. 1445), or to any other felony, it must be proved that the defendant procured, incited, or in some other way encouraged the act of the principal. *See R.* v. *Taylor*, L. R. 2 C. C. R. 147; 44 L. J. (M. C.) 67; 13 Cox, 68 (*ante*, p. 1445).

As it is essential to constitute the offence of accessory that the party should be absent at the time the offence was committed (*see ante*, p. 1443), if it is proved that C. D. was present when the felony in question was committed, he must, if indicted as an accessory, be acquitted. *R.* v. *Gordon*, 1 Leach, 515; 1 East, P. C. 352: *R.* v. *Brown*, 14 Cox, 144.

The accessory may controvert the guilt of his principal, and cannot be convicted on this indictment unless the principal is found guilty. *See* 1 Hale, 624; 2 Co. Inst. 184; Fost. 365. So, the accessory may prove that, after he had so counselled, procured, incited, hired, or commanded J. S., he repented of it, and actually countermanded the order, etc. 1 Hale, 618. The accessory may prove that he ordered or advised one crime, and that the principal committed another (*see ante*, p. 1444). But the accessory is liable for all that ensues upon the execution of the unlawful act commanded by him; as for instance, if A. commmanded B. to beat C., and he beats him so that he dies, A. is accessory to the murder. 4 Bl. Com. 37; 1 Hale, 617. Or if A. commands B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house. *R.* v. *Saunders*, Plowd. 473, 475. It is no defence that the crime was committed by means different from those ordered (*ante*, p. 1445). As to procurement through intermediate agents, *see ante*, p. 1445.

Indictment against an Accessory before the Fact, as for a Substantive Felony, (24 & 25 *Vict. c.* 94, *s.* 2, *ante*, p. 1450.)

Commencement as ante, p. 1425.

STATEMENT OF OFFENCE.

Accessory before the fact to larceny.

PARTICULARS OF OFFENCE.

A.B., on the —— day of ——, in the county of ——, did counsel, procure, and command C. D., servant to E. F., to steal from the said E. F. ten cases of sugar.

Any number of accessories at different times may be charged together on this indictment. 24 & 25 Vict. c. 94, s. 6 (ante, p. 1447).

SECT. 3.

ACCESSORIES AFTER THE FACT TO FELONY.

Common Law.

In high treason there are no accessories after the fact, those who in felony would be accessories after the fact being principals in high treason (*ante*, p. 1444); yet in their progress to conviction they must be treated as accessories, and indicted specially for the receiving, etc., and not as principal traitors. 1 Hale, 238. *And see* 1 Chit. Cr. L. 264; Steph. Dig. Cr. L. (6th ed.) 36; So, in offences under felony there are no accessories after the fact: 1 Hale, 613; although, if the act of the receiver amounts to a rescue, or to obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 Hawk. c. 29, s. 4; 1 Russ. Cr. (7th ed.) 127.

An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. 3 Co. Inst. 138 : 1 Hale, 618 : 4 Bl. Com. 37 : Fost. 373 : 2 Hawk. c. 29, s. 1 : 1 Russ. Cr. (7th ed.) 126 : *R.* v. *Burridge*, 3 P. Wms. 439, 475; 24 Eng. Rep. 1133, 1146. The principal felony must be complete at the time of the harbouring, etc. 2 Hawk. c. 29, ss. 26 *et seq.* Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact; as, for instance, that he concealed him in the house; Dalt. c. 161; or shut the door against his pursuers, until he should have an opportunity of escaping; 1 Hale, 619; or took money from him to allow him to escape; Y. B. 9 H. 4, pl. 1; or supplied him with money, a horse, or other necessaries, in order to enable him to escape; Hale's Sum. 218 : 2 Hawk. c. 29, s. 26; or, the principal being in prison, J. W. bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape; 1 Hale, 621; or removed evidence of his guilt. *R.* v. *Levy* [1912] 1 K. B. 158; 81 L. J. (K. B.) 264; 22 Cox, 702; 106 L. T. 192; 76 J. P. 123; 28 T. L. R. 93.

But merely suffering the principal to escape will not make the party an accessory after the fact; for it amounts at most but to a mere omission. Y. B. 9 H. 4, pl. 1 : 1 Hale, 619 : *and see post*, p. 1455. So, if a person supplies a felon in prison with victuals or other necessaries for his sustenance; 1 Hale, 620; or relieves and maintains him if he is bailed out of prison; *Id.* : or if a physician or surgeon professionally attends a felon sick or wounded, though he knows him to be a felon; 1 Hale, 332; or if a person speaks or writes in order to obtain a felon's pardon or deliverance; 26 Ass. 47; or advises his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 Co. Inst. 139 : 1 Hale, 621; or even if he himself agrees for money not to give evidence against the felon: Moore (K. B.) 8; or knows of the felony and does not discover it; 1 Hale, 371, 618: none of these acts would be sufficient to make the party an accessory after the fact. He

must be proved to have done some act to assist the felon personally. *R.* v. *Chapple*, 9 C. & P. 355. But if he employs another person to do so, he will be equally guilty as if he harboured or relieved him himself. *R.* v. *Jarvis*, 2 M. & Rob. 40.

A wife is not punishable as accessory for receiving, etc., her husband, although she knew him to have committed felony; 1 Hale, 48, 621: *R.* v. *Manning*, 2 C. & K. 903 n.: *R.* v. *Good*, 1 C. & K. 185: *R.* v. *McClarens*, 3 Cox, 425 (*see ante*, p. 23), for she is presumed to act under his coercion. She may, however, be convicted as a principal felon with her husband if in the part which she took in the commission of the felony she was acting independently of her husband. *R.* v. *Mary Baines*, 69 L. J. (Q. B.) 681; 19 Cox, 542 (*ante*, p. 23). No other relation of persons can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.* Even one may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring the thief, or assisting in his escape. Fost. 123: Crom. 41 b, pl. 4 and 5. If the wife alone, the husband being ignorant of it, receives a felon, the wife is accessory, and not the husband. 1 Hale, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Id.*

To constitute this offence, it is necessary that the accessory at the time when he assists or comforts the felon, should have notice, direct or implied, that he had committed a felony. 2 Hawk. c. 29, s. 32. It is also necessary that the felony should be complete at the time the assistance is given; for, if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for until death ensues no murder or manslaughter is committed. 2 Hawk. c. 29, s. 35: 4 Bl. Com. 38.

Accessories after the fact can be tried before the conviction of the principal. 24 & 25 Vict. c. 94, s. 3, *infra*.

On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact. *R.* v. *Fallon*, L. & C. 217; 32 L. J. (M. C.) 66: *Richards* v. *R.*, 61 J. P. 389: *R.* v. *Watson*, [1916] 2 K. B. 385. Where several persons are tried upon one indictment, some as principals in murder, others as accessories after the fact to the murder, and the principals are convicted of manslaughter only, the persons charged as accessories may be convicted as accessories to the manslaughter. *R.* v. *Richards*, 2 Q. B. D. 311; 46 L. J. (M. C.) 200; 13 Cox, 611.

As to the joinder of several accessories after the fact in the same indictment, *see* 24 & 25 Vict. c. 94, s. 6 (*ante*, p. 1447).

Receiver.]—The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanor, punishable by fine and imprisonment; 1 Hale, 620. In *R.* v. *Cross*, 1 Ld. Raym. 711, 712 (*ante*, p. 722), it was held that the common law misdemeanor of receiving merged in the felony created by 3 W. & M. c. 9. But it was held in *R.* v. *Payne*

[1906] 1 K. B. 97; 75 L. J. (K. B.) 115, that an indictment for the common law misdemeanor of receiving lay in the case of a larceny not referred to in s. 91 of the *Larceny Act*, 1861, repealed and now replaced by s. 33 of the *Larceny Act*, 1916 (*ante*, p. 723); and in *R.* v. *Garland* [1910] 1 K. B. 154; 79 L. J. (K. B.) 239; on an indictment for receiving as a common law misdemeanor, it was held that a conviction could be upheld although the facts proved felonious receiving.

Statutes.

24 & 25 *Vict. c.* 94 (*Accessories and Abettors Act*, 1861), *s.* 3.—*Accessories after the fact may be indicted as such, or as substantive felons.*]—Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished. [*This section re-enacts* 11 & 12 Vict. c. 46, s. 2. *As to common law rule before this enactment*, see 1 Hale, 623; 2 Hawk. c. 29, s. 45; and see 7 G. 4, c. 64, s. 10, rep.]

Sect. 4.—*Punishment of accessories after the fact.*]—Every accessory after the fact to any felony, except where it is otherwise specially enacted (*e.g.*, as to accessories after the fact to murder. 24 & 25 Vict. c. 100, s. 67), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the Court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. [*This section generalized the provisions in* Peel's Acts *as to punishment of accessories after the fact.*]

Sect. 5.—*Prosecution after conviction of principal.*]—Ante, p. 1447.

Sect. 7.—*Venue and trial.*]—Ante, p. 1447.

Sect. 9.—*Accessories after the fact to offences in admiralty jurisdiction.*]—Ante, p. 1448.

7 *W.* 4 & 1 *Vict. c.* 88, *s.* 4.—*Accessories after the fact to offences within the Piracy Act*, 1837.]—Ante, p. 1440.

11 & 12 *Vict. c.* 12, *s.* 8.—*Accessories after the fact to treason felony.*]—Ante, p. 1077.

24 & 25 *Vict. c.* 96, *s.* 98.—*Accessories after the fact to felonies within the Larceny Act*, 1861.]—Ante, p. 1441.

24 & 25 *Vict. c.* 97, *s.* 56.—*Accessories after the fact to felonies within the Malicious Damage Act*, 1861.]—Ante, p. 1441.

24 & 25 *Vict. c.* 98, *s.* 49.—*Accessories after the fact to felonies within the Forgery Act*, 1861.]—Ante, p. 1441.

24 & 25 *Vict. c.* 99, *s.* 35.—*Accessories after the fact to felonies within the Coinage Offences Act*, 1861.]—Ante, p. 1442.

24 & 25 *Vict. c.* 100, *s.* 67.—*Accessories after the fact to murder and to other felonies within the Offences against the Person Act*, 1861.]—Ante, p. 1442.

Indictment against an Accessory after the Fact with the Principal.
(24 & 25 *Vict c.* 94, *s.* 3, ante, p. 1453.)

Commencement as ante, p. 1425.

STATEMENT OF OFFENCE.

A. B., *arson*, contrary to section 3 of the Malicious Damage Act, 1861.
C. D., accessory after the fact to same offence.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, set fire to a house with intent to injure or defraud.

C. D., on the same day, and on other days afterwards, did receive, harbour, maintain, the said A. B., knowing that he had committed the said offence.

On an indictment charging a man as a principal felon only, he cannot be convicted of being an accessory after the fact. R. *v.* Fallon, L. & C. 217; 32 L. J. (M. C.) 66: Richards *v.* R., 61 J. P. 389: R. *v.* Bubb, 70 J. P. 143 (C. C. R.): R. *v.* Watson, 32 T. L. R. 580; 12 Cr. App. R. 62. *Where several persons are tried upon one indictment, some as principals in murder, others as accessories after the fact to the murder, and the principals are convicted of manslaughter only, the prisoners charged as accessories may be convicted as accessories to the manslaughter.* R. *v.* Richards, 2 Q. B. D. 311; 46 L. J. (M. C.) 200; 13 Cox, 611.

The offence of the accessory after the fact is felony whether the principal offence is felony at common law or by statute. 24 & 25 Vict. c. 94, s. 3 (ante, p. 1453). *Accessories after the fact to murder may be kept in penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour.* 24 & 25 Vict. c. 100, s. 67 (ante, p. 1442). *Accessories after the fact to larceny, arson and malicious injuries, forgery, to coinage offences, to offences against the person, and to piracy, are liable to imprisonment, with or without hard labour, not exceeding two years.* See *the*

statutes, ante, pp. 1440—1442. *So are accessories after the fact to any felony whether at common law or by statute, unless it is otherwise specially enacted.* 24 & 25 Vict. c. 94, s. 4 (ante, p. 1453). *There seem now to be no cases in which an accessory after the fact can be punished capitally or in the same way as the principal offender. As to former law*, see ante, p. 1451, and 3 Co. Inst. 59; 1 Hale, 235, 236, 328; 2 Hawk. c. 29, s. 14. *Accessories after the fact are now triable* (1) *as accessories after the fact to the principal felony, together with the principal felon, or after his conviction; or* (2) *as for a substantive felony irrespective of the principal felon.* 24 & 25 Vict. c. 94, s. 3 (ante, p. 1453).

Any number of accessories to the same felony may be charged with substantive felonies in the same indictment. Id., s. 6; ante, p. 1447.

Evidence.

1. The prosecutor must prove the principal guilty of the felony charged against him by the indictment, as in ordinary cases.

2. To justify conviction of an accessory after the fact, it must be proved that after the commission of the principal felony, he did some act to assist the felon personally (*R.* v. *Chapple*, 9 C. & P. 355), or employed another person to harbour or relieve the felon. *R.* v. *Greenacre*, 8 C. & P. 35: *R.* v. *Butterfield*, 1 Cox, 39; *R.* v. *Lee*, 6 C. & P. 536, *and ante*, p. 1451: *R.* v. *Jarvis*, 2 M. & Rob. 40. As to what acts constitute harbouring, *see ante*, p. 1451; and as to the special position of the wife of a felon, *see ante*, pp. 23, 1452.

3. It must be proved that C. D., at the time he received or assisted the principal felon, knew that he had committed a felony. This knowledge may be proved either from the defendant's admissions, or the like, or by evidence of circumstances from which the jury may fairly presume it. (*See ante*, p. 396). *R.* v. *Burridge*, 3 P. Wms. 439; 2 Hawk. c. 29, ss. 32, 33.

Prove the commission of the principal felony by A. B., and then prove the offence of the accessory as directed, *ante*, p. 1450.

Sect. 4.

MISPRISION OF TREASON OR FELONY.

Misprision of treason consists in the concealment or keeping secret of high treason (1 & 2 Ph. & M. c. 10, s. 6, *ante*, p. 1056), or failing with due diligence to inform of treasons committed or threatened by others without the assent of the accused, or any active part in rescuing traitors from justice. Fourth Report Crim. Law Commissioners, 1848, p. 79. As to misprisions generally, *see* Steph. Dig. Cr. L. (6th ed.), pp. 121, 122, 401; 3 Co. Inst. 140; 1 Russ. Cr. (7th ed.) 129; Encycl. Engl. Law (2nd ed.), vol. ix., p. 269; 1 Hawk. c. 20; 2 Hawk. c. 29, s. 23.

The offence is a misdemeanor at common law, punishable by imprisonment for life, and absolute forfeiture of the goods and forfeiture for life of the profits of the lands of the offender. The punishment is not affected by 33 & 34 Vict. c. 23, s. 1. The offence is not triable at quarter sessions (5 & 6 Vict. c. 38, s. 1, *ante*, p. 106).

The procedure on prosecution for misprision of treason is the same as for treason. *See* the statutes collected under that title, *ante*, pp. 1053 *et seq.*

Misprision of felony.]—Misprision of felony consists in concealing or procuring the concealment of a felony known to have been committed. 1 Hawk. cc. 20, 59; 1 Chit. Cr. L. 3. The offence is a misdemeanor at common law; it seems to be triable at quarter sessions, and is punishable by fine and imprisonment, the punishment under 3 Edw. 1, c. 9, having been repealed by 50 & 51 Vict. c. 55, s. 39, as to sheriffs and their officers. There do not appear to be any authorities as to what will constitute concealment; but the offence appears to be founded on a duty to inform the King's officers of the commission of a felony, and to differ from that of an accessory after the fact in that no actual assistance to the felon need be proved, and from that of an accessory before the fact in that no privity to the commission of the felony need be proved. *See* 3 Co. Inst. 140; 1 Hale, 373. Prosecutions for misprision of felony have not been instituted of recent years. *See Williams* v. *Bayley*, L. R. 1 H. L. 200, 220; 35 L. J. (Ch.) 717, Lord Westbury. There is no modern precedent of an indictment for the offence. For an old precedent, *see* 2 Chit. Cr. L. 232. As to compounding felonies, etc., *see ante*, p. 1208.

SECT. 5.

ABETTORS IN MISDEMEANOR.

Statutes.

24 & 25 *Vict. c.* 94 (*Accessories and Abettors Act*, 1861), *s.* 8.]—Whosoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender. [*This section was framed from* 7 & 8 G. 4, c. 30, s. 26. *It is said to be declaratory of the common law.* Du Cros *v.* Lambourne [1907] 1 K. B. 40; 76 L. J. (K. B.) 50; 21 Cox, 311; 70 J. P. 525; Gould & Co., Ltd. *v.* Houghton [1921] 1 K. B. 509.]

24 & 25 *Vict. c.* 96, *s.* 98.—*Aiders and abettors in misdemeanors under the Larceny Act*, 1861.]—Ante, p. 1441.

6 & 7 *G.* 5, *c.* 50, *s.* 35.—*Aiders and abettors in misdemeanors under the Larceny Act*, 1916.]—Ante, p. 1441.

24 & 25 *Vict. c.* 97, *s.* 56.—*Aiders and abettors in misdemeanors under the Malicious Damage Act*, 1861.]—Ante, p. 1441.

24 & 25 *Vict. c.* 98, *s.* 49.—*Aiders and abettors in misdemeanors under the Forgery Act*, 1861.]—Ante, p. 1441.

3 & 4 *G.* 5, *c.* 27, *s.* 11.—*Aiders and abettors in misdemeanors under the Forgery Act.* 1913.]—Ante, p. 1441.

24 & 25 *Vict. c.* 99, *s.* 35.—*Aiders and abettors in misdemeanors under the Coinage Offences Act*, 1861.]—Ante, p. 1442.

24 & 25 *Vict. c.* 100, *s.* 67.—*Aiders and abettors in misdemeanors under the Offences against the Person Act*, 1861.]—Ante, p. 1442.

33 & 34 *Vict. c.* 90, *s.* 12.—*Aiders and abettors in misdemeanors under the Foreign Enlistment Act*, 1870.]—Ante, p. 1084.

1 & 2 *G.* 5, *c.* 6, *s.* 7.—*Aiders and abettors in misdemeanors under the Perjury Act*, 1911.]—Ante, p. 1190.

10 & 11 *G.* 5, *c.* 75, *s.* 7.—*Aiders and abettors in misdemeanors under the Official Secrets Acts*, 1911 & 1920.]—Ante, p. 1150.

Indictment.

Commencement as ante, p. 1425.

STATEMENT OF OFFENCE.

A. B., *undischarged bankrupt obtaining credit*, contrary to section 155 (*a*) of the Bankruptcy Act, 1914.

C. D., being accessory to same offence.

PARTICULARS OF OFFENCE.

A. B., etc., as on p. 1266.

C. D., at the same time and place, did aid, abet, counsel, and procure A. B. to commit the said offence.

It is now usual to indict aiders, etc., within 24 & 25 Vict. c. 94, s. 8, *as principals.* See R. *v.* Burton, 13 Cox, 71; 39 J. P. 532: Benford *v.* Sims [1898] 2 Q. B. 641; 67 L. J. (Q. B.) 655, *decided on similar provisions contained in s.* 5 *of the* Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); *which was followed in* Du Cros *v.* Lambourne (supra); and cf. R. *v.* Clayton, 1 C. & K. 128: R. *v.* Moland, 2 Mood. 276. *But in certain cases, e.g., where the principal offence is that of a bankrupt under the* Bankruptcy Act, 1914, *it is still necessary to indict the abettor in the above form.*

Evidence.

Prove that the principal offence was committed, and that the defendant aided, abetted, counselled, or procured its commission (*as ante*, p. 1450). In support of an information, under 11 & 12 Vict. c. 43, s. 5, against A. for aiding and

abetting B. to commit the offence of trespass in pursuit of game, there was evidence that A. drove B. in a trap along a turnpike road for a lawful purpose, that B. got out, and entered a field and shot a hare, which he gave to A. on returning to the trap, and that A. then drove on; it was held that there was evidence on which A. might be convicted. *Stacey* v. *Whitehurst*, 34 L. J. (M. C.) 94.

PART V.

SECT. 1.

OFFENCES COMMITTED AFTER PREVIOUS CONVICTION, AND OFFENCES BY CONVICTS ON LICENCE OR UNDER POLICE SUPERVISION.

Statutes.

7 & 8 *G.* 4, *c.* 28 (*Criminal Law Act*, 1827), *s.* 11.—*Punishment of felony after a previous conviction for felony.*]—(*Whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction of felony, whether such conviction shall have taken place before or after the commencement of this Act* [*1st July*, 1827] : *be it therefore enacted, that*) if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable . . . to be transported beyond the seas for life. . . . [*Now to penal servitude or imprisonment*, see ante, pp. 236, 237. *Preamble and words omitted rep.* Statute Law Revision (No. 2) Act, 1888.]

Trial.]—And a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy, shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony; and, being lawfully convicted thereof, shall be liable . . . to be transported beyond the seas for the term of seven years. . . . [*Now to penal servitude or imprisonment*, see ante, pp. 236, 237. *Words omitted rep.* Statute Law Revision (No. 2) Act, 1888 and Indictments Act, 1915.]

20 & 21 *Vict. c.* 3. *s.* 2.—*Substitutes penal servitude for transportation.*]—Ante, p. 237.

54 & 55 *Vict. c.* 69, *s.* 1.—*Regulates length of sentences of penal servitude and authorizes imprisonment in lieu thereof.*]—Ante, pp. 238, 239.

6 & 7 *W.* 4, *c.* 111 (*Previous Conviction Act*, 1836).—*Course of proceedings at the trial on a charge of felony after a previous conviction of felony.*]—*After reciting that by* 7 & 8 G. 4, c. 28 (supra), *provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction of felony; and that since the passing of the said Act the practice had been on the trial of any person for any subsequent felony to charge the jury to inquire at the same time concerning such previous conviction: and that doubts might be reasonably entertained whether such practice was consistent with a fair and impartial inquiry as regarded the matter of such subsequent felony, and it was expedient that such practice should thenceforth be discontinued, enacts:*—That from and after the passing of this Act [20th August, 1836] it shall not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: provided nevertheless, that if upon the trial of any person for any such subseequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned; and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.

6 & 7 *G.* 5, *c.* 50 (*Larceny Act*, 1916), *s.* 37.—*Punishment of simple larceny after a previous conviction of felony, etc.*]—Ante, p. 501.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 12.—*Uttering base coin after a previous conviction under ss.* 9-11.]—Ante, p. 1101.

27 & 28 *Vict. c.* 47 (*Penal Servitude Act*, 1864), *s.* 9.—*Remission of convict to undergo original sentence on revocation or forfeiture of licence.*]—Where any licence granted in the form set forth in the said schedule A. is forfeited by a conviction *on indictment of any offence*, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall for the purpose of his undergoing such last-mentioned punishment be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined by warrant under the

hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.

[*The words in italics were substituted for words originally in the enactment by* 54 & 55 Vict. c. 69, s. 3. *The section applies now to licences in any form:* 27 & 28 Vict. c. 47, s. 10; 54 & 55 Vict. c. 69, s. 5. *As to the effect of the section on the powers of the Court*, see ante, p. 234.]

28 & 29 *Vict. c.* 18 (*Criminal Procedure Act*, 1865), *s.* 6.—*Proof of conviction for felony or misdemeanor.*]—A witness may be cross-examined as to whether he has been convicted of any felony or misdemeanor, and if, on being so questioned, he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk or officer of the Court or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of four shillings, and no more, shall be demanded or taken), shall upon proof of the identity of the person be sufficient evidence of the said conviction without proof of the signature or official character of the person appearing to have signed the same.

[*This enactment is qualified by* 61 & 62 Vict. c. 36 (Criminal Evidence Act, 1898), *as to the cross-examination of an accused person who elects to give evidence on oath;* see ante, p. 458. *As to what is necessary for "proof of the identity" of a convicted person*, see Martin *v.* White [1910] 1 K. B. 665; 79 L. J. (K. B.) 553.]

34 & 35 *Vict. c.* 112 (*Prevention of Crimes Act*, 1871), *s.* 5.—*Convict under licence to notify residence to police.*]—Every holder of a licence granted under the *Penal Servitude Acts*, who is at large in Great Britain or Ireland, shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, *and whenever he is about to leave a police district, he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at that place; and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district*; moreover, every male holder of such licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself or to such other person as that officer may direct, and such report may, according as such officer directs, be required to be made personally or by letter. *If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall, in any such case, be guilty of an offence against this Act, unless he proves to the satisfaction of the Court before whom he is tried, either that being on a journey he tarried*

no longer in the place, in respect of which he is charged with failing to notify his place of residence, than was reasonably necessary, or that otherwise he did his best to act in conformity with the law; and on conviction of such offence it shall be lawful for the Court in its discretion either to forfeit his licence, or to sentence him to imprisonment, with or without hard labour, for a term not exceeding one year. [*The words in italics in this section were substituted for the original provisions of the section by s.* 4 (1) *of the* Penal Servitude Act, 1891 (54 & 55 Vict. c. 69).]

42 & 43 *Vict. c.* 55 (*Prevention of Crime Act*, 1879), *s.* 2.]—*After reciting* 34 & 35 Vict. c. 112, ss. 5, 8, *enacts that* :—Any holder of a licence required under s. 5 (*supra*), and any person subject to the supervision of the police required under s. 8 of the *Prevention of Crimes Act*, 1871 (*post*, p. 1464), to notify his residence or any change of his residence to a chief officer of police, shall comply with such requirement by personally presenting himself and declaring his place of residence to the constable or person who at the time when such notification is made is in charge of the police station or office of which notice has been given to such holder or person as the place for receiving his notification, or if no such notice has been given, in charge of the chief office of such chief officer of police.

The power of the chief officer of a police district to direct that the reports required by ss. 5 and 8 of the *Prevention of Crimes Act*, 1871, to be made by holders of licences and persons subject to the supervision of the police shall be made to some other person, shall extend to authorize him to direct such reports to be made to the constable or person in charge of any particular police station or office without naming the individual person.

Any appointment, direction, or authority purporting to be signed by the chief officer of police, and to have been made or given for the purposes of this Act, or of ss. 5 and 8 of the *Prevention of Crimes Act*, 1871, or one of them, shall be evidence until the contrary is proved, that the appointment, direction, or authority thereby made or given was duly made or given by the chief officer of police, and evidence that it appears from the records kept by authority of the chief officer of police that a person required as above mentioned to notify his residence or change of residence, or make a report, has failed to comply with such requirement, shall be *primâ facie* evidence that the person has not complied with such requirement; but if the person charged alleges that he made such notification or report to any particular person or at any particular time, the Court shall require the attendance of such persons as may be necessary to prove the truth or falsehood of such allegation.

34 & 35 *Vict. c.* 112, *s.* 7.—*Special offences by persons twice convicted of crime.*]—Where any person is convicted on indictment of a crime [*defined s.* 20, *post*, p. 1467], and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence under this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them :—

First.—If, on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a court of summary jurisdiction, it appears to such court that there are reasonable grounds for believing that the person so charged is getting his livelihood by dishonest means : or,

Secondly.—If, on being charged with any offence punishable on indictment or summary conviction, and on being required by a court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or a false address : or,

Thirdly.—If he is found in any place, whether public or private, under such circumstances as to satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction ; or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction : or,

Fourthly.—If he is found in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure-ground, or nursery-ground, or in any building or erection in any garden, orchard, pleasure-ground, or nursery-ground, without being able to account to the satisfaction of the Court before whom he is brought for his being found on such premises.

Any person charged with being guilty of any offence against this Act mentioned in this section may be taken into custody as follows : (that is to say),

In the case of any such offence against this Act as is first in this section mentioned, by any constable without warrant, if such constable is authorised so to do by the chief officer of police of his district ;

In the case of any such offence against this Act as is thirdly in this section mentioned, by any constable without warrant, although such constable is not specially authorized to take him into custody.

Also, where any person is charged with being guilty of an offence against this Act fourthly in this section mentioned, he may, without warrant, be apprehended by any constable, or by the owner or occupier of the property on which he is found, or by the servants of the owner or occupier, or by any other person authorized by the owner or occupier, and may be detained until he can be delivered into the custody of a constable.

[*The provisions of this section, being very stringent, must not be invoked on mere suspicion. There must be positive testimony to enable the police to bring a prosecution.* R. *v.* Pavitt, 75 J. P. 432 (C. C. A.). *The defendant can elect to be tried on indictment*, 42 & 43 Vict. c. 49. s. 17 (*ante*, p. 7).

Indictment.

THE KING *v.* A. B.

Hants Quarter Sessions held at Winchester.

PRESENTMENT OF THE GRAND JURY.

A. B. is charged with the following offence :—

STATEMENT OF OFFENCE.

Waiting for an opportunity to commit an offence, contrary to section 7 of the Prevention of Crimes Act, 1871.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, A.D. ——, was convicted on indictment of burglary at the Central Criminal Court, and a previous conviction of larceny was then and there proved against him.

A. B., on the —— day of ——, A.D. —— ("*within seven years immediately after the* expiration *of the sentence passed on him for the* last *of such crimes*"), in the county of ——, was found in a public place, namely, —— Street, waiting for an opportunity to commit or aid in the commission of larceny.

The previous convictions must be given in evidence to the jury on the trial for the subsequent offence, as their proof is essential to establish the complete offence. R. v. *Penfold* [1902] 1 K. B. 547; 71 L. J. (K. B.) 306; 20 Cox, 161; 66 J. P. 248, overruling R. *v.* Brown, 65 J. P. 136. *The punishment under this section is altered by* 54 & 55 Vict. c. 69, s. 6, infra.

34 & 35 *Vict. c.* 112, *s.* 8.—*Sentence of supervision of the police, when it may be passed.*]—Where any person is convicted on indictment of a "crime" [*as defined in s.* 20, post, p. 1467], and a previous conviction of a crime is proved against him, the Court, having cognizance of such indictment, may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the Court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes. Every person subject to the supervision of the police, who is at large in Great Britain or Ireland, shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, *and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at that place, and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district;* moreover, every person subject to the supervision of the

police if a male shall once in each month report himself, at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself, or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter. [*The words in italics were substituted for the former words by* 54 & 55 Vict. c. 69, s. 4 (1). *The penalty for non-compliance with this section is contained in the last paragraph printed under s.* 5 (ante, p. 1461), *which was by* 54 & 55 Vict. c. 69, s. 4 (1), *substituted for the penalty clause of the present section.*]

54 & 55 *Vict. c.* 69 (*Penal Servitude Act*, 1891), *s.* 2.]—Any constable may take into custody without warrant any holder of a licence under the *Penal Servitude Acts* (16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3 *(ante*, p. 237); and 27 & 28 Vict. c. 47, *see ante*, p. 1460, *and this Act*), or any person under the supervision of the police in pursuance of the *Prevention of Crimes Act*, 1871, whom he reasonably suspects of having committed any offence, and may take him before a court of summary jurisdiction to be dealt with according to law. Any convict may be convicted before a court of summary jurisdiction of an offence against s. 3 of the *Prevention of Crimes Act*, 1871, although he was brought before the Court on some other charge or not in manner provided by that section.

Sect. 4, sub-s. 1.]—*Incorporated with* 34 & 35 Vict. c. 112, ss. 5 (ante, p. 1461) and 8 (ante, p. 1464), *which it amends.*

Sub-sect. 2.]—His Majesty may by order under the hand of a secretary of state, remit any of the requirements of ss. 5 and 8 of the *Prevention of Crimes Act*, 1871, either generally or in the case of any holder of a licence or person subject to the supervision of the police. [*See* 4 & 5 Geo. 5, c. 58, s. 26 (1).]

Sect. 6.—*Extension of* 34 & 35 *Vict. c.* 112, *s.* 7].—A person who has been convicted on indictment of a crime within the meaning of the *Prevention of Crimes Act*, 1871 *(see s.* 20, *post*, p. 1467), and against whom a previous conviction of such a crime is proved shall, (*a*) if the second sentence is to a term of imprisonment, then at any time within seven years after the expiration of the sentence: and (*b*) if the second sentence is to a term of penal servitude then whilst at large on licence under that sentence, and also at any time within seven years after the expiration of the sentence, be guilty of an offence against the *Prevention of Crimes Act*, 1871, under the circumstances stated in s. 7 of that Act *(ante*, p. 1462), or any of them, and may be taken into custody in manner provided by that section. [*See R.* v. *Penfold* [1902] 1 K. B. 547; 71 L. J. (K. B.) 306, *ante*, p. 1464.]

34 & 35 *Vict. c.* 112, *s.* 9.—*Form of, and proceedings upon, indictment charging previous conviction.*]—The rules contained in the one hundred and sixteenth section of the *Larceny Act*, 1861 (24 & 25 Vict. c. 96), *(ante*, p. 172), in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act after previous conviction for a crime, whether the crime

charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the *Larceny Act*, 1861. (*a*) [*This section does not apply to an indictment for an offence under s.* 7. R. *v.* Penfold, ante, p. 1464. *In* Faulkner *v.* R. [1905] 2 K. B. 76; 74 L. J. (K. B.) 562, *where the provisions as to arraignment contained in s.* 116 *of the* Larceny Act, 1861, *as extended by this section, were contravened, the conviction was quashed on writ of error.* And see R. *v.* Huberty [1905] 70 J. P. 6 (ante, p. 1327).]

Sect. 14.—*Care of children of women convicted of crime after a previous conviction.*]—Rep. 8 Edw. 7, c. 67, s. 134. See s. 58 *of that Act.*

Sect. 18.—*How previous convictions may be proved.*]—A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall, in the case of an indictable offence, consist of a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction, and purporting to be signed by the clerk of the Court, or other officer having the custody of the records of the Court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the Court by which such conviction was made, or by the clerk or other officer of any court to which such conviction had been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction. [*See ante*, pp. 421-424; *Commissioner of Metropolitan Police* v. *Donovan* [1903] 1 K. B. 895; 72 L. J. (K. B.) 545; 20 Cox, 435; *Martin* v. *White* [1910] 1 K. B. 665; 79 L. J. (K. B.) 553.]

4 *& 5 Geo.* 5, *c.* 58 (*Criminal Justice Administration Act*, 1914) *s.* 28 (1).] —The record or extract by which a conviction may be proved under section

(*a*) This section put an end to controversies as to the proper course to be pursued under 7 & 8 G. 4, c. 28, s. 11, and 6 & 7 W. 4, c. 111, as to which see Archb. Cr. Pl. (23rd ed.) 1320 n.; 2 Russ. Cr. (4th ed., by Greaves) 349; Greaves, Crim. Law Cons. Acts (2nd ed.), 201.

eighteen of the *Prevention of Crimes Act*, 1871, may in the case of a summary conviction consist of a copy of the minute or memorandum of the conviction entered in the register required to be kept under section twenty-two of the *Summary Jurisdiction Act*, 1879, purporting to be signed by the clerk of the court by whom the register is kept.

34 & 35 *Vict. c.* 112, *s.* 20.—*Interpretation.*]—The expression "crime" means, in England and Ireland, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under the fifty-eighth section of the *Larceny Act*, 1861 (*now the twenty-eighth section of the Larceny Act*, 1916, ante, p. 654); and in Scotland, any of the pleas of the Crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing, falsehood, fraud and wilful imposition, uttering base coin, or the possession of such coin with intent to utter the same. [*This definition is incorporated in Part II. of the* Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), post, pp. 1469, 1470.]

The expression "offence" means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.

Indictment for Felony after a Previous Conviction for Felony.

After charging the subsequent offence or offences, state at the conclusion of the indictment:—

A. B. has been previously convicted of felony, to wit, burglary, on the —— day of ——, A.D. ——, at the Assizes held at Reading. [*See* 5 & 6 G. 5, c. 90, r. 11, *ante*, p. 53.]

The subsequent offence must be first *charged in any indictment for committing a crime as defined by* 34 & 35 Vict. c. 112, s. 20 (supra), *after previous conviction for a crime* (34 & 35 Vict. c. 112, s. 9, ante, p. 1465, and see post, p. 1470). *Any number of previous convictions may be laid and proved.* R. *v.* Clark, Dears. 198; 22 L. J. (M. C.) 135; 6 Cox, 210. *In* R. *v.* Garland, Ir. Rep. 3 Ch. 383; 11 Cox, 224, *the Irish Court for Crown Cases Reserved held that a previous conviction for felony could not be charged in an indictment for a subsequent misdemeanor, and quashed the conviction upon an indictment so framed, but the English Court of Crown Cases Reserved affirmed a conviction in a like case.* R. *v.* Deane, 46 L. J. (M. C.) 155. *This case, however, seems to have turned upon a different point, namely, the question of punishment, nor does* R. *v.* Garland *appear to have been cited to the Court. It is submitted that* R. *v.* Garland *was correctly decided.* See R. *v.* Deane, 46 L. J. (M. C.) at p. 156, note, and Roscoe, Cr. Ev. (13th ed.) 162.

Punishment.]—*Where the indictment is for a felony not punishable with death, and not being simple larceny, committed after a previous conviction for*

felony, the punishment is penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour for the whole or any part of the imprisonment. 7 & 8 G. 4, c. 28, s. 11 (ante, p. 1459); 20 & 21 Vict. c. 3 (ante, p. 237); 54 & 55 Vict. c. 69, s. 1 (ante, pp. 238, 239).

Where the indictment is for simple larceny committed after a previous conviction for felony, the punishment under 6 & 7 Geo. 5, c. 50, s. 37 (1), (3), (4), ante, p. 501, *is penal servitude for any term not exceeding ten years, or imprisonment for not more than two years, with or without hard labour; and, in the case of a male under sixteen, whipping in addition.*

Where the indictment is for simple larceny (or any offence made punishable like simple larceny), committed after a previous conviction of any indictable misdemeanor punishable under the Larceny Act, 1916, *the punishment is penal servitude for not more than seven years, or imprisonment for not more than two years, with or without hard labour, and, in the case of a male under sixteen, whipping in addition,* 6 & 7 Geo. 5, c. 50, s. 37 (2) (*a*), (3), (4) (ante, p. 501).

Under the Larceny Act, 1861, *it was held that "any offence made punishable like simple larceny" was intended to apply to the offences referred to in ss.* 31, 32, 33, *and* 36 *of the* Larceny Act, 1861, *and did not include the offence of obtaining goods, etc., by false pretences.* R. *v.* Horn, 15 Cox, 205 (C. C. R.). See *now s.* 37 *of the* Larceny Act, 1916, ante, p. 501. *The only effect of charging a previous conviction for an indictable misdemeanor punishable under the* Larceny Act, 1916, *in an indictment for obtaining goods, etc., by false pretences is to enable the Court to pass a sentence of police supervision, obtaining goods, etc., by false pretences being a "crime" within s.* 20 *of the* Prevention of Crimes Act, 1871 (ante, p. 1467).

Where the indictment is for simple larceny, or any offence made punishable like simple larceny, committed after two summary convictions of any offence punishable upon summary conviction under 24 & 25 Vict. c. 96, *or* 24 & 25 Vict. c. 97, *or* 6 & 7 G. 5, c. 50, *the punishment is penal servitude for not more than seven years, or imprisonment for not more than two years, with or without hard labour, and, in the case of a male under sixteen, whipping in addition.* 6 & 7 G. 5, c. 50, s. 37 (2) (*b*), (3), (4) (ante, p. 501).

Police supervision.]—*The* Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 8 (ante, p. 1464), *as explained by s.* 20 (ante, p. 1467), *prescribes, as an addition to the sentence which may be passed in certain cases of subsequent conviction, the sentence of subjection to the supervision of the police. The circumstances under which that sentence may be passed, and its duration, are fully set out in the sections above referred to. As to the form of and the proceedings upon the indictment in such cases, see s.* 9 (ante, p. 1465).

As to the form of indictment and the punishment in the case of subsequent coinage offences, see ante, pp. 1090 et seq.

Evidence.

The allegations in the order in which they occur in the indictment are—1. The subsequent felony, which is proved as in other cases. See *the different titles.* 2. The previous conviction, which is proved by a certificate or, in the case of a

summary conviction, by a copy (7 & 8 G. 4, c. 28, s. 11 (*ante*, p. 1459); 24 & 25 Vict. c. 96, s. 116; 24 & 25 Vict. c. 99, s. 37 (*ante*, p. 1090); 34 & 35 Vict. c. 112, s. 18 (*ante*, pp. 422, 1466)), with evidence of the identity of the defendant. To prove the identity, it is not essential to call a witness who was present at the trial to which the certificate refers: it is sufficient to prove that the defendant is the person who was convicted as stated in the certificate, *R.* v. *Crofts*, 9 C. & P. 219: *R.* v. *Leng*, 1 F. & F. 77; S. C. as *R.* v. *Levy*, 8 Cox, 73. *See Martin* v. *White* [1910] 1 K. B. 665; 79 L. J. (K. B.) 553. In *R.* v. *Ackroyd*, 1 C. & K. 158: *R.* v. *Stonnell*, 1 Cox, 142, it was held that the certificate *must* state that *judgment* was given for the previous felony; and that it was insufficient to state a conviction. But these decisions if not overruled do not apply where a previous verdict or plea of guilty has been entered under the *Criminal Law Consolidation Acts* of 1861, even if not followed by a judgment. *R.* v. *Blaby* [1894] 2 Q. B. 170; 63 L. J. (M. C.) 133; 18 Cox, 5. As to what constitutes a conviction *at common law*, *or under the* Criminal Appeal Act, 1907, see ante, pp. 230, 334, and Felstead *v.* R. [1914] A. C. 534; 83 L. J. (K. B.) 1132.

SECT. 2.

OFFENCES BY HABITUAL CRIMINALS.

8 *Edw.* 7, *c.* 59 (*Prevention of Crime Act*, 1908), *s.* 10.—*Power of court to pass sentence of preventive detention in addition to penal servitude.*]—(1) Where a person is convicted on indictment of a crime, committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention, and a person on whom such a sentence is passed shall, whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, be deemed for the purposes of the *Forfeiture Act*, 1870, and for all other purposes, to be a person convicted of felony. [*The words "a crime committed after the passing of this Act" refer to the date of the royal assent* (December 21, 1908), *and not to the coming into operation of the Act* (August 1, 1909, *by s.* 19 (2)), *so that persons convicted of crimes committed after December* 21, 1908, *may be prosecuted as habitual criminals.* R. *v.* Smith [1910] 1 K. B. 17; 79 L. J. (K. B.) 1; 26 T. L. R. 23; 3 Cr. App. R. 40.]

(2) A person shall not be found to be a habitual criminal unless the jury finds on evidence—

(a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

(b) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

(3) *Repealed by the* Indictments Act, 1915. [*See* 5 & 6 G. 5, c. 90, r. 11, *ante*, p. 53.]

(4) In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again. [*Where the accused pleads guilty to the primary charge against him, but pleads not guilty to being a habitual criminal, it is sufficient to swear the jury in the ordinary way as for misdemeanor only.* R. *v.* Turner [1910] 1 K. B. 346; 79 L. J. (K. B.) 176; 26 T. L. R. 212; 74 J. P. 81; 3 Cr. App. R. 103. *Where two persons are jointly charged with the primary crime, and each is also charged as a habitual criminal, it is advisable that each should, on conviction of the primary crime, be separately arraigned and tried on the charge of being a habitual criminal.* R. v. *Taylor*, 5 *Cr. App. R.* 168, *explaining* R. v. *Blake*, 4 *Cr. App. R.* 275. *The proceedings relating to the crime charged in the indictment, and to the charge of being a habitual criminal must be before the same jury.* R. *v.* Hunter [1921] 1 K. B. 555; 85 J. P. 147:

Provided that a charge of being a habitual criminal shall not be inserted in an indictment—

(a) without the consent of the director of public prosecutions; and

(b) unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge;

and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge. [*In Scotland a different procedure is followed*; see s. 17 (3).]

(5) Without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life.

(6) For the purposes of this section the expression "crime" has the same meaning as in the *Prevention of Crimes Act*, 1871 (*ante*, p. 1467), and the definition of "crime" in that Act, set out in the schedule to this Act, shall apply accordingly. [*This sub-section does not apply to Scotland; see s.* 17 (4).]

Schedule.—The expression "crime" means, in England and Ireland, any felony or the offence of uttering false or counterfeit coin (*a*), or of possessing

(*a*) Uttering, under ss. 9, 10, 15 of the *Coinage Offences Act*, 1861, is not punishable by penal servitude.

counterfeit gold or silver coin (*b*), or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud (*c*), or any misdemeanor under the fifty-eighth section of the *Larceny Act*, 1861 (*now the twenty-eighth section of the* Larceny Act, 1916, ante, p. 654).

Sect. 11.—*Appeal against sentence to Court of Criminal Appeal.*]—A person sentenced to preventive detention may, notwithstanding anything in the *Criminal Appeal Act*, 1907 (*ante*, pp. 300 *et seq.*), appeal against the sentence without the leave of the Court of Criminal Appeal. [*Different provisions are made as to Scotland* (*s.* 17 (5)) *and Ireland* (*s.* 18 (*f*)). *The Court of Criminal Appeal has decided to treat this provision as including a right to appeal against the primary sentence of penal servitude, which is made, by s.* 10 (1) *of this Act, a condition precedent to a sentence of preventive detention.* R. *v.* Smith [1910] 1 K. B. 17; 79 L. J. (K. B.) 1; 26 T. L. R. 23; 3 Cr. App. R. 40.]

Sect. 12.—*Powers in certain cases to commute penal servitude to preventive detention.*]—Where a person has been sentenced, whether before or after the passing of this Act, to penal servitude for a term of five years or upwards, and he appears to the Secretary of State to have been a habitual criminal within the meaning of this Act, the Secretary of State may, if he thinks fit, at any time after three years of the term of penal servitude have expired, commute the whole or any part of the residue of the sentence to a sentence of preventive detention, so, however, that the total term of the sentence when so commuted shall not exceed the term of penal servitude originally awarded. [*Such sentence must be passed for the offence "on its merits," and not with a view to recommending the Secretary of State to exercise his powers under this section in the case of a convict who has not been tried as a habitual criminal.* R. *v.* Flicker, 26 T. L. R. 540; and see R. *v.* Raybould, 73 J. P. 334; 2 Cr. App. R. 184.]

Sect. 13.—*Effect and execution of sentence.*]—(1) The sentence of preventive detention shall take effect immediately on the determination of the sentence of penal servitude, whether that sentence is determined by effluxion of time or by order of the Secretary of State at such earlier date as the Secretary of State, having regard to the circumstances of the case and in particular to the time at which the convict, if sentenced to penal servitude alone, would ordinarily have been licensed to be at large, may direct. [*Sub-ss.* (2), (3) *and* (4) *deal with the treatment of prisoners under sentence of preventive detention.*]

Sect. 14.—*Power to discharge on licence.*]—(1) The Secretary of State shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, take into consideration the condition, history, and circumstances of that person with a view to determining whether he shall be placed out on licence, and, if so, on what conditions. [*Sub-ss.* (2), (3), (4), (5) *and* (6) *give power to the Secretary of State to discharge on licence and regulate supervision, etc., of persons so discharged.*]

(*b*) Possessing counterfeit gold or silver coin is punishable by penal servitude under s. 11.

(*c*) This offence is not punishable by penal servitude. Consequently it would seem that no sentence of preventive detention can be passed on a primary conviction for this offence, even if the offender is proved to be a habitual criminal.

(7) The provisions relating to licences to be at large granted to persons undergoing penal servitude (*ante*, pp. 1460-1462) shall not apply to persons undergoing preventive detention.

Sect. 15.—*Provisions as to persons placed out on licence.*

Indictment for being a Habitual Criminal.

After charging the primary crime, add:—"A. B. is a habitual criminal." 5 & 6 G. 5, c. 90, r. 11 (*ante*, p. 53). *This is not a count in the indictment, but an allegation as to the status of the accused.* R. *v.* Hunter, infra.

Where the primary "crime" is not one for which penal servitude can be imposed (see ante, p. 1471 and notes), *a sentence of preventive detention cannot be passed, and it is useless to charge the offender as a habitual criminal. When a prisoner has been tried and convicted of the substantive offence charged in the indictment the trial of the charge of being a habitual criminal cannot be adjourned to a subsequent session;* R. *v.* Hunter [1921] 1 K. B. 555; 85 J. P. 147; *but the judge can discharge the jury from giving a verdict on the whole indictment and direct that the whole case be tried at a subsequent session of the Court.* R. *v.* Jennings, 74 J. P. 245; 4 Cr. App. R. 120.

Punishment: preventive detention for not less than five nor more than ten years, to take effect on the determination of a sentence of penal servitude (for not less than three years) for the primary crime charged in the indictment. (See 8 Edw. 7, c. 59, s. 10 (1), ante, p. 1469). *The sentence on the primary charge should not be pronounced before the trial of the charge of being a habitual criminal.* R. *v.* Turner [1910] 1 K. B. 346; 79 L. J. (K. B.) 176; 26 T. L. R. 112; 3 Cr. App. R. 103; 74 J. P. 81: R. *v.* Walker, 27 T. L. R. 51; 5 Cr. App. R. 231. *It is not proper to increase the sentence for the primary offence so as to enable the Court to pass sentence of preventive detention.* R. *v.* Jones, 27 T. L. R. 108; 6 Cr. App. R. 1: R. *v.* Bell, 30 T. L. R. 645; 10 Cr. App. R. 262. *Before these decisions doubt had been expressed in the case of* R. *v.* Sweeney, 4 Cr. App. R. 70, 72. *It is to be observed that there are three conditions precedent to passing a sentence of preventive detention,* viz., (1) *the offender must be convicted on indictment of a crime committed after the passing of* 8 Edw. 7, c. 59 (viz., *December* 21, 1908, R. *v.* Smith, [1910] 1 K. B. 17); (2) *he must subsequently admit that he is, or must be found by the jury to be, a habitual criminal;* (3) *a sentence of penal servitude must be lawful in respect of the primary offence and must be passed by the Court.*

Sentences of penal servitude for more than three years have in several cases been reduced to three years where preventive detention has also been ordered. R. *v.* Smith [1910] 1 K. B. 17, 27: R. *v.* Smith, 3 Cr. App. R. 90. R. *v.* Walker, 27 T. L. R. 51; 5 Cr. App. R. 231.

As to the principles to be observed in determining the length of the period of preventive detention, see R. *v.* Crowley, *and* R. *v.* Sullivan, 83 L. J. (K. B.) 298; 78 J. P. 142; 30 T. L. R. 94; 9 Cr. App. R. 201.

Evidence.

Consent of director of public prosecutions.]—By s. 10 (4) (*a*) the consent of the director of public prosecutions is required for the insertion in the indictment of a charge of being a habitual criminal. This is essential: *See R.* v. *Harris and others*, 38 T. L. R. 343; but such consent need not be averred in the indictment. *See* s. 10 (3); *R.* v. *Waller* [1910] 1 K. B. 364; 79 L. J. (K. B.) 184; 26 T. L. R. 142; 3 Cr. App. R. 213; 74 J. P. 81. The consent of the assistant director is made equivalent by 8 Edw. 7. c. 3, s. 1 (5). Such consent is given in writing signed by the director or assistant director.

The prosecution is not bound to prove the consent of the director of public prosecutions as a part of the case before the petty jury, and the Court may assume that such consent has been given, unless objection is taken on behalf of the prisoner. *R.* v. *Waller* (*supra*). *Cf. Knowlden* v. *R.*, 5 B. & S. 532; 33 L. J. (M. C.) 219; 10 L. T. 691; 9 Cox, 483. If objection is taken, a document purporting to be signed by the director must be produced and proved. The Court of Criminal Appeal has declined to lay down any general rule as to the exact method of proof required, but has held that it would be sufficient to call a person who had been in communication with the director, and had received the document produced in the ordinary course. *R.* v. *Turner* [1910] 1 K. B. 346; 79 L. J. (K. B.) 176; 26 T. L. R. 112; 79 L. J. (K. B.) 176; 3 Cr. App. R. 103. Judicial notice cannot be taken of the signature of the director of public prosecutions under the *Evidence Acts* of 1845 (8 & 9 Vict. c. 113, s. 1) or 1851 (14 & 15 Vict. c. 99, s. 14). *R.* v. *Waller* (*supra*).

Seven days' notice.]—By s. 10 (4) (*b*) not less than seven days' notice must have been given to the proper officer of the Court, by which the accused is to be tried, and to the accused himself, that it is intended to insert such a charge in the indictment. The seven days must be seven *clear* days. *R.* v. *Turner* (*supra*). Any objection to the notice on this ground must be taken at the trial, or it will not be entertained by the Court of Criminal Appeal. *R.* v. *Weston* [1910] 1 K. B. 17; 79 L. J. (K. B.) 1; 3 Cr. App. R. 53. *See also R.* v. *Jones*, 5 Cr. App. R. 29.

To the proper officer of the Court.]—Receipt of the notice may be proved by the person who gave it, or by a person in the office of the clerk of the Court, without calling the clerk himself, but it must be proved in some shape or other. *R.* v. *Turner* (*supra*). It seems, however, that if no objection to the absence of this evidence is taken at the trial, the Court of Criminal Appeal will not interfere with the verdict. *R.* v. *Foster*, 3 Cr. App. R. 173.

To the accused.]—By s. 10 (4) (*b*) the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge. The three previous convictions relied upon for this purpose must be specifically stated, but the other grounds (if any) may be stated in a general way as grounds, not as evidence:—*e.g.*, that the accused is a habitual associate of thieves. *R.* v. *Turner* (*supra*); *and see R.* v. *Webber* [1913] 1 K. B. 33; 23 Cox, 323; 82 L. J. (K. B.) 108; and *R.* v. *Harris and others*, 38 T. L. R. 343. It is not sufficient to say that the accused has been persistently leading a dishonest or a criminal life. *Id.* Where the three

previous convictions alone are relied upon by the prosecution as affording sufficient proof that the accused is a habitual criminal (*see infra*), other grounds need not be specified in the notice. *R.* v. *Waller*, *ante*, p. 1473. If the notice given to the prisoner is not produced at the trial, secondary evidence of its contents may be given. *R.* v. *Turner*, *ante*, p. 1473.

Evidence cannot be given of a nature not suggested by the grounds set out in the notice, and where such evidence has been given the conviction may be quashed on appeal. *R.* v. *Fawcett*, 74 J. P. 444; 5 Cr. App. R. 115 : *R.* v. *Moran*, 75 J. P. 110; 5 Cr. App. R. 110 : *R.* v. *Maxfield*, 28 T. L. R. 404; 7 Cr. App. R. 230 : *R.* v. *Wilson*, 28 T. L. R. 561; 8 Cr. App. R. 20 : *R.* v. *Fowler*, 77 J. P. 379; 29 T. L. R. 422; 8 Cr. App. R. 240 : *R.* v. *Neilson*, 23 Cox, 685; 78 J. P. 158; 30 T. L. R. 125; 9 Cr. App. R. 218; *R.* v. *Westfall*, 85 J. P. 116; *R.* v. *Wilkins*, 16 Cr. App. R. 96; unless the Court hold that it cannot have had any effect on the jury. *R.* v. *Westwood*, 29 T. L. R. 492; 8 Cr. App. R. 273 : *R.* v. *Heron*, 77 J. P. 380; 9 Cr. App. R. 29 : *R.* v. *Russell*, 12 Cr. App. R. 271; *and see R.* v. *Harris and others*, *ante*, p. 1473.

These preliminary requirements having been satisfied, prove the charge as defined by s. 10 (2) (*a*) (*ante*, p. 1469).

Age.]—The age of the accused must be proved unless it is obvious from his appearance that he was over sixteen at the time of the first in date of the three previous convictions relied upon by the prosecution and specified in the notice above referred to. A prison official may be called to prove that the age, as shown in the calendar, was so stated on the authority of the accused. *R.* v. *Turner*, *ante*, p. 1473.

Three previous convictions.]—Prove the three previous convictions precisely as specified in the notice given to the accused. *R.* v. *Turner*, *ante*, p. 1473. These must be strictly proved. *R.* v. *Franklin*, 3 Cr. App. R. 48; 74 J. P. 24 : *R.* v. *Stewart*, 74 J. P. 246; 4 Cr. App. R. 175. As to the mode of proving previous convictions, *see ante*, pp. 421-424.

Other convictions.]—It is not necessary to prove any other convictions which are set out in the notice served on the appellant with the same strictness. *R.* v. *Franklin* (*supra*) : *R.* v. *Chatway*, 5 Cr. App. R. 151 : *R.* v. *Summers*, 10 Cr. App. R. 11.

Leading persistently a dishonest or criminal life.]—The evidence that the accused is leading persistently a dishonest or criminal life must be brought down to the time of arrest. *R.* v. *Turner*, *ante*, p. 1473 : *R.* v. *Brown*, 23 Cox, 615; 78 J. P. 79; 30 T. L. R. 40; 9 Cr. App. R. 161. But evidence may be given of his past conduct generally. *Id.* By s. 10 (5) evidence of character and repute may be given; and other convictions, in addition to the three above referred to, may be proved in order to show his habit of life. *R.* v. *Franklin* (*supra*) : *R.* v. *Brummitt*, 4 Cr. App. R. 192 : *R.* v. *Sullivan*, 30 T. L. R. 94; 9 Cr. App. R. 201. The three previous convictions specified in the notice alone may in some cases, from the nature of the crimes and the surrounding circumstances, be sufficient proof of dishonesty or criminality of life. *R.* v. *Waller*, *ante*, p. 1473. *And see R.* v. *Foster*, 3 Cr. App. R. 173 : *R.* v. *Everitt*, 27 T. L. R. 570; 6 Cr. App. R. 267 : *R.* v. *Heard*, 22 Cox, 725; 76 J. P. 232;

106 L. T. 304; 28 T. L. R. 154; 7 Cr. App. R. 80: *R.* v. *Keane*, 8 Cr. App. R. 12: *R.* v. *Wilson*, 28 T. L. R. 562; 8 Cr. App. R. 20; though as a rule some other evidence is required. *R.* v. *Mitchell*, 23 Cox, 284; 108 L. T. 224; 76 J. P. 423; 28 T. L. R. 484; 7 Cr. App. R. 283, as explained in *R.* v. *Wilson*, 28 T. L. R. 562; 8 Cr. App. R. 20; *and see R.* v. *Harris and others*, 38 T. L. R. 343. Where, however, nine months had elapsed since the accused last came out of prison, and the prosecution gave no evidence as to his conduct during that period, the conviction for being a habitual criminal was quashed. *R.* v. *Kelly*, 26 T. L. R. 196; 74 J. P. 167; 3 Cr. App. R. 248: *R.* v. *Wells*, 5 Cr. App. R. 33. But where in a similar case the prisoner himself gave evidence, and was cross-examined as to his conduct during the interval between his last release and subsequent arrest, his conviction as a habitual criminal was affirmed; and this in spite of the fact that he gave no evidence on his own behalf, but was called by his co-defendant. *R.* v. *Rowland*, 26 T. L. R. 202; 3 Cr. App. R. 277. No hard and fast rule can be laid down as to the length of time the interval must be to make it essential to have evidence other than previous conviction to establish persistence in crime. *R.* v. *Heard*, *supra; and see R.* v. *Williams*, 8 Cr. App. R. 49. The failure to report by a convict on licence is not in itself sufficient other evidence where it is required. *R.* v. *Mitchell* (*supra*), as explained in *R.* v. *Wilson* (*supra*). Where the prisoner after expiration of a sentence of penal servitude went to an asylum and some two months after his discharge therefrom committed the primary offence (shopbreaking), the Court held that he had not been proved to be persistently leading a dishonest life, it appearing that he had been kept by the charity of his friends during the two months, and the Court not considering his last offence one which, like coining, would in itself be evidence of persistent criminality. *R.* v. *Baggott*, 26 T. L. R. 266; 4 Cr. App. R. 67. For other illustrations *see R.* v. *Condon*, 4 Cr. App. R. 109: *R.* v. *Martin*, 5 Cr. App. R. 31: *R.* v. *Jones*, *Id.*, 29: *R.* v. *Jennings*, 74 J. P. 245: *R.* v. *Wells*, 5 Cr. App. R. 33: *R.* v. *Marshall*, 74 J. P. 380; 5 Cr. App. R. 25; *R.* v. *Hammersley*, 14 Cr. App. R. 118.

It is important that the judge should take great care in his summing up to explain correctly to the jury what the essential matters are which the Crown must prove in order to establish the allegation against the defendant of being a habitual criminal, and the Court should also be careful to safeguard him as much as possible, since from the nature of the charge and the trial the jury may well be predisposed against him. *R.* v. *Young*, 23 Cox, 624; 78 J. P. 80; 30 T. L. R. 69; 9 Cr. App. R. 185; *and see also R.* v. *Brown*, 23 Cox, 624; 78 J. P. 79; 30 T. L. R. 40: *R.* v. *Sullivan*, 30 T. L. R. 94; 9 Cr. App. R. 201.

By s. 10 (2) (*b*), (*ante*, p. 1470), the charge of being a habitual criminal may also be proved by showing that the accused has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention. *R.* v. *Davis* [1917] 2 K. B. 855; 89 L. J. (K. B.) 119; 13 Cr. App. R. 10.

But the Court has a discretion as to whether it shall pass a sentence of preventive detention. *R.* v. *Stanley* [1920] 2 K. B. 235; 84 J. P. 119; 14 Cr. App. R. 141; *R.* v. *Wilkins*, 16 Cr. App. R. 96.

SECT. 3.

OFFENCES BY HABITUAL DRUNKARDS.

Statutes.

42 & 43 *Vict. c.* 19 (*Inebriates Act*, 1879), *s.* 3.—*Definition of habitual drunkard.*]— . . . "Habitual drunkard" means a person who *not being amenable to any jurisdiction in lunacy* is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself and his or her affairs. *As to who are amenable to jurisdiction in lunacy*, see 53 & 54 Vict. c. 5, s. 116; Wood-Renton on Lunacy, 392, 954. [*A man may be a habitual drunkard within this definition if habitually given to bouts of drinking, although during intervals between the bouts he is a sober man, and capable of managing his affairs.* Eaton *v.* Best [1909] 1 K. B. 632; 78 L. J. (K. B.) 425; 73 J. P. 113; 25 T. L. R. 244.]

61 & 62 *Vict. c.* 60 (*Inebriates Act*, 1898), *s.* 1.—(1) *Power where a habitual drunkard is convicted on indictment for an offence to which drunkenness is a contributory cause, to order detention in an inebriate reformatory.*]—Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is, or is found by the jury to be, a habitual drunkard (*see supra*), the Court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years in any state inebriate reformatory, or in any certified inebriate reformatory the managers of which are willing to receive him. [*The Irish Court for Crown Cases Reserved has held that the word "convicted" includes a plea of guilty, and that the word "evidence" includes the sworn depositions.* R. *v.* Mehan [1905] 2 Ir. Rep. 577.]

(2) . . . In the proceedings on the indictment the offender shall, in the first instance, be arraigned on so much only of the indictment as charges the said offence, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless the offender admits that he is a habitual drunkard, be charged to inquire whether he is a habitual drunkard, and in that case it shall not be necessary to swear the jury again. Provided that, unless evidence that the offender is a habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to charge habitual drunkenness in the indictment. [*Words omitted rep.* Indictments Act, 1915. *The use of the word "given" seems to mean that the notice need not be in writing.* See R. *v.* Shurmer, 17 Q. B. D. 323; 55 L. J. (M. C.) 153 (ante, p. 436).]

Sect. 2.—*Power to detain in an inebriate reformatory a habitual drunkard four times convicted of drunkenness, etc.*]—(1) Any person who commits any

of the offences mentioned in the first schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable on conviction on indictment, or if he consents to be dealt with summarily (*see* 42 & 43 Vict. c. 49, s. 12), on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him. [*The consent of the defendant to be tried summarily under this section is necessary before a magistrate can make an order under s.* 6, *sub-s.* 1, *of the* Licensing Act, 1902. Commissioner of Metropolitan Police *v.* Donovan [1903] 1 K. B. 895; 72 L. J. (K. B.) 545; 20 Cox, 435.]

(2) The *Summary Jurisdiction Act*, 1879 (42 & 43 Vict. c. 49), shall apply to proceedings under this section as if the offence charged were specified in the second column of the first schedule to the Act [*which relates to indictable offences by adults who consent to be summarily tried. Under this clause the offender must be informed of his right to be tried on indictment:* see 42 & 43 Vict. c. 49, s. 17 (ante, p. 7), and R. *v.* Cockshott [1898] 1 Q. B. 582; 67 L. J. (Q. B.) 467. *There is no power under this section to order imprisonment as well as detention in a certified inebriate reformatory, as the words of s.* 1 (1) "*in addition to or in substitution for any other sentence*" *are not inserted in this section.* R. *v.* Briggs [1909] 1 K. B. 381; 78 L. J. (K. B.) 116; 73 J. P. 31; 43 L. J. Newsp. 737].

Sect. 3.—*Power of Secretary of State to establish state inebriate reformatories.*]—*Such reformatories have been established, at Aylesbury Prison for women, and at Warwick Prison for men.* See Parl. Pap. 1904 (C. 2285), p. 91; Parl. Pap. 1909 (C. 4438, 4439).

Sect. 4.—*Power of Secretary of State to make rules and regulations for the management of state inebriate reformatories.*]—*Exercised as to England* 21*st June*, 1901, 8*th June*, 1902, 29*th Dec.*, 1903, *and* 29*th April*. 1904. See Stat. Rules and Orders Revised (ed. 1904), vol. 6, tit. Inebriate, p. 51, and Stat. Rules and Orders, 1904, p. 261.

Sects. 5, 6, 21.—*Power of Secretary of State to certify inebriate reformatories and to make regulations for certified inebriate reformatories.*]—*Model regulations have been framed for such institutions* (Id. p. 51), *but the regulations for each institution are separately certified, and are printed as statutory rules. Regulations have also been made* (6*th Dec.*, 1900) *as to the absence of inmates on leave and* (4*th June*, 1902) *as to transfer of inmates from one such reformatory to another and from such reformatories to state inebriate reformatories; and* (*July* 1, 1904) *as to photographing inmates.*

Sect. 8.—*Power of Treasury to contribute to the expenses of persons detained in certified inebriate reformatories.*]—*Such contributions are made.*

Sect. 9.—*Power of county or borough councils to contribute to or maintain certified inebriate reformatories.*]—See Parl. Pap. 1909 (C. 4438, 4439). *for a report on these Acts.*

Sect. 29.—*Short title and construction.*]—This Act may be cited as the *Inebriates Act*, 1898, and shall be construed as one with the *Inebriates Acts*, 1879 and 1888.

62 & 63 *Vict. c.* 35 (*Inebriates Act*, 1899), *s.* 1.—*Costs.*]—The expenses of any prosecution on indictment under s. 2 of the *Inebriates Act*, 1898, shall be payable as in cases of indictment for felony, and where any case under that section is dealt with summarily, the expenses of the prosecution shall be payable in manner provided by s. 28 of the *Summary Jurisdiction Act*, 1879 (42 & 43 Vict. c. 49). [*This section is adapted to the present practice as to costs by* 8 Edw. 7, c. 15, s. 9 (6), ante, p. 271.]

FIRST SCHEDULE TO 61 & 62 VICT. C. 60.

Being found drunk in a highway or other public place, whether a building or not, or on licensed premises.	*Licensing Act*, 1872 (35 & 36 Vict. c. 94), s. 12.
Being guilty while drunk of riotous or disorderly behaviour in a highway or other public place, whether a building or not.	
Being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine.	
Being drunk while in possession of any loaded firearms.	
Refusing or failing when drunk to quit licensed premises when requested.	*Licensing (Consolidation) Act*, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 80, 112.
Refusing or failing when drunk to quit any premises or place licensed under the *Refreshment Houses Act*, 1860, when requested.	*Refreshment Houses Act*, 1860 (23 & 24 Vict. c. 27), s. 41.
Being found drunk in any street or public thoroughfare within the metropolitan police district, and being guilty while drunk of any riotous or indecent behaviour.	*Metropolitan Police Act*, 1839 (2 & 3 Vict. c. 47), s. 58.
Being drunk in any street and being guilty of riotous or indecent behaviour therein.	*Town Police Clauses Act*, 1847 (10 & 11 Vict. c. 89), s. 29.
Being intoxicated while driving a hackney carriage.	*Town Police Clauses Act*, 1847 (10 & 11 Vict. c. 89), s. 61.
Being drunk during employment as a driver of a hackney carriage, or as a driver or conductor of a stage carriage in the metropolitan police district.	*London Hackney Carriages Act*, 1843 (6 & 7 Vict. c. 86), s. 28.

FIRST SCHEDULE—*continued.*

Being drunk and persisting, after being refused admission on that account, in attempting to enter a passenger steamer.	*Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), s. 287.
Being drunk on board a passenger steamer, and refusing to leave such steamer when requested.	
[Being found drunk on any highway or other public place, whether a building or not, or on any licensed premises, while having the charge of a child under the age of seven years.	*Licensing Act*, 1902 (2 Edw. 7, c. 28), s. 2, sub-s. 3 (E).]
[Being found in a state of intoxication and incapable of taking care of himself and not under the care or protection of some suitable person, in any street, thoroughfare, or public place, whether a building or not, or on any licensed premises.	*Licensing (Scotland) Act*, 1903 (3 Edw. 7, c. 25), s. 70, sub-ss. 1, 3, 5, 6. (*a*)]
[Being drunk while in charge in any street or other place of any carriage, horse, cattle, or steam-engine, or when in the possession of any loaded firearms.	*Licensing (Scotland) Act*, 1903 (3 Edw. 7, c. 25), s. 70, sub-ss. 1, 3. (*b*)]
[Behaving while drunk in a riotous or disorderly manner in any street, thoroughfare, or public place, whether a building or not, or on any licensed premises, or while drunk in any street, etc., using any obscene or indecent language to the annoyance of any person.	*Licensing (Scotland) Act*, 1903 (3 Edw. 7, c. 25), s. 70, sub-ss. 1, 3. (*c*)]
[Being found drunk in any street, thoroughfare, or public place, whether a building or not, while having the charge of a child apparently under the age of seven years.	*Licensing (Scotland) Act*, 1903 (3 Edw. 7, c. 25), s. 70, sub-ss. 2, 3, 5, 6.]
[Being found in any shebeen drunk.	*Public Houses Acts Amendment (Scotland) Act*, 1862 (25 & 26 Vict. c. 35), s. 19. (*d*)]
Refusing or neglecting when drunk to quit any premises or places licensed under the *Refreshment Houses (Ireland) Act*, 1860, when requested.	*Refreshment Houses (Ireland) Act*, 1860 (23 & 24 Vict. c. 107), s. 42.
Being drunk in any street or public thoroughfare within the Dublin police district, or being guilty while drunk of any riotous or indecent behaviour.	*Dublin Police Act*, 1842 (5 & 6 Vict. c. 24), s. 15.
Being found drunk in any street, square, lane, road, way, or other public thoroughfare or place.	*Licensing (Ireland) Act*, 1836 (6 & 7 W. 4, c. 38), s. 12.
All similar offences in local Acts.	

(*a*) Substituted for 25 & 26 Vict. c. 35, s. 23 (*rep.*), and 55 & 56 Vict. c. 55, s. 381 (24) (*rep.*).

(*b*) Substituted for 55 & 56 Vict. c. 55, s. 380 (11), by 3 Edw. 7, c. 25, ss. 70 (4), 110.

(*c*) Substituted for 63 & 64 Vict. c. 28, s. 2 (*rep.*).

(*d*) 25 & 26 Vict. c. 35, s. 19, was repealed by 3 Edw. 7, c. 25, s. 110.

8 *Edw.* 7, *c.* 67 (*Children Act*, 1908), *s.* 26.—*Power as to habitual drunkards.*] —Where it appears to the Court by or before which any person is convicted of an offence of cruelty, or of any of the offences mentioned in the first schedule to this Act (*ante*, p. 994), that that person is a parent of the child or young person in respect of whom the offence was committed, or is living with the parent of the child or young person, and is a habitual drunkard within the meaning of the *Inebriates Acts*, 1879 to 1900, the Court, in lieu of sentencing that person to imprisonment, may, if it thinks fit, make an order for his detention in a retreat under the said Acts, the licensee of which is willing to receive him, for any period named in the order, not exceeding two years, and the said order shall have the like effect, and copies thereof shall be sent to the local authority and Secretary of State in like manner, as if it were an application duly made by that person and duly attested by a justice under the said Acts; and the Court may order an officer of the Court or constable to remove that person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid: Provided that—

(*a*) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the Court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and

(*b*) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the Court shall, before making the order, take into consideration any representation made to it by the wife or husband; and

(*c*) before making the order the Court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat; and

(*d*) nothing in this section shall affect any power of the Court to order the person convicted to be detained in a certified inebriate reformatory [*under* 61 & 62 Vict. c. 60, supra].

[*This section is a re-enactment of* 4 Edw. 7, c. 15, s. 11, *with the addition of* (*d*).]

Charge in indictment (*ante*, p. 1476).

After charging the offence, add "A. B. is a habitual drunkard." 5 & 6 Geo. 5, c. 90, r. 11, ante, p. 53.

Evidence.

As to the proof of the offence charged, *see ante, passim*. Prove also that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence. To prove that the offender is a habitual drunkard, call evidence to show that he is addicted to the intemperate use of intoxicants, and that he has consequently on specified occasions been dangerous

to himself or others, or incapable of managing his affairs, and that he has not been certified as insane, nor otherwise rendered amenable to jurisdiction in lunacy. Previous convictions of offences within the first schedule seem to be admissible. Seven days' notice prior to the trial (*see ante*, p. 1476) of the intention to charge habitual drunkenness must be given to the accused person and to the proper officer of the Court of trial, unless evidence of habitual drunkenness has been given before the magistrates.

Indictment under 61 *&* 62 *Vict. c.* 60, *s.* 2 (ante, p. 1476).

Commencement as ante, p. 1464.

STATEMENT OF OFFENCE.

Habitual drunkard, contrary to section 2 of the Inebriates Act, 1898.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, was found drunk in a highway.

A. B. has been three times summarily convicted, within the twelve months preceding the ——day of ——, of being found drunk in a highway, namely, on —— day of ——, at ——; on the —— day of ——, at ——; and on the —— day of ——, at ——.

A. B., is a habitual drunkard.

Evidence.

Prove the commission of the subsequent offence. Prove the previous convictions by producing a record or extract, with evidence to identify the defendant with the person convicted. *See* 34 & 35 Vict. c. 112, s. 18 (*ante*, pp. 422, 1466). Convictions in Scotland or Ireland appear to be admissible. The register of the Court of summary jurisdiction is sufficient proof on a trial on indictment. 4 & 5 Geo. 5, c. 58, s. 28 (1) (*ante*, p. 423). Prove that the accused is a habitual drunkard as directed under the last precedent.

APPENDICES.

APPENDIX A.

Indictments Act, 1915 (5 & 6 Geo. 5, c. 90).

1.—*Rules as to indictments.*—The rules contained in the First Schedule to this Act with respect to indictments shall have effect as if enacted in this Act, but those rules may be added to, varied, or annulled by further rules made by the rule committee under this Act.

2.—*Powers of rule committee.*—(1) There shall be established for the purposes of this Act a rule committee consisting of the Lord Chief Justice of England for the time being, and of a judge of the High Court, a chairman of quarter sessions, a recorder, a clerk of assize, a clerk of the peace, and another person having experience in criminal procedure, appointed in each case by the Lord Chief Justice.

(2) The rule committee shall have power from time to time, subject to the approval of the Lord Chancellor, to make rules varying or annulling the rules contained in the First Schedule to this Act and to make further rules with respect to the matters dealt with in those rules, and those rules shall have effect subject to any modifications or additions so made.

(3) Any rules made by the rule committee shall be laid, as soon as may be, before both Houses of Parliament, and, if within forty days on which either House has sat since the rules were so laid before the House a petition is presented to His Majesty by that House praying that the rules or any part of them may be annulled, His Majesty may thereupon by Order in Council annul the same, and the same shall thenceforth be void, but without prejudice to the validity of anything done thereunder.

(4) The term of office of any person who is a member of the committee by virtue of appointment shall be such as may be specified in the appointment.

3.—*General provisions as to indictments.*—(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act.

4.—*Joinder of charges in the same indictment.*—Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanor, and charges for both felonies and misdemeanors, may be joined in the same indictment, but where a felony is tried together with any misdemeanor, the jury shall be sworn and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies.

5.—*Orders for amendment of indictment, separate trial, and postponement of trial.*—(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

(2) Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been found by the grand jury in the amended form.

(3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.

(5) Where an order of the court is made under this section for a separate trial or for the postponement of a trial—

(a) if such an order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and

(b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and

(c) the court may make such order as to costs and as to admitting the accused person to bail, and as to the enlargement of recognizances and otherwise as the court thinks fit.

(6) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

6.—*Costs of defective or redundant indictments.*—Where it appears to the court that an indictment contains unnecessary matter, or is of unnecessary

length, or is materially defective in any respect, the court may make such order as to the payment of that part of the costs of the prosecution which has been incurred by reason of the indictment so containing unnecessary matter, or being of unnecessary length, or being materially defective as the court thinks fit.

7.—*Provision as to Vexatious Indictments Acts.*—Nothing in this Act shall prevent an indictment being open to objection if it contravenes or fails to comply with the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), as amended by section one of the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), or any other enactment: Provided that an indictment shall not be open to objection under those Acts on the ground that a count is joined with the rest of the indictment which could not at the time of the passing of the Criminal Law Amendment Act, 1867, be lawfully joined, if that count can be lawfully joined under the law for the time being in force.

8.—*Savings and interpretation.*—(1) Nothing in this Act or the rules thereunder shall affect the law or practice relating to the jurisdiction of a court or the place where an accused person can be tried, nor prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the laws of evidence in criminal cases.

(2) In this Act, unless the context otherwise requires, the expression "the court" means the court before which any indictable offence is tried or prosecuted.

(3) The provisions of this Act relating to indictments shall apply to criminal informations in the High Court and inquisitions, and also to any plea, replication, or other criminal pleading, with such modifications as may be made by rules under this Act.

9.—*Repeal, extent, short title, and commencement.*—(1) The enactments specified in the Second Schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

(2) This Act shall not extend to Scotland or Ireland.

(3) This Act may be cited as the Indictments Act, 1915.

(4) This Act shall come into operation on the first day of April nineteen hundred and sixteen, but shall not apply to indictments in the case of persons committed for trial before that date, or to the trial of any such person.

SCHEDULES.

First Schedule.

Rules.

1.—*Material, &c., for indictments.*—(1) An indictment may be on parchment or durable paper, and may be either written or printed, or partly written and partly printed.

(2) Each sheet on which an indictment is set out shall be not more than 12 and not less than 6 inches in length, and not more than 14 and not less than 12 inches in width, and if more than one sheet is required, the sheets shall be fastened together in book form.

(3) A proper margin not less than 3 inches in width shall be kept on the left-hand side of each sheet.

(4) Figures and abbreviations may be used in an indictment for expressing anything which is commonly expressed thereby.

(5) There shall be endorsed on the back of an indictment the name of every witness examined or intended to be examined by the grand jury, and the foreman of the grand jury shall write his initials against the name of each witness so examined.

(6) An indictment shall not be open to objection by reason only of any failure to comply with this rule.

2.—*Commencement of the indictment.*—The commencement of the indictment shall be in the following form :—

The King *v.* A. B.

Court of Trial [e.g., *Central Criminal Court*, [or] *In the High Court of Justice, King's Bench Division*, [or] *Durham County Assizes held at Durham*, [or] *Hants Quarter Sessions held at Winchester*].

Presentment of the Grand Jury.

A. B. is charged with the following offence [offences] :—

3.—*Joining of charges in one indictment.* Charges for any offences, whether felonies or misdemeanors, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.

4. *Mode in which offences are to be charged.*—(1) A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count.

(2) A count of an indictment shall commence with a statement of the offence charged, called the statement of offence.

(3) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.

(4) After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary :

Provided that where any rule of law or any statute limits the particulars of an offence which are required to be given in an indictment, nothing in this rule shall require any more particulars to be given than those so required.

(5) The forms set out in the appendix to these rules or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case.

(6) Where an indictment contains more than one count, the counts shall be numbered consecutively.

5.—*Provisions as to statutory offences.*—(1) Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence.

(2) It shall not be necessary, in any count charging a statutory offence, to negative any exception or exemption from or qualification to the operation of the statute creating the offence.

6.—*Description of property.*—(1) The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.

(2) Where property is vested in more than one person, and the owners of the property are referred to in an indictment it shall be sufficient to describe the property as owned by one of those persons by name with others, and if the persons owing the property are a body of persons with a collective name, such as " Inhabitants," " Trustees," " Commissioners," or " Club " or other such name, it shall be sufficient to use the collective name without naming any individual.

7.—*Description of persons.*—The description or designation in an indictment of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such descrip-

tion or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "a person unknown."

8.—*Description of document.*—Where it is necessary to refer to any document or instrument in an indictment, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purport thereof, without setting out any copy thereof.

9.—*General rule as to description.*—Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.

10.—*Statement of intent.*—It shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person where the statute creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence.

11.—*Charge of previous convictions, &c.*—Any charge of a previous conviction of an offence or of being a habitual criminal or a habitual drunkard shall be charged at the end of the indictment by means of a statement—in the case of a previous conviction that the person accused has been previously convicted of that offence at a certain time and place without stating the particulars of the offence, and in the case of a habitual criminal or habitual drunkard, that the offender is a habitual criminal or a habitual drunkard, as the case may be.

12.—*Saving for s.* 32 (4) *of* 8 *Edw.* 7, *c.* 67. Nothing in these rules or in any rules made under section two of this Act shall affect the provisions of subsection (4) of section thirty-two of the Children Act, 1908.

13.—*Duty to furnish copy of indictment.*—(1) It shall be the duty of the clerk of assize, after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge.

(2) The cost of any copy supplied to the accused person whether under this rule or otherwise shall be treated as part of the costs of the prosecution for the purpose of section one of the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15).

(3) In the application of this rule to quarter sessions, the clerk of the peace shall be substituted for the clerk of assize.

14.—*Interpretation.*—The Interpretation Act, 1889 (52 & 53 Vict. c. 63), applies for the interpretation of these rules, as it applies for the interpretation of an Act of Parliament.

15.—*Short title.*—These rules may be cited as the Indictment Rules, 1915, and these rules, together with any rules made under section two of this Act, may be cited together by such collective title as may be prescribed by the last-mentioned rules.

THE INDICTMENT RULES, 1916, DATED MAY 3, 1916, BEING RULES MADE BY THE RULE COMMITTEE ESTABLISHED UNDER THE INDICTMENTS ACT, 1915 (5 & 6 GEO. 5, C. 90). STATUTORY RULES AND ORDERS, 1916. (No. 282—L. 11.)

We, the Rule Committee established under section 2 of the Indictments Act, 1915, hereby make the following Rules :—

1.—(1) Forms 2, 9, 13 and 22 appended to the Indictment Rules, 1915, are hereby annulled, and the forms appended hereto and bearing the numbers 2, 9, 13 and 27 are respectively substituted therefor.

(2) Additional forms numbered 28, 29, 30, 31 and 32 respectively, and appended hereto, shall be used in cases to which they are applicable in accordance with Rule 4 (5).

2.—(1) These rules may be cited as the Indictment Rules, 1916, and, together with the Indictment Rules, 1915, as the Indictment Rules, 1915-16.

(2) These rules shall not apply to indictments in the case of persons committed for trial before the first day of April, 1916, or to the trial of any such person.

THE INDICTMENT (CRIMINAL INFORMATIONS AND INQUISITIONS) RULES, 1916, DATED MAY 23, 1916, RELATING TO CRIMINAL INFORMATIONS AND INQUISITIONS, MADE BY THE RULE COMMITTEE ESTABLISHED UNDER THE INDICTMENTS ACT, 1915 (5 & 6 GEO. 5, C. 90). STATUTORY RULES AND ORDERS, 1916. (No. 323 —L. 12.)

We, the Rule Committee established under section 2 of the Indictments Act, 1915 (hereinafter called "the Act"), hereby make the following Rules :—

1. Rule 1 (5) in the First Schedule to the Act shall not apply to Criminal Informations in the High Court.

Rule 2 in the First Schedule to the Act shall apply to such Criminal Informations, substituting for the words " Presentment of the Grand Jury " the words " Criminal Information filed by the King's Attorney-General " or " The King's Coroner and Attorney."

2. The King's Attorney-General or any person procuring any Criminal Information to be exhibited, received, or filed at the Crown Office shall deliver to the Master of the Crown Office a true copy thereof for each accused person who shall on request be supplied therewith free of charge.

3.—(1) Rule 1 (5) and Rule 2 in the First Schedule to the Act shall not apply to Coroners' Inquisitions.

(2) In Coroners' Inquisitions the form of Inquisition provided by the Coroners' Act, 1887, may be used with such alterations as may be made under that Act, but any offence charged therein shall be stated in accordance with the form of indictment relating thereto prescribed by the Indictment Rules, 1915-16.

4. It shall be the duty of the Clerk of Assize to supply on request free of charge to a person committed for trial on a Coroners' Inquisition a copy of so much of the Inquisition as charges him with an offence, and the cost of such copy shall be treated as part of the costs of the prosecution for the purpose of section one of the Costs in Criminal Cases Act, 1908.

5. Except as in these Rules otherwise provided the Indictment Rules, 1915-16, relating to Indictments shall apply to Criminal Informations in the High Court and to Inquisitions and also to any plea replication or other pleading relating thereto.

6.—(1) These Rules may be cited as the Indictment (Criminal Informations and Inquisitions) Rules, 1916, and together with the Indictment Rules, 1915, and the Indictment Rules, 1916, as the Indictment Rules, 1915-16.

(2) These Rules shall not apply to Criminal Informations in the High Court filed before the 1st day of May, 1916, nor to Inquisitions found before that date, nor to the trial of any person upon any such Criminal Information or Inquisition.

A TABLE OF THE PRINCIPAL INDICTABLE OFFENCES.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		**See foot of page.*		† *See foot of page.*	
ABDUCTION					
of child under 14 with intent to steal	24 & 25 Vict. c. 100, s. 56	F. 7 yrs. p.s.	Yes		1014
of girl under 16	24 & 25 Vict. c. 100, s. 55	M. 2 yrs. imp.	No		1008
of girl under 18	48 & 49 Vict. c. 69, s. 7	M. 2 yrs. imp.	No		1012
of woman on account of her fortune	24 & 25 Vict. c. 100, s. 53	F. 14 yrs. p.s.	No		1006
of woman by force	24 & 25 Vict. c. 100, s. 54	F. 14 yrs. p.s.	No		1007
ABORTION					
supplying poison, &c. or instruments for purpose of procuring	24 & 25 Vict. c. 100, s. 59	M. 5 yrs. p.s.	Yes		922
using poison or instrument to procure	24 & 25 Vict. c. 100, s. 58	F. Life	No		922
ACCUSATION OF CRIME (see MENACES)					
ADMINISTERING POISON, &c. (see POISON)					

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment. *See foot of page.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty. † See foot of page.	Page of this Book where dealt with.
ARSON					
attempt, buildings generally	24 & 25 Vict. c. 97, s. 8	F. 14 yrs. p.s.	Yes		738
coal mines	24 & 25 Vict. c. 97, s. 27	F. 14 yrs. p.s.	Yes		747
ships	24 & 25 Vict. c. 97, s. 44	F. 14 yrs. p.s.	Yes		749
stacks	24 & 25 Vict. c. 97, s. 18	F. 7 yrs. p.s.	Yes		752
buildings generally	24 & 25 Vict. c. 97, s. 6	F. 14 yrs. p.s.	Yes		737
church, chapel, &c.	24 & 25 Vict. c. 97, s. 1	F. Life	No		736
coal mine, &c.	24 & 25 Vict. c. 97, s. 26	F. Life	No		747
crops, &c.	24 & 25 Vict. c. 97, s. 16	F. 14 yrs. p.s.	Yes		752
dockyards, arsenals, &c.	29 & 30 Vict. c. 109, s. 34	F. Death	No		748
dwelling-house, with person therein	24 & 25 Vict. c. 97, s. 2	F. Life	No		737
goods in buildings	24 & 25 Vict. c. 97, s. 7	F. 14 yrs. p.s.	Yes		738
public buildings	24 & 25 Vict. c. 97, s. 5	F. Life	No		737
ships	12 Geo. 3, c. 24, s. 1	F. Death	No		748
stations, &c.	24 & 25 Vict. c. 97, s. 4	F. Life	No		737
stacks, &c.	24 & 25 Vict. c. 97, s. 17	F. Life	No		752
ASSAULT					
common	Common law	M. 1 yr. imp.	Yes		929
indecent (see INDECENT ASSAULT)					
occasioning actual bodily harm	24 & 25 Vict. c. 100, s. 47	M. 5 yrs. p.s.	Yes	Common assault	927
on gamekeeper by poachers	9 Geo. 4, c. 69, s. 2	M. 7 yrs. p.s.	Yes		966
on officer saving wreck	24 & 25 Vict. c. 100, s. 37	M. 7 yrs. p.s.	Yes		955
on peace officer in execution of his duty	24 & 25 Vict. c. 100, s. 38	M. 2 yrs. imp.	Yes		961
with intent to commit buggery	24 & 25 Vict. c. 100, s. 62	M. 10 yrs. p.s.	Yes		1048
with intent to commit felony	24 & 25 Vict. c. 100, s. 38	M. 2 yrs. imp.	Yes		961
with intent to rob	6 & 7 Geo. 5, c. 50, s. 23 (c)	F. 5 yrs. p.s.	Yes		637

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
ATTEMPTS					
to carnally know girl under 13	48 & 49 Vict. c. 69, s. 4	M. 2 yrs. imp.	No		1024
to carnally know girl 13-16	48 & 49 Vict. c. 69, s. 5	M. 2 yrs. imp.	No		1024
to choke, &c.	24 & 25 Vict. c. 100, s. 21	F. Life Whipping	No		943
to commit crime generally	Common law	M. Fine or imp. or both	Yes		1431
to commit sodomy	24 & 25 Vict. c. 100, s. 62	M. 10 yrs. p.s.	Yes		1048
to murder	24 & 25 Vict. c. 100, ss. 14 & 15	F. Life	No		911, 917
BANKRUPTCY					
as to disclosure of property	4 & 5 Geo. 5, c. 59, s. 154	M. 2 yrs. imp.	Yes		1254–1256
bankrupt absconding with property of value of 20*l.*	4 & 5 Geo. 5, c. 59, s. 159	F. 2 yrs. imp.	Yes		1258
concealing or removing property	4 & 5 Geo. 5, c. 59, s. 156 (c)	M. 1 yr. imp.	Yes		1257
failing to keep proper accounts	4 & 5 Geo. 5, c. 59, s. 158	M. 2 yrs. imp.	Yes		1258
gambling	4 & 5 Geo. 5, c. 59, s. 157	M. 2 yrs. imp.	Yes		1257
making gift, &c. of property	4 & 5 Geo. 5, c. 59, s. 156 (b)	M. 1 yr. imp.	Yes		1257
obtaining credit under false pretences or by other fraud	4 & 5 Geo. 5, c. 59, s. 156 (a)	M. 1 yr. imp.	Yes		1257

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† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
BANKRUPTCY—*continued.*					
false claim by creditor	4 & 5 Geo. 5, c. 59, s. 160	M. 2 yrs. imp.	Yes		1259
undischarged bankrupt obtaining credit to 10*l.* or trading in another name without disclosure of bankruptcy	4 & 5 Geo. 5, c. 59, s. 155	M. 2 yrs. imp.	Yes		1256
BAWDY HOUSE					
allowing child 4-16 to frequent or reside in	8 Edw. 7, c. 67, s. 16	M. 6 mth. imp.	Yes		1026
keeping	Common law	M. Imp. or fine or both	Yes		1326
BETTING					
keeping betting house	16 & 17 Vict. c. 119, s. 1	M. 6 months imp.	Yes		1334
BIGAMY	24 & 25 Vict. c. 100, s. 57	F. 7 yrs. p.s.	No		1292
BLASPHEMY	Common law	M. Fine or imp. or both	No		1159
BREAKING PRISON	Common law	F. 7 yrs. or M. 1 yr. according as deft. was in custody for F. or M.	Yes		1176
BRIBERY					
of public official	Common law	M. Fine or imp. or both	No		1205

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† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
BUGGERY	24 & 25 Vict. c. 100, s. 61	F. Life	No		1046
attempt or assault with intent to commit	24 & 25 Vict. c. 100, s. 62	M. 10 yrs. p.s.	Yes		1048
BURGLARY	6 & 7 Geo. 5, c. 50, s. 25	F. Life	Yes	Entering dwelling-house in the night with intent to commit a felony; Housebreaking Larceny in dwelling-house to value of £5 (if stealing is alleged and property stolen is alleged to be of the value of £5) Simple larceny (if stealing alleged)	654
CARNAL KNOWLEDGE of girl under 13	48 & 49 Vict. c. 69, s. 4	F. Life	No	(1) Procuring unlawful carnal connexion by threats, fraud, or drugs (2) Carnal knowledge of idiot or imbecile (3) Indecent assault	1024
of girl 13-16	48 & 49 Vict. c. 69, s. 5 (1)	M. 2 yrs. imp.	No		1024
encouraging seduction or prostitution of girl under 16	8 Edw. 7, c. 67, s. 17	M. 2 yrs. imp.	Yes		1027

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
CARNAL KNOWLEDGE—*cont.*					
permitting defilement of girl by owner or occupier of premises					
girl under 13	48 & 49 Vict. c. 69, s. 6 (1)	F. Life	No	Allowing child to reside in or frequent brothel	1025
girl 13-16	48 & 49 Vict. c. 69, s. 6 (2)	M. 2 yrs. imp.	No	Allowing child to reside in or frequent brothel	1025
CAUSING GRIEVOUS BODILY HARM (see WOUNDING)					
CHEATING					
at games	8 & 9 Vict. c. 101, s. 17	M. 5 yrs. p.s.	Yes		720
generally	Common law	M. Fine or imp. or both	Yes		721
CHILDREN					
abandonment or exposure of child under 2	24 & 25 Vict. c. 100, s. 27	M. 5 yrs. p.s.	Yes		977
allowing child 4-16 to reside in or frequent a brothel	8 Edw. 7, c. 67, s. 16	M. 6 mth. imp.	Yes		1026
carnal knowledge of (see CARNAL KNOWLEDGE)					
cruelty to	8 Edw. 7, c. 67, s. 12 (1)	M. 2 yrs. imp.	Yes		980
	8 Edw. 7, c. 67, s. 12 (5)	M. 5 yrs. p.s.	Yes		981
forcibly or fraudulently taking away child under 14	24 & 25 Vict. c. 100, s. 56	F. 7 yrs. p.s.	Yes		1014

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
COINAGE					
buying or selling gold or silver counterfeit coin at lower than face value	24 & 25 Vict. c. 99, s. 6	F. Life	No		1097
copper coin	24 & 25 Vict. c. 99, s. 14	F. 7 yrs. p.s.	Yes		1098
colouring, &c. coin	24 & 25 Vict. c. 99, s. 3	F. Life	No		1093
defacing, &c. coin	24 & 25 Vict. c. 99, s. 16	M. 1 yr. imp.	Yes		1096
exporting coin	24 & 25 Vict. c. 99, s. 8	M. 2 yrs. imp.	Yes		1099
importing gold and silver current coin	24 & 25 Vict. c. 99, s. 7	F. Life	No		1099
foreign gold or silver coin	24 & 25 Vict. c. 99, s. 19	F. 7 yrs. p.s.	Yes		1100
impairing coin	24 & 25 Vict. c. 99, s. 4	F. 14 yrs. p.s.	Yes		1095
making current gold or silver counterfeit coin	24 & 25 Vict. c. 99, s. 2	F. Life	No		1091
copper coin	24 & 25 Vict. c. 99, s. 14	F. 7 yrs. p.s.	Yes		1091
foreign gold or silver counterfeit coin	24 & 25 Vict. c. 99, s. 18	F. 7 yrs. p.s.	Yes		1091
other foreign coin	24 & 25 Vict. c. 99, s. 22	1st offence. M. 1 yr. imp. 2nd offence. 7 yrs. p.s.	Yes		1091
making, buying or selling or possessing tools for current copper coin	24 & 25 Vict. c. 99, s. 14	F. 7 yrs. p.s.	Yes		1109
gold or silver coin	24 & 25 Vict. c. 99, s. 24	F. Life	No		1109

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
COINAGE, making, buying, &c.—*continued.*		**See foot of page.*		† *See foot of page.*	
medals resembling current gold or silver coin	46 & 47 Vict. c. 45, s. 2	M. 1 yr. imp.	Yes		1113
conveying tools out of mint	24 & 25 Vict. c. 99, s. 25	F. Life	No		1113
possessing 3 or more current gold or silver counterfeit coins	24 & 25 Vict. c. 99, s. 11	M. 5 yrs. p.s.	Yes		1107
copper coin	24 & 25 Vict. c. 99, s. 15	M. 1 yr. imp.	Yes		1107
uttering current gold or silver coin	24 & 25 Vict. c. 99, s. 9	M. 1 yr. imp.	Yes		1101
with possession of or after passing within 10 days other similar coins	24 & 25 Vict. c. 99, s. 10	M. 2 yrs. imp.	Yes		1101
after previous conviction	24 & 25 Vict. c. 99, s. 12	F. Life	No		1101
current copper coin	24 & 25 Vict. c. 99, s. 15	M. 1 yr. imp.	Yes		1102
foreign gold or silver coin	24 & 25 Vict. c. 99, s. 20	M. 6 mth. imp.	Yes		1102
after previous conviction for similar offence	24 & 25 Vict. c. 99, s. 21	M. 2 yrs. imp.	Yes		1102
after 2 previous convictions for similar offences	24 & 25 Vict. c. 99, s. 21	F. Life	No		1102
COMPOUNDING OFFENCES	Common law & 18 Eliz. c. 5, ss. 4 & 5	Fine or imp. or both	Yes		1208
corruptly taking money for recovery of stolen dog	6 & 7 Geo. 5, c. 50, s. 5 (3)	M. 18 mths. imp.	Yes		1212
corruptly taking reward for restoring stolen property	6 & 7 Geo. 5, c. 50, s. 34	F. 7 yrs. p.s.	Yes		1212

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
CONCEALMENT OF BIRTH	24 & 25 Vict. c. 100, s. 60	M. 2 yrs. imp.	No		919
CONSPIRACY	Common law	M. Fine or imp. or both	Not unless the conspiracy is to commit an offence which they have jurisdiction to try when committed by one person		1416
to murder	24 & 25 Vict. c. 100, s. 4	M. 14 yrs. p.s.	No		906
CORRUPTION					
by agents	6 Edw. 7, c. 4, s. 1	M. 2 yrs. imp.	No		1411
when H.M. Government is concerned	6 & 7 Geo. 5, c. 64, s. 1	M. 7 yrs. p.s.	No		1412
by or of members or servants of public bodies	52 & 53 Vict. c. 69, s. 1	M. 2 yrs. imp.	No		1408
COUNTING-HOUSE BREAKING (as in HOUSEBREAKING)					
DREDGING FOR OYSTERS	24 & 25 Vict. c. 96, s. 26	M. 3 mths. imp.	Yes		557
DRUGS					
administering—					
with intent to commit offence	24 & 25 Vict. c. 100, s. 22	F. Life	No		944
with intent to endanger life, &c.	24 & 25 Vict. c. 100, s. 23	F. 10 yrs. p.s.	Yes	Misdemeanor under s. 24	945 945
with intent to injure, &c.	24 & 25 Vict. c. 100, s. 24	M. 5 yrs. p.s.	Yes		922
with intent to procure abortion	24 & 25 Vict. c. 100, s. 58	F. Life	No		

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Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
EMBEZZLEMENT		*See foot of page.		† See foot of page.	
by officer of P.O.	6 & 7 Geo. 5, c. 50, s. 18 (a) & 8 Edw. 7, c. 48, s. 50	F. Life	No		580, 581
	6 & 7 Geo. 5, c. 50, s. 18 (b) & 8 Edw. 7, c. 48, s. 50	F. 7 yrs. p.s.	Yes		580, 581
by clerk or servant	6 & 7 Geo. 5, c. 50, s. 17	F. 14 yrs. p.s.	Yes	Larceny	601
by officer of Bank of England or Ireland	6 & 7 Geo. 5, c. 50, s. 19	F. Life	No		601
EXPLOSIVES					
causing bodily injury by	24 & 25 Vict. c. 100, s. 28	F. Life	No		947
causing explosion likely to endanger life, &c.	46 & 47 Vict. c. 3, s. 2	F. Life	No		756
making or possessing with intent to endanger life, &c.	46 & 47 Vict. c. 3, s. 3	F. 20 yrs. p.s.	Yes		756
making or possession under suspicious circumstances	46 & 47 Vict. c. 3, s. 4	F. 14 yrs. p.s.	Yes		756
placing near building or shop with intent to do bodily injury	46 & 47 Vict. c. 3, s. 30	F. 14 yrs. p.s.	Yes		948
using, with intent to do grievous bodily injury	46 & 47 Vict. c. 3, s. 29	F. Life	No		947
FALSE IMPRISONMENT	Common law	M. Imp. or fine or both	Yes		999
FALSE PRETENCES					
obtaining chattels, &c. by or inducing execution of valuable security, &c.	6 & 7 Geo. 5, c. 50, s. 32	M. 5 yrs. p.s.	Yes	Not entitled to be acquitted if larceny proved.	691

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		*See foot of page.		† See foot of page.	
FALSIFICATION OF ACCOUNTS by clerks or servants	38 & 39 Vict. c. 24, s. 1	M. 7 yrs. p.s.	Yes		734
FIREARMS possession with intent to endanger life, &c.	10 & 11 Geo. 5, c. 43, s. 7	F. 20 yrs. p.s.	Yes		758
FORGERY wills, bonds or deeds, or bank-notes	3 & 4 Geo. 5, c. 27, s. 2 (1)	F. Life	No		807
valuable security, documents of title, &c.	3 & 4 Geo. 5, c. 27, s. 2 (2)	F. 14 yrs. p.s.	No		808
document stamped with Great Seal, &c.	3 & 4 Geo. 5, c. 27, s. 3 (1)	F. Life	No		818
registers, &c. of births, baptisms, marriages, deaths, &c.	3 & 4 Geo. 5, c. 27, s. 3 (2)	F. 14 yrs. p.s.	No		818
official documents	3 & 4 Geo. 5, c. 27, s. 3 (3)	F. 7 yrs. p.s.	No		818
documents other than provided for	3 & 4 Geo. 5, c. 27, s. 4	M. 2 yrs. imp.	No		820
seals	3 & 4 Geo. 5, c. 27, s. 5 (1)	F. Life	No		820
	3 & 4 Geo. 5, c. 27, s. 5 (2)	F. 14 yrs. p.s.	No		821
	3 & 4 Geo. 5, c. 27, s. 5 (3)	F. 7 yrs. p.s.	No		821
dies	3 & 4 Geo. 5, c. 27, s. 5 (4)	F. 14 yrs. p.s.	No		821
	3 & 4 Geo. 5, c. 27, s. 5 (5)	F. 7 yrs. p.s.	No		821
demanding money on forged document	3 & 4 Geo. 5, c. 27, s. 7	F. 14 yrs. p.s.	No		824
making or possessing certain paper or implements	3 & 4 Geo. 5, c. 27, s. 9	F. 7 yrs. p.s.	No		825
purchasing or possessing certain paper before stamped and issued	3 & 4 Geo. 5, c. 27, s. 10	M. 2 yrs. imp.	No		826

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		*See foot of page.		† See foot of page.	
FORGERY—*continued.*					
possession of forged banknote	3 & 4 Geo. 5, c. 27, s. 8 (1)	F. 14 yrs. p.s.	No		825
possession of forged die for marking gold, silver, &c.	3 & 4 Geo. 5, c. 27, s. 8 (2)	F. 14 yrs. p.s.	No		825
possession of forged stamp or die within Stamp Duties Management Act, 1891	3 & 4 Geo. 5, c. 27, s. 8 (2)	F. 14 yrs. p.s.	No		825
possession of forged stamp or die within Local Stamp Act, 1869	3 & 4 Geo. 5, c. 27, s. 8 (3)	F. 7 yrs. p.s.	No		825
uttering forged document, seal, or die	3 & 4 Geo. 5, c. 27, s. 6	As if guilty of forging	No		822
false entries of stock, &c. in books of Bank of England or Ireland	24 & 25 Vict. c. 98, s. 5	F. Life	No		840
false entries of stock, &c. in books created by L.C.C.	2 & 3 Geo. 5, c. cv., s. 39	F. 14 yrs. p.s.	No		841
making false dividend warrant, &c. by clerk, &c. of Bank of England or Ireland	24 & 25 Vict. c. 98, s. 6	F. 7 yrs. p.s.	No		842
making false dividend warrant, &c. by clerk of L.C.C.	2 & 3 Geo. 5, c. cv., s. 40	F. 7 yrs. p.s.	No		842
false entries of birth, baptism, &c.	3 & 4 Vict. c. 92, s. 8	F. 5 yrs. p.s.	No		843
false entries of birth, baptism, &c.	24 & 25 Vict. c. 98, ss. 36, 37	F. Life	No		843, 844

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		*See foot of page.		† See foot of page.	
FRAUDS BY DIRECTORS, &c.	24 & 25 Vict. c. 96, ss. 82, 83, 84	M. 7 yrs. p.s.	No		623, 624
	8 Edw. 7, c. 69, s. 216	M. 2 yrs. imp.	No		626
FRAUDULENT CANCELLATION					
documents of title to land	24 & 25 Vict. c. 96, s. 28	F. 5 yrs. p.s.	No		565
other valuable security	24 & 25 Vict. c. 96, s. 27	F. 5 yrs. p.s.	No		567
will	24 & 25 Vict. c. 96, s. 29	F. Life	No		561
FRAUDULENT CONVERSION OF PROPERTY					
in general	6 & 7 Geo. 5, c. 50, s. 20	M. 7 yrs. p.s.	No		621
by factors or agents	6 & 7 Geo. 5, c. 50, s. 22	M. 7 yrs. p.s.	No		622
by officers of savings banks, &c.	26 & 27 Vict. c. 87, s. 9	M. 7 yrs. p.s.	No		625
by trustee	6 & 7 Geo. 5, c. 50, s. 21	M. 7 yrs. p.s.	No		621
FRAUDULENT REMOVAL					
records from place of deposit, of	24 & 25 Vict. c. 96, s. 30	F. 5 yrs. p.s.	No		566
GAMING					
keeping common gaming-house	Common law	M. Fine or imp. or both	Yes		1331
keeping or permitting user of house as common gaming-house	17 & 18 Vict. c. 38, s. 4	M. 12 mths. imp.	Yes		1332

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HOUSEBREAKING					
felony committed	6 & 7 Geo. 5, c. 50, s. 25	F. 14 yrs. p.s.	Yes	(1) Larceny in dwelling-house to amount of £5 (if stealing alleged and value of property) (2) Simple larceny (if stealing alleged)	654
with intent to commit felony	6 & 7 Geo. 5, c. 50, s. 27	F. 7 yrs. p.s.	Yes		654
HOUSEBREAKING IMPLEMENTS					
possession of, by night	6 & 7 Geo. 5, c. 50, s. 28	M. 5 yrs. p.s. M. 10 yrs. p.s. (if previous conviction of this misdemeanor or any felony)	Yes		654
INCEST					
by males	8 Edw. 7, c. 45, s. 1	M. 7 yrs. p.s.	No	(1) Carnal knowledge or attempted carnal knowledge of girl, idiot, or imbecile (2) Indecent assault	1042
if other party under 13	8 Edw. 7, c. 45, s. 1	F. Life	No		1042
attempt	8 Edw. 7, c. 45, s. 1 (3)	M. 2 yrs. imp.	No		1043
by females over 16	8 Edw. 7, c. 45, s. 2	M. 7 yrs. p.s.	No		1043

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INCITING TO COMMIT CRIME	Common law	M. Fine or imp. or both	Yes		1428
INDECENT ASSAULT					
on females	24 & 25 Vict. c. 100, s. 52	M. 2 yrs. imp.	Yes	Common assault	1032
on males	24 & 25 Vict. c. 100, s. 62	M. 10 yrs. p.s.	Yes	Common assault	1048
gross indecency with male persons	48 & 49 Vict. c. 69, s. 11	M. 2 yrs. imp.	No		1048
INDECENT PRINTS, &c.					
selling, &c.	Common law	M. Fine or imp. or both	Yes		1318
sending through post	8 Edw. 7, c. 48, s. 63	M. Fine or imp. or both	Yes		1321
LARCENY					
by tenant or lodger	6 & 7 Geo. 5, c. 50, s. 16 (a)	F. 7 yrs. p.s.	Yes		600
	6 & 7 Geo. 5, c. 50, s. 16 (b)	F. 2 yrs. imp.	Yes		600
from the person	6 & 7 Geo. 5, c. 50, s. 14	F. 14 yrs. p.s.	Yes		597
from ships, docks, &c.	6 & 7 Geo. 5, c. 50, s. 15	F. 14 yrs. p.s.	Yes		598
in dwelling-house	6 & 7 Geo. 5, c. 50, s. 13	F. 14 yrs. p.s.	Yes		653
of cattle	6 & 7 Geo. 5, c. 50, s. 3	F. 14 yrs. p.s.	Yes		546
of deer	24 & 25 Vict. c. 96, s. 12	F. 2 yrs. imp. (after previous conviction)	Yes		551
of documents of title	24 & 25 Vict. c. 96, ss. 28 & 30; 6 & 7 Geo. 5, c. 50, s. 7	F. 5 yrs. p.s.	Yes		563, 565, 566
of dogs	6 & 7 Geo. 5, c. 50, s. 5	M. 18 mths. imp.	Yes		548

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LARCENY—*continued.*					
of electricity	6 & 7 Geo. 5, c. 50, s. 10	F. 5 yrs. p.s.	Yes		577
of fish	24 & 25 Vict. c. 96, s. 24	M. 2 yrs. imp.	Yes		555
of fixtures	6 & 7 Geo. 5, c. 50, s. 80	F. 5 yrs. p.s.	Yes		572
of goods in process of manufacture	6 & 7 Geo. 5, c. 50, s. 9	F. 14 yrs. p.s.	Yes		576
of hares or rabbits at night	24 & 25 Vict. c. 96, s. 17	M. 2 yrs. imp.	Yes		553
of ore	24 & 25 Vict. c. 96, s. 39 & 6 & 7 Geo. 5, c. 50, s. 11	F. 2 yrs. imp.	Yes		578
of plants	6 & 7 Geo. 5, c. 50, s. 8 (3)	F. 5 yrs. p.s.	Yes		573
of postal packets	6 & 7 Geo. 5, c. 50, s. 12 & 8 Edw. 7, c. 48, s. 50	F. Life	No		579, 580
by officer of post office	6 & 7 Geo. 5, c. 50, s. 18 (a) & 8 Edw. 7, c. 48, s. 55	F. Life	No		580, 581
	6 & 7 Geo. 5, c. 50, s. 18 (b)	F. 7 yrs. p.s.	Yes		580
of trees, &c.	6 & 7 Geo. 5, c. 50, s. 8 (2)	F. 5 yrs. p.s.	Yes		572
of wills, &c.	6 & 7 Geo. 5, c. 50, s. 6	F. Life	No		560
killing animals with intent to steal carcase, &c.	6 & 7 Geo. 5, c. 50, s. 4	F. 14 yrs. p.s.	Yes		546
simple	6 & 7 Geo. 5, c. 50, s. 2	F. 5 yrs. p.s.	Yes	(1) Embezzlement (2) False pretences	500
LIBEL					
defamatory	Common law & 6 & 7 Vict. c. 96, s. 4	M. 2 yrs. imp.	No		1238
publishing knowing falsity	6 & 7 Vict. c. 96, s. 4	M. 2 yrs. imp.	No	Publishing	1238
publishing	6 & 7 Vict. c. 96, s. 5	M. 1 yr. imp.	No		1239
obscene	Common law	M. 1 yr. imp.	No		1318
seditious	Common law	M. Imp. or fine or both	No		1116

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MALICIOUS CANCELLATION, records, of	24 & 25 Vict. c. 96, s. 30	F. 5 yrs. p.s.	No		565
MALICIOUS DAMAGE					
animals other than cattle, to	24 & 25 Vict. c. 97, s. 41	M. 6 mths. or 12 for second offence	Yes		788
agricultural or certain other machinery, to	24 & 25 Vict. c. 97, s. 15	F. 7 yrs. p.s.	Yes		768
attempting to blow up dwelling-houses	24 & 25 Vict. c. 97, s. 9	F. Life	No		755
conspiring to cause explosions, &c.	46 & 47 Vict. c. 3, s. 3	F. 20 yrs. p.s.	Yes		756
banks of river or sea, to	24 & 25 Vict. c. 97, s. 30	F. Life	No		778
piles, &c. in banks, to	24 & 25 Vict. c. 97, s. 31	F. 7 yrs. p.s.	Yes		779
buoys, &c. to	24 & 25 Vict. c. 97, s. 48	F. 7 yrs. p.s.	Yes		777
bridges, to	24 & 25 Vict. c. 97, s. 33	F. Life	No		781
cattle, to	24 & 25 Vict. c. 97, s. 40	F. 14 yrs. p.s.	Yes		788
causing explosion likely to endanger life or injure property	46 & 47 Vict. c. 3, s. 2	F. Life	No		756
electric lines or works, to	45 & 46 Vict. c. 56, s. 22	F. 5 yrs. p.s.	Yes		784
fish ponds, mill ponds, &c., to	24 & 25 Vict. c. 97, s. 32	M. 7 yrs. p.s.	Yes		787
goods in process of manufacture or machinery, to	24 & 25 Vict. c. 97, s. 14	F. Life	No		767
hopbinds, to	24 & 25 Vict. c. 97, s. 19	F. 14 yrs. p.s.	Yes		792
manufacture or possession of explosives for purpose of committing offences	24 & 25 Vict. c. 97, s. 54	M. 2 yrs. imp.	Yes		755

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		*See foot of page.		† See foot of page.	
MALICIOUS DAMAGE—*cont.*					
mines, to	24 & 25 Vict. c. 97, s. 28	F. 7 yrs. p.s.	Yes		770
engines, &c. used in	24 & 25 Vict. c. 97, s. 29	F. 7 yrs. p.s.	Yes		771
putting explosive near building	24 & 25 Vict. c. 97, s. 10	F. 14 yrs. p.s.	Yes		755
plants in gardens (second offence)	24 & 25 Vict. c. 97, s. 23	F. 5 yrs. p.s.	Yes		796
post office letter boxes, to	8 Edw. 7, c. 48, s. 61	M. 12 mths. imp.	Yes		801
railways, to	24 & 25 Vict. c. 97, s. 35	F. Life	No		783
obstructing	24 & 25 Vict. c. 97, s. 36	M. 2 yrs. imp.	Yes		783
riotously demolishing houses, &c.	24 & 25 Vict. c. 97, s. 11	F. Life	No	(1) Misdemeanor under s. 7 of same Act (2) Riot	763
ships, to	24 & 25 Vict. c. 97, s. 42	F. Life	No		748
submarine telegraph cables, to	48 & 49 Vict. c. 49, s. 3	M. 5 yrs. p.s.	Yes		784
otherwise than by fire or explosives	24 & 25 Vict. c. 97, s. 46	F. 7 yrs. p.s.	Yes		774
by false signals, &c.	24 & 25 Vict. c. 97, s. 47	F. Life	No		775
in distress	24 & 25 Vict. c. 97, s. 49	F. 14 yrs. p.s.	Yes		776
telegraphs, to	24 & 25 Vict. c. 97, s. 37	M. 2 yrs. imp.	Yes		783
tenants, by	24 & 25 Vict. c. 97, s. 13	M. 2 yrs. imp.	Yes		766
trees in parks (damage exceeding 1*l.*), to	24 & 25 Vict. c. 97, s. 20	F. 5 yrs. p.s.	Yes		793
trees not in parks (damage exceeding 5*l.*), to	24 & 25 Vict. c. 97, s. 21	F. 5 yrs. p.s.	Yes		793
third offence (damage 1*s.*)	24 & 25 Vict. c. 97, s. 22	M. 2 yrs. imp.	Yes		794
works of art, to	24 & 25 Vict. c. 97, s. 39	M. 6 mth. imp.	Yes		798
exceeding 20*l.*	24 & 25 Vict. c. 97, s. 51 & 4 & 5 Geo. 5, c. 58, s. 14	M. 2 yrs. imp. M. 5 yrs. p.s. if committed at night	Yes		799

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		*See foot of page.		† See foot of page.	
MANSLAUGHTER	24 & 25 Vict. c. 100, s. 5	F. Life	No	Ill-treatment of child	862, 866
MENACES					
demanding money by, with intent to extort, defraud, or injure	6 & 7 Geo. 5, c. 50, s. 29	F. Life	No		681
demanding money by, with intent to steal	6 & 7 Geo. 5, c. 50, s. 30	F. 5 yrs. p.s.	Yes		682
threatening to publish with intent to extort or induce favour, &c.	6 & 7 Geo. 5, c. 50, s. 31	M. 2 yrs. imp.	Yes		682
MONEY-LENDERS					
false statements by	63 & 64 Vict. c. 51, s. 4	M. 2 yrs. and/or fine £500	Yes		690
MURDER	24 & 25 Vict. c. 100, s. 1	F. Death	No	(1) Manslaughter (2) Concealment of birth (where the murder charged is that of a child)	860, 865
administering poison with intent to	24 & 25 Vict. c. 100, s. 11	F. Life	No		907
attempted	24 & 25 Vict. c. 100, s. 14	F. Life	No		911
	24 & 25 Vict. c. 100, s. 15	F. Life	No		917
conspiring, &c. to	24 & 25 Vict. c. 100, s. 4	M. 10 yrs. p.s.	No		906
destroying buildings with intent to	24 & 25 Vict. c. 100, s. 12	F. Life	No		915
destroying ships with intent to	24 & 25 Vict. c. 100, s. 13	F. Life	No		917
wounding, &c. with intent to	24 & 25 Vict. c. 100, s. 11	F. Life	No		907

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NUISANCE	Common law	M. Fine or imp. or both	Yes		1308
OBSCENE LIBEL	Common law	M. Fine or imp. or both	Yes		1318
OBSCENE PRINTS					
exposing for sale, selling, &c.	Common law	M. Fine or imp. or both	Yes		1319
OBTAINING CREDIT					
under false pretences or by other fraud	32 & 33 Vict. c. 62, s. 13	M. 1 yr. imp.	Yes		1267
by bankrupts (see BANKRUPTCY)					
OFFICIAL SECRETS					
spying	1 & 2 Geo. 5, c. 28, s. 1	F. 7 yrs. p.s.	No	Misdemeanor under same Act	1141
	1 & 2 Geo. 5, c. 28, s. 2	M. 2 yrs. imp.	No		1142
attempts	10 & 11 Geo. 5, c. 75, s. 7	As if full offence committed	No		1150
harbouring spies	1 & 2 Geo. 5, c. 28, s. 7	M. 1 yr. imp.	No		1143
unauthorised use of uniforms, &c.	10 & 11 Geo. 5, c. 75, s. 1	M. 2 yrs. h.l.	No		1146
forgery	10 & 11 Geo. 5, c. 75, s. 1	M. 2 yrs. h.l.	No		1146
personation	10 & 11 Geo. 5, c. 75, s. 1	M. 2 yrs. h.l.	No		1146
PERJURY					
as to births and deaths	1 & 2 Geo. 5, c. 6, s. 4	M. 7 yrs. p.s.	No		1188
as to marriages	1 & 2 Geo. 5, c. 6, s. 3	M. 7 yrs. p.s.	No		1188
in judicial proceedings	1 & 2 Geo. 5, c. 6, s. 1	M. 7 yrs. p.s.	No		1183
not in judicial proceedings	1 & 2 Geo. 5, c. 6, s. 2	M. 7 yrs. p.s.	No		1188

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		*See foot of page.		† See foot of page.	
PERJURY—*continued.*					
subornation of	1 & 2 Geo. 5, c. 6, s. 7 (1)	As if principal offender	No		1190
subornation, attempted	1 & 2 Geo. 5, c. 6, s. 7 (2)	M. 1 yr. imp.	No		1190
false declarations to obtain registration for carrying on a vocation	1 & 2 Geo. 5, c. 6, s. 6	M. 1 yr. imp.	No		1189
statutory declarations	1 & 2 Geo. 5, c. 6, s. 5	M. 2 yrs. imp.	No		1189
PERSONATION					
of bail	24 & 25 Vict. c. 98, s. 34	F. 7 yrs. p.s.	Yes		858
of heir, &c.	37 & 38 Vict. c. 36, s. 1	F. Life	No		858
of owner of stock	24 & 25 Vict. c. 98, s. 3 & 33 & 34 Vict. c. 58, s. 4	F. Life	No		856
of owner of Indian stock	26 & 27 Vict. c. 73, s. 14	F. Life	No		856
of seaman	28 & 29 Vict. c. 124, s. 8	M. 5 yrs. p.s.	Yes		853
of soldier	7 Geo. 4, c. 16, s. 38 & 2 & 3 Will. 4, c. 53, s. 49	F. Life	No		853, 854
PIRACY					
common law	Common law	F. As if committed on land	No		646
slave trading	5 Geo. 4, c. 113, s. 9	F. Life	No		651
trading with pirates	8 Geo. 1, c. 24, s. 1	F. Life	No		650
under foreign commission	11 Will. 3, c. 7, ss. 7, 8	F. Life	No		648, 649
under enemy's commission	18 Geo. 2, c. 30, s. 1	F. Life	No		651
with violence	7 Will. 4 & 1 Vict. c. 88, s. 2	F. Death	No		652

* The imprisonment referred to in this column may be with or without hard labour.

† On an indictment for felony or misdemeanor the accused may be found guilty of an attempt to commit the offence charged, and be punished accordingly.

Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
POACHING	9 Geo. 4, c. 69, s. 1	M. 7 yrs. p.s. (on third conviction under this section)	Yes		1380
by 3 or more armed	9 Geo. 4, c. 69, s. 9	M. 14 yrs. p.s.	No		1381
POISON					
administering so as to endanger life, &c.	24 & 25 Vict. c. 100, s. 23	F. 10 yrs. p.s.	Yes	M. Administering poison with intent to injure	945
administering with intent to injure	24 & 25 Vict. c. 100, s. 24	M. 5 yrs. p.s.	Yes		945
POLICE					
causing disaffection amongst	9 & 10 Geo. 5, c. 46, s. 3	M. 2 yrs. imp.	Yes		1133
PROCURATION	48 & 49 Vict. c. 69, s. 2 (1)—(4)	M. 2 yrs. imp. whipping	No		1034, 1035
where threats, fraud, or drugs used	48 & 49 Vict. c. 69, s. 3 (1)—(3)	M. 2 yrs. imp. whipping	No		1035
detention in brothel	48 & 49 Vict. c. 69, s. 8	M. 2 yrs. imp. whipping	No		1035
PROSTITUTION					
living on earnings of	61 & 62 Vict. c. 39, s. 1	M. 2 yrs. imp. whipping	Yes		1039

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Offence.	How Created.	Maximum Punishment. *See foot of page.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty. † See foot of page.	Page of this Book where dealt with.
RAILWAYS-					
endangering safety of passengers	24 & 25 Vict. c. 100, ss. 32, 33	F. Life	No		953, 954
endangering safety by unlawful act or omission	24 & 25 Vict. c. 100, s. 34	M. 2 yrs. imp.	Yes		954
maliciously obstructing	24 & 25 Vict. c. 100, s. 35	F. Life	No		783
unlawfully obstructing	24 & 25 Vict. c. 100, s. 36	M. 2 yrs. imp.	Yes		783
RAPE	24 & 25 Vict. c. 100, s. 48	F. Life	No	(1) Carnal knowledge or attempted carnal knowledge of girl, idiot, or imbecile (2) Indecent assault (3) Incest	1016
RECEIVING					
any property	6 & 7 Geo. 5, c. 50, s. 33 (1)	If stealing felony, F. 14 yrs. p.s.	Yes		723
		If stealing mis., M. 5 yrs. p.s.	Yes		
postal packets	8 Edw. 7, c. 48, s. 52	As for larceny	Yes		581
	6 & 7 Geo. 5, c. 50, s. 33 (2)	As for larceny	Yes		724
RIOT	Common law	M. Fine or imp. or both	Yes	(1) Unlawful assembly (2) Assault (if charged) (3) Rout	1221
after proclamation	1 Geo. 1, st. 2, c. 5, s. 1	F. Life	No		1224

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Offence.	How Created.	Maximum Punishment.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty.	Page of this Book where dealt with.
		*See foot of page.		† See foot of page.	
ROBBERY	6 & 7 Geo. 5, c. 50, s. 23 (2)	F. 14 yrs. p.s.	Yes	Assault with intent to rob	637
armed	6 & 7 Geo. 5, c. 50, s. 23 (1) (a)	F. Life and whipping	No		637
with violence	6 & 7 Geo. 5, c. 50, s. 23 (1) (b)	F. Life and whipping	No	(1) Robbery (2) Assault with intent to rob (3) Larceny from the person (4) Simple larceny	637
assault with intent to rob	6 & 7 Geo. 5, c. 50, s. 23 (3)	F. 5 yrs. p.s.	Yes		637
assault with intent to rob, armed	6 & 7 Geo. 5, c. 50, s. 23 (1) (a)	F. Life and whipping	No		637
SACRILEGE	6 & 7 Geo. 5, c. 50, s. 24	F. Life	No		654
SEDITIOUS LIBEL	Common law	M. Fine or imp. or both	No		1116
SHOOTING					
at customs officers or King's ships	63 & 64 Vict. c. 36, s. 193	F. Life	No		968
with intent to maim, &c.	24 & 25 Vict. c. 100, s. 18	F. Life	No		936
SHOPBREAKING (as in HOUSEBREAKING)					

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Offence.	How Created.	Maximum Punishment. *See foot of page.	Whether triable at Quarter Sessions.	Other Offences of which Accused may be found Guilty. † See foot of page.	Page of this Book where dealt with.
SPRING GUNS					
setting with intent to inflict grievous bodily harm	24 & 25 Vict. c. 100, s. 31	M. 5 yrs. p.s.	Yes		951
SUICIDE					
attempt	Common law	M. Fine or imp. or both	Yes		1431
THREATS					
to burn houses, &c.	24 & 25 Vict. c. 97, s. 50	F. 10 yrs. p.s.	Yes		1235
to murder	24 & 25 Vict. c. 97, s. 16	F. 14 yrs. p.s.	Yes		1235
(see also MENACES)					
TREASON	25 Edw. 3, st. 5, c. 2 & 33 & 34 Vict. c. 23, s. 3	Death	No		1053
TREASON FELONY	11 & 12 Vict. c. 12, s. 3	F. Life	No		1077
UNLAWFUL ASSEMBLY	Common law	M. Fine or imp. or both	Yes		1218
WAREHOUSE BREAKING (as in HOUSEBREAKING)					
WOUNDING					
unlawful	24 & 25 Vict. c. 100, s. 20	M. 5 yrs. p.s.	Yes	Common assault	936
with intent to maim, &c.	24 & 25 Vict. c. 100, s. 18	F. Life	No	Unlawful wounding	936
with intent to murder	24 & 25 Vict. c. 100, s. 11	F. Life	No	Unlawful wounding	907

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APPENDIX C.

NOTE AS TO DIFFERENT KINDS OF PUNISHMENT.

PENAL SERVITUDE.

There are two divisions of convict sentences to penal servitude—

A. The Ordinary Division.

B. The Long-sentence Division for convicts sentenced to 8 years or more.

Convicts immediately after sentence are placed in the Ordinary Division in either (*a*) the Star Class, for those not previously convicted or not habitually criminal or of corrupt habits; (*b*) the Intermediate Class, for first offenders who, owing to their general character and antecedents, are not considered suitable for the Star Class, or for offenders previously convicted but not of grave or persistent crime; (*c*) Recidivist Class, for those previously sentenced to penal servitude, or who have been guilty of grave or persistent crime.

Convicts sentenced to more than 8 years may be placed in long-sentence division after serving more than 5 years provided their general character and conduct in prison are satisfactory. They are then kept in a separate part of the prison and allowed to earn gratuity continuously, a portion of which may be expended in the purchase of comforts at the prison store. They may also be allowed to have their meals in association, and converse with each other at exercise or meals.

Young convicts under 21 may be transferred to a Borstal Institution (Prevention of Crime Act, 1908, s. 3, *ante*, p. 255). Those who serve their sentence in a convict prison may be given special treatment and instruction in education and useful trades and industries to fit them to earn their livelihood on release.

All male convicts pass the first part of their sentence in separate confinement for periods not exceeding 3 months, according to the class they are placed in. During this period they are employed in suitable industrial labour. After its completion they are transferred to a Public Works Prison where they may be employed in association in workshops or the usual prison industries or out of doors on quarrying or farm or building work. Weak-minded convicts who cannot be certified as actually insane are given special treatment. A male convict by good conduct and industry may earn a remission of sentence of one fourth of his total sentence; a female convict one third, and in addition female convicts under sentences of 5 years and upwards are in certain cases transferred to Refuges nine months before the ordinary time for their release. In the case of life sentences the ordinary rules as to remission do not apply, but each case is considered on its merits at intervals, and especially at the end of 20 years.

The remission earned by convicts differs from the remission in the case of a sentence of imprisonment, not only as to its length (see *infra*) but also as to its nature. In the case of a sentence of imprisonment the remission is absolute, but in the case of penal servitude the remission is conditional only, and may be forfeited (see *ante*, p. 1460).

IMPRISONMENT.

Without hard labour.—Persons sentenced to imprisonment without hard labour are classed in three divisions—First, Second, and Third.

Prisoners in the First Division are treated in very much the same way as prisoners awaiting trial.

Prisoners in the Second Division are kept separate from other prisoners, wear a different dress, and are allowed more frequent letters and visits, and a mattress to sleep on throughout their sentence. They are employed on industrial work.

The Third Division includes all convicted persons not sentenced to penal servitude or imprisonment with hard labour. Their treatment differs but little from prisoners sentenced to hard labour except for the first month. They are employed on industrial labour throughout their sentence and may work either in their cells or in association, and are not required to sleep without a mattress.

With hard labour.—A prisoner sentenced to imprisonment with hard labour serves the first 28 days in strict separation and is employed on hard bodily or manual labour during that time. After that period he is eligible for employment in association either at his trade or at some suitable industrial labour. If under 60 he may be required to sleep without a mattress for the first 14 days.

Remission of sentence.—A prisoner sentenced to imprisonment for more than one month may by special industry and good conduct earn a remission of a part of his sentence not exceeding one sixth of the whole. The sentence is deemed to expire on the day when he is discharged, and the remission is therefore not conditional as in the case of a sentence of penal servitude.

THE BORSTAL SYSTEM.

The following are the principal features of the system :—

(1) *Trade instruction.*—Special workshop accommodation is provided and every juvenile-adult works at, and if necessary is taught in association under a competent officer, some useful industry such as carpentry, building, blacksmithing, tinsmithing, baking, or market gardening and other agricultural work.

(2) *Education.*—Special and personal attention is given by the chaplain and schoolmaster to the matter of the inmates' education and instruction. Every juvenile-adult who has not passed Standard III. receives instruction in association, and those who have passed Standard III. receive further special

instruction in evening classes. Every inmate is encouraged to use the carefully selected literature provided in the library. Lectures and addresses are arranged from time to time.

(3) *Drill.*—Every juvenile-adult who is medically fit is exercised regularly during his sentence in physical and military marching drill under competent instructors.

(4) *Scheme of rewards and encouragement to industry and good conduct.*—This scheme comprises a special classification into grades, and a system of marks according to which promotion is adjudged and certain privileges awarded, and it has been carefully devised with a view to stimulating and encouraging the inmate to profit from the reformatory influences which are brought to bear on him. There are three grades of juvenile-adults—Ordinary, Special, and Penal. Each inmate commences on the Ordinary Grade. He may for good conduct and industry be promoted to the Special Grade, or if he is ill-conducted he may be degraded by order of the Governor or the Prison Commissioners to the Penal Grade.

As an adjunct quite indispensable to any scheme for the reclamation of young criminals there must always be effective means of supervision and rehabilitation in honest life after discharge from the Institution. In the case of the Borstal System this is provided by a voluntary association known as the Borstal Association (assisted by paid agents), which devotes much labour and care to the lads, visiting them whilst still in the Institution, arranging suitable employment for them against their discharge, assisting them with advice, and in every way possible encouraging them to take honourable places in the community.

A person undergoing detention in Borstal Institutions does not earn remission of sentence as a matter of course, but is eligible for consideration for licence after he has earned marks representing not less than six months' sentence. The Institution Board (composed of such officials of the Institution the Prison Commissioners may select) consider each case on its merits and submit it to the Visiting Committee, who, if they think fit, may recommend to the Prison Commissioners that he be discharged from the Institution on licence.

The time spent under training necessarily varies with the individual, and remission is only granted where it appears that the prisoner is likely to benefit by release rather than by serving under the system the whole of his sentence, and in this connection special regard is paid to the report of the Borstal Association on the arrangements which can be made for his employment and on his prospects generally.

The following classes of prisoners are, as a rule, not regarded as suitable for Borstal treatment :—

(*a*) Young prisoners whose previous character is good and who might suffer more by association with recidivists and " hooligans " than they would gain by the special training.

(*b*) Young persons who have already served a term in a Borstal Institution and failed to profit by it.

(*c*) Ex-reformatory boys or girls where it seems impossible that further training will have any good effect.

(*d*) Aliens.

Modified Borstal System.—Where juvenile-adults are sentenced to imprisonment of the ordinary kind they may at the discretion of the Prison Commissioners serve their sentence under a system similar to the Borstal system with modifications.

HABITUAL CRIMINALS.

RULES, DATED APRIL 24, 1911, MADE BY THE SECRETARY OF STATE UNDER THE PRISON ACT, 1898 (61-2 VICT. C. 41), AND THE PREVENTION OF CRIME ACT, 1908 (8 EDW. 7. C. 59), FOR PERSONS UNDERGOING PREVENTIVE DETENTION.

(1) Persons undergoing Preventive Detention shall be divided into three Grades, Ordinary, Special, and Disciplinary. On entering upon Preventive Detention, they shall be placed in the Ordinary Grade.

(2) After every six months passed in the Ordinary Grade with exemplary conduct a prisoner who has shown zeal and industry in the work assigned to him may be awarded a certificate of industry and conduct. Four of these certificates will entitle him to promotion to the Special Grade. With each certificate a prisoner will receive a good conduct stripe carrying privileges or a small money payment.

(3) A prisoner may be placed in the Disciplinary Grade by order of the Governor as part of a punishment for misconduct, or because he is known to be exercising a bad influence on others, and may be kept there as long as may be necessary in the interests of himself and of others. While in the Disciplinary Grade he may be employed in association if his conduct justifies association, but he will not be associated with others except at labour.

(4) Prisoners will be employed either at useful trades in which they will be instructed, or at agricultural work, or in the service of the prison, and those in the Ordinary and Special Grades will be allowed to earn gratuity by their work. They will be allowed to spend a portion of their gratuity in the purchase of additions to their dietary, or to send it to their families, or to accumulate it for use on their discharge.

(5) A prisoner who is in hospital, or medically unfit for full work will, on the recommendation of the medical officer who will certify that the disability was genuine and not caused by the prisoner's own fault, be credited with gratuity in proportion to his earnings when in health or calculated on his general disposition to work, coupled with good conduct.

(6) A canteen will be opened in the prison at which prisoners in the Ordinary and Special Grades may purchase articles of food, and other small articles at prices to be fixed by the directors. The cost of such articles will be charged against each prisoner's gratuity. The privilege of purchasing articles in the canteen may at any time be limited or withdrawn by the Governor.

(7) Prisoners who have obtained three certificates of industry will be eligible

to have a garden allotment assigned to them which they may cultivate at such times as may be prescribed. The produce of these allotments will, if possible, be purchased for use in prisons at market rates, and the proceeds credited to the prisoner.

(8) Prisoners in the Ordinary Grade may be allowed to associate at meal times and also, after gaining the second certificate, in the evenings. Prisoners in the Special Grade may also be allowed to associate at meal times and in the evenings, and shall be allowed such additional relaxations of a literary and social character as may be prescribed from time to time.

(9) Any of the privileges prescribed in these special rules or gratuity earned may be forfeited for misconduct. A prisoner has no legal claim upon his gratuity, which will be expended for his benefit, or may be withheld at the discretion of the society or person under whose supervision he is placed.

(10) It will be the duty of the chaplain and prison minister to see each prisoner individually from time to time during his detention and to promote the reformation of those under their spiritual charge. Divine Service will be held weekly in the prison, and there will be in addition such mission services, lectures and addresses on religious, moral, and secular subjects as may be arranged.

(11) Prisoners shall receive the diets which the directors may prescribe from time to time.

(12) Prisoners will be allowed to write and receive a letter and to receive a visit at fixed intervals according to their grade.

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